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Chapter X. Extraterritorial Obligations and the Obligation to Protect

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Abstract

Since the late 1970s, what we today label 'globalisation' has altered many aspects of international law, not least international human rights law. This has been reflected *inter alia* in increased calls for universal respect for human rights beyond a state's territorial border. The challenges to territoriality in this regard does not only relate to the actions of states abroad, but also with respect to their regulation of the conduct of business enterprises over which they exert significant influence. The chapter analyses the European Court of Human Rights' jurisprudence and practice of the UN human rights bodies, and argues that extraterritorial human rights obligations have become an integral part of international human rights law. It is held that what has been seen as 'exceptional' now represent 'common practice'. This conclusion is then applied to the discussion of the new treaty on human rights as currently being drafted.

Keywords

Extraterritorial Human Rights Obligations; Business and Human Rights; Obligation to Protect; Jurisdiction; Transnational Corporations; Treaty on Business and Human Rights

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X.1 Introduction

The significant shift that occurred in international relations and particularly in international financial relations from the late 1970s onwards, commonly labelled 'globalisation', has had a profound impact on international human rights law. This part of international law has in the last few decades had to respond to realities in a world that is very different to the one in which the drafters of the Charter of the United Nations, and subsequent international human rights treaties found themselves. Some of the new challenges relate directly to concepts of territoriality. The post-Second World War environment was characterised by the domination of nation states, with emerging intergovernmental organisations aimed at solving international problems 'in economic, social, cultural, educational, health, and related fields'[2] under the leadership of states. The last 30 years have seen a reduction in the role of the state in international relations, and the rapid growth of other actors on the international arena, including the increasingly powerful transnational corporations (TNCs).

The challenge and shift in terms of territoriality relate to states' human rights obligations. While the rights contained in international human rights law (as proclaimed particularly in the Universal Declaration on Human Rights) are supposed to be *universal* in their enjoyment, traditionally states were considered to be under obligations to secure these rights for the citizens and residents within their physical territory only.

In the twenty-first century, where individuals' lives are commonly impacted by the actions of foreign actors (whether another state, international organisations, or TNCs), this territoriality of human rights obligations has been challenged. It has been questioned whether suffering from human rights breaches committed by actors other than an individual's own government, is not covered by human rights law due to its territorial constraints. In her important contribution to the human rights obligations discourse, Margot Salomon argues that 'the proper regulation of non-state actors, notably transnational corporations (TNCs), […] requires revisiting international standards and mechanisms to ensure that their activities are consistent with human rights',[3] and that doing so is necessary 'if human rights law is to remain relevant'.[4]

[2] 1945 Charter of the United Nations, 1 UNTS XVI (UN Charter), Article 57.
[3] Salomon 2007, at 11.
[4] Ibid., at 12.

In this chapter, I ask the question as to whether the interpretation of international human rights law through the practice of international human rights courts and committees now considers extraterritorial reach of state obligations to be an integral part of human rights law, and, if so, what this means for states' obligations to regulate the conduct of business enterprises over which they exert control when they operate outside the territory of the state. I will first discuss the meaning of extraterritoriality in international human rights law from a theoretical perspective, and how such extraterritoriality relates to the obligation to protect individuals against human rights violations committed by private entities (Section X.2), before addressing how the concept of extraterritoriality has evolved in human rights practice (Section X.3). Much of the opposition to extraterritorial human rights obligations are based on the view that jurisdiction is territorial, and due to the wording of human rights treaties, obligations stemming from them are only relevant if a state acts within its jurisdiction. Therefore, much of this section will focus on how the European Court of Human Rights (ECtHR) has interpreted the concept of jurisdiction, and also how this relates to the attribution of acts to states. The section will also address the views of various UN human rights bodies on the obligation of states to protect against human rights abuses by third parties. The final section (X.4) will address what the consequences of these findings will be for states' obligations related to the regulation of activities of TNCs and other business enterprises, and how this may impact upon the work currently undertaken to draft a treaty on business and human rights.[5]

X.2 The Concept of Extraterritorial Obligations in Human Rights Law and the Obligation to Protect

The term extraterritorial obligations I n international human rights law is now used to describe obligations related to the 'acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory'.[6] Obligations pertaining to such acts and omissions have been recognised for a considerable amount of time both within international human rights law, and also other areas of

[5] UN Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, UN Doc A/HRC/26/L.22/Rev.1, 25 June 2014.

[6] Maastricht Principles on States' Extraterritorial Obligations in the area of Economic, Social and Cultural Rights, adopted by a group of experts in Maastricht in September 2011, http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23, accessed 27 January 2017, Principle 8.

international law, such as international humanitarian law,[7] and international environmental law.[8]

While the principles underlying extraterritorial human rights obligations have been recognised, the question as to what to call such acts and omissions of states beyond their territory has received significant attention and been subject to discussion for a number of years.[9] Some authors have used the term 'transnational obligations'; others 'international obligations', 'shared obligations', or 'global obligations'.[10]

The term extraterritorial obligations has been criticised from a number of different perspectives: First, some commentators hold that 'extraterritorial' implies that the obligations go just beyond a state border, rather than encompassing all the various locations where a state's acts or omissions may have an impact.[11] Others will argue that the use of 'extraterritorial' gives too much emphasis on territory and gives the impression that obligations are considered to be largely confined to the physical territory of the state, rather than where a state has influence over the acts or omissions that result in human rights violations even beyond its territory.[12] Furthermore, the use of the term extraterritorial has also been criticised as it has connotations to rather narrow use in US anti-trust law,[13] or criminal law,[14] and it is therefore not a concept that US lawyers readily associate with human rights law.

The term 'international obligations' has been preferred by several UN bodies, including the Committee on Economic, Social and Cultural Rights. For instance, the Committee holds, in its General Comment No. 14 on the right to the highest attainable standard of health, that:

> To comply with their *international obligations* in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third

[7] International humanitarian law is in its origin extraterritorial in that it consists of legal regulation of conduct when a state is engaged in military conflict abroad.
[8] Knox 2010, at 82.
[9] Gibney 2013.
[10] For a thorough discussion on the terminology used to describe the phenomenon often referred to as 'extraterritorial human rights obligations', see Gibney 2013.
[11] UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4, 11 August 2000, para 39.
[12] Gibney 2013, at 40.
[13] See for instance Beckler and Kirtland 2003, at 11.
[14] Gibney 2013, at 41.

> parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.[15]

However, to use international obligations as a term has been criticised as it may be confused with the regular horizontal obligations between states in international law, where treaty obligations are reciprocal and owed to the other states that have ratified a treaty. What extraterritorial obligations imply is rather that obligations relate to individuals within another state and whose human rights are being affected by acts or omissions by the foreign state. This relationship therefore depicts a different obligations' relationship as the link between the right-holder and the obligation-holder transcends a territorial border, and therefore produces what can be called a 'diagonal relationship'.[16] Or in other words, *international obligations* could refer to the obligations one ratifying state has vis-à-vis the other states parties to the same human rights treaty, rather than to the population within those other states. Similarly, the use of 'transnational' obligations have by some been considered to indicate too much of a state-to-state relationship, rather than (again) the link to individuals in another state. Finally, the term 'global obligations' is used, but the reference here is usually applied to describe obligations of the international community as a whole and relates to structures in this community which may hinder or assist in human rights enjoyment worldwide.[17]

While not necessarily an ideal term, 'extraterritorial human rights obligations' is now increasingly used by academics and practitioners. It also reflects the changing approach to territoriality and will therefore be the chosen term in this chapter.

The next question to be addressed is how these extraterritorial obligations relate to the conduct of TNCs. Obligations pertaining to human rights are both of a negative and positive nature. This means that states need to refrain from interfering in rights' enjoyment by individuals, as well as taking positive steps to ensure that human rights may be enjoyed by individuals. These negative and positive obligations have been further conceptualised into three main categories of obligations: the obligation to respect; the obligation to protect; and the obligation to fulfil. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights provides this explanation of the categories:

[15] UN Committee on Economic, Social and Cultural Rights (2000), General Comment No. 14, The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2000/4, 11 August 2000, para 39.
[16] Knox 2010, at 83.
[17] Margot E. Salomon holds that '[t]he collective obligations of the international community of states […] pertain to obligations to ensure arrangements that are just, and thereby conducive to the fulfilment of the socio-economic rights of all people'. Salomon 2007, at 182.

> Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. […] The obligation to protect requires States to prevent violations of such rights by third parties. […] The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.[18]

While this tripartite classification of obligations was first articulated in relationship to economic, social and cultural rights, it is now generally accepted that all human rights carry both positive and negative obligations, and the classification is being applied to all categories of human rights. Thus, the question raised about states' obligations to ensure that TNCs do not infringe upon an individual's enjoyment of human rights relates in particular to the second category of obligations, namely the obligation to *protect*. This category of obligations concerns the state's duty to regulate the conduct of private parties, whether individuals or other entities. The UN Human Rights Committee has confirmed that this category of obligations is also relevant for the International Covenant on Civil and Political Rights (ICCPR)[19]:

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or

[18] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted by a group of international experts in Maastricht, 22-26 January 1997, http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html, accessed 22 August 2016, para 6. This categorisation is commonly used by international human rights bodies. For instance, in the General Comment on the Right to Adequate Food, the UN Committee on Economic, Social and Cultural Rights confirms that:'[t]he right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. […] The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.' UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12, The right to adequate food (Article 11), UN Doc E/C.12/1999/5, 12 May 1999, para 15.

[19] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR).

> entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.[20]

An essential part of this obligation is to ensure that business enterprises do not breach human rights in their operations. In the UN Guiding Principles on Business and Human Rights (UNGP),[21] this has been framed in the recognition that '[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.'[22]

To comply with the obligation to protect, states need to legislate and regulate the conduct of private individuals and entities, including businesses. This can be considered a requirement to carry out due diligence. Due diligence is a concept that is often used in business circles, and has, in the framework of the UNGP been defined as:

> An ongoing risk management process that a reasonable and prudent company needs to follow in order to identify, prevent, mitigate and account for how it addresses its adverse human rights impacts. It includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed.[23]

However, due diligence is not only relevant for the conduct of businesses themselves. States' obligation to protect requires legislation and regulation of the conduct of businesses to ensure that they do not threaten or breach human rights of individuals by applying a due diligence process. The importance of due diligence is that it focuses on the process of ascertaining what can reasonably be predicted as human rights consequences of certain actions or omissions. A legal definition of due diligence includes the proviso of 'measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised […] under the particular circumstances; not measured by any absolute standard, but depending on the

[20] UN Human Rights Committee (HRC), General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 8.
[21] UN Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04, 2011.

[22] Ibid., at 3.
[23] UN Guiding Principles Reporting Framework, Glossary, Human Rights Due Diligence, http://www.ungpreporting.org/resources/glossary/, accessed 22 August 2016.

relative facts of the special case'.[24] In human rights terms, this can be considered as a *normative* function, rather than the *de facto* degree of control.[25] Legislation requiring businesses to carry out such due diligence considerations regarding potential human rights effects of their operations should create accountability on part of these enterprises for potential failure to comply with such provisions. This would be one way for states to comply with their obligation to protect.

The link between a state's obligation to protect and extraterritorial human rights obligations concerns the question whether the content of this level of obligation goes beyond the territorial limitations of the state. In the commentary to the UNGP it is held that '[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.'[26] In the following, I will consider the practice of the ECtHR and UN Human Rights bodies to ascertain whether such an interpretation of the relevant human rights treaties is as straightforward as the commentary to the UNGP imply or whether human rights obligations are now considered to extend extraterritorially to include a duty to regulate the conduct of entities other than the state (including TNCs) when they operate beyond that state's territory.

X.3. Interpretation of Human Rights Treaties by International Human Rights Bodies

X.3.1 Background

Article 31 of the Vienna Convention on the Law of Treaties is the starting point for any treaty interpretation. This provision gives the general rules of interpretation, namely that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[27] Thus, this provision establishes three general principles for treaty interpretation: the textual ('ordinary meaning'); the treaty's 'context'; and the teleological ('object and purpose'). While practitioners and academics have debated whether this listing in Article 31 is an expression of

[24] Black's Law Dictionary Online, What is Due Diligence, http://thelawdictionary.org/due-diligence/, accessed 23 August 2016.
[25] De Schutter 2016, at 54.
[26] UNGP, at 3-4.
[27] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (VCLT), Article 31.

a hierarchy of interpretation principles,[28] there seems to be a relative consensus that while all three principles should be applied in any treaty interpretation, the relative weight may vary dependent upon the character of the treaty, and the material content of it.[29] Having said this, the view among scholars and international judges have been that the contextual or teleological principles cannot be applied in a manner that ignores the 'ordinary meaning' of the text.[30] In addition, Article 32 provides for supplementary means of interpretation, which include the preparatory work of the treaty and the circumstances of its conclusion.[31]

It therefore becomes essential to address the relevant provisions in the various treaties to ascertain whether they contain text whose interpretation in accordance with the VCLT principles may confirm extraterritorial obligations. The most relevant provisions to be addressed are the general obligations provisions in each of the main human rights treaties.

X.3.2 Obligations Terminology in Human Rights Treaties

The first multilateral treaty to codify human rights law on a universal level was the UN Charter in 1945.[32] The Charter clearly states general, yet fundamental, principles of human rights as being one of the purposes of the collective of nations joining together under the auspices of the new organisation. Even so, the Charter does not address in much specificity what the concrete obligations of the member states of the UN are. The most precise reference to the content of such obligations is found in Articles 55 and 56 read together, where the members of the United Nations 'pledge themselves to take joint and separate action in co-operation with the Organization'[33] to achieve 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[34] The reading of these provisions shows that the drafters envisaged more than domestic concern for human rights realisation, as 'joint' necessarily will involve efforts beyond at least one state's border.[35]

[28] Çali 2014, at 528.
[29] Ibid., at 533.
[30] Jonas and Saunders 2010, at 581.
[31] VCLT, Article 32.
[32] See in particular articles 1(3), 55 and 56 of the UN Charter.
[33] UN Charter, Article 56.
[34] UN Charter, Article 55.
[35] For further elaboration of the importance of these passages in an extraterritorial context, see Skogly 2010.

X.3.2.1 Universal Human Rights Treaties

Article 2 in both of the International Covenants on Human Rights from 1966[36] contain their general obligations provisions. However, the content of the two vary considerably. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the states parties to the covenant shall 'take steps, individually and through international assistance and cooperation […] to achieve progressively the full realization of the rights' recognized in the Covenant. On the other hand, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) contains a rather different wording: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction […]' the rights recognised in the Covenant. It is important to note here that the ICCPR refers to both 'territory' and 'jurisdiction', while the ICESCR refers to neither of these terms, but includes a specific reference to international assistance and cooperation.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[37] does not contain any references to territory or jurisdiction in its general obligations provision (Article 2), but refers to negative and positive obligations for 'public authorities and public institutions, national and local',[38] who are under obligations to act in accordance with the provisions of the treaty. Similarly, Article 2 of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[39] does not refer to any specific activity of an international character, focusing on obligations to take legislative measures on constitutional and other levels to prohibit discrimination against women.[40] Other sections of Article 2 include obligations to take measures to prevent *de facto* discrimination against women, and are non-specific as to the locality for such measures.[41]

[36] 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (ICESCR); and ICCPR.
[37] 1965 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (ICERD).
[38] ICERD, Article 2(1)(a).
[39] 1979 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (CEDAW).
[40] CEDAW, Article 2(a).
[41] See in particular Article 2(d) and (e) of CEDAW.

In contrast to the previous two conventions mentioned, the International Convention against Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), is more explicitly restrictive in its wording:

> Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.[42]

Thus, the text of this treaty specifies both territory and jurisdiction in its provisions detailing state parties' obligations. By contrast, the Convention on the Rights of the Child (CRC)[43] is explicit on obligations beyond the national setting. Article 4 of this Convention starts by stating that the '[s]tates Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention'. This is non-specific in terms of territorial or jurisdictional application. The provision continues to provide that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation'. 'Such measures' here refers to 'all appropriate legislative, administrative, and other measures', and there is therefore no territorial or jurisdictional limitation specified for the obligations of states with regards to the rights in the convention, and it is additionally provided that for economic, social and cultural rights, these shall be implemented within the framework of international co-operation.

The most recent comprehensive UN Convention – the Convention on Rights of Persons with Disabilities (CRPD),[44] has a very detailed general obligations provision in its Article 4. The first part of the article does not contain any territorial or jurisdictional limitations. Additionally, similar to Article 4 CRC, Article 4(2) CRPD states that:

> With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights […].

[42] 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (CAT), Article 2(1).
[43] 1989 Convention on the Rights of the Child, 1577 UNTS 3 (CRC).
[44] 2006 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (CRPD).

Furthermore, this treaty is unique in terms of universal human rights treaties as it contains a separate article confirming the importance and necessity of international cooperation for the protection of rights of persons with disabilities.[45] This article details what state parties are supposed to do in terms of international cooperation to that end.

As a preliminary observation going through the various treaties adopted under the auspices of the United Nations over the past 70 years, several treaties contain language that is open-ended in terms of the reach of obligations, and some also include specific provisions requiring international co-operation when that is necessary.

X.3.2.2 Regional Human Rights Treaties

On the regional level, the four main conventions again differ with respect to the general obligations' provisions. The first of these, the European Convention on Human Rights and Fundamental Freedoms (ECHR),[46] provides in its Article 1 that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' The American Convention on Human Rights (ACHR)[47] has a similar provision in its Article 1, which reads: '[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms'. Thus, these two conventions include specific references to the ratifying state's jurisdiction, but there is no mention of territory. The later regional treaty, the African Charter on Human and Peoples' Rights (ACHPR) of 1981[48] has a general obligation provision that does not refer to jurisdiction or territory: '[t]he Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.'[49] Finally, the Arab Charter on Human Rights (ArCHR) of 2004[50] returns to a very similar wording to that of the American Convention by stating in its Article 3 that '[e]ach State party to the

[45] CRPD, Article 32.
[46] 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended, ETS 5 (ECHR).
[47] 1969 American Convention on Human Rights 1144 UNTS 123 (ACHR).
[48] 1981 African Charter on Human and Peoples' Rights, 1520 UNTS 217 (ACHRP).
[49] ACHPR, Article 1.
[50] League of Arab States, Arab Charter on Human Rights, (ArCHR) translation by Dr. Mohammed Amin Al-Midani and Mathilde Cabanettes, revised by Professor Susan M. Akram, 2004, http://www.eods.eu/library/LAS_Arab%20Charter%20on%20Human%20Rights_2004_EN.pdf, accessed 27 January 2017 (ArCHR).

present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein.'

From this brief overview, it is interesting to note that only two conventions, namely the ICCPR and the CAT, specifically refer to territory when it comes to the ratifying states' obligations to respect and protect the rights contained in the treaties. Three treaties (ICESCR, CRC and CRPD) include a specific mention of international assistance and cooperation for economic, social, and cultural rights; while five treaties (ICCPR, CAT, ECHR, ACHR and ArCHR) refer to jurisdiction in their obligations provisions. Finally, three treaties (CERD, CEDAW and ACHPR) do not make any mention of territory, jurisdiction or international assistance and cooperation in the text providing the general obligations for ratifying states. Thus, the common interpretation that obligations stemming from human rights treaties are limited to the territory of the ratifying state cannot stem from a textual interpretation of the treaty texts. In fact, the ICCPR and CAT would be seen as the only two treaties that have a text to provide for such interpretation. The textual justification for claiming that human rights obligations are (primarily) territorial must lie elsewhere, and this may be (as will be further addressed below) in a textual understanding of 'jurisdiction' as implying territorial limitations. This will be addressed in the section below analysing relevant case law.

The work of the various international human rights bodies differ dependent on their mandate. The regional human rights courts deal with specific complaints, while few (apart from the UN Human Rights Committee) of the UN human rights bodies have a similar body of considerable case law to refer to. This does not mean that the work of the UN bodies is less significant, but rather that the focus of the work is different and consequently, so is the nature of their interpretation.

X.3.3 The Evolution of Extraterritoriality in International Human Rights Practice

The most important issue in much of the case law that has developed regarding extraterritorial obligations of states relates to the question of jurisdiction. In spite of the fact that only some of the treaties have jurisdictional limitations, the question of jurisdiction (of the state and the international supervisory organ) is seen as essential to enable the relevant court or committee to address alleged violations of human rights abroad.

Among the first cases to be heard relating to situations involving what we would now consider an extraterritorial application of obligations emerged from the ECtHR and the UN Human Rights Committee in the 1980s. As early as 1981, the UN Human Rights Committee heard the case of *Sergio Euben Lopez Burgos v Uruguay*.[51] In this case, Mr. Lopez Burgos, who was a political refugee in Argentina after being persecuted by the Uruguayan government for his trade union involvement, was abducted by Uruguayan security forces and forcibly taken back to Uruguay. He was subjected to treatment that amounted to torture. The UN Human Rights Committee found that Uruguay was in violation of its obligations under the ICCPR even though the activities had taken place outside Uruguayan territory. In this case, the Committee held that:

> [t]he reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' […] is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.[52]

It further held that:

> Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but this does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.[53]

In this early case, the UN Human Rights Committee thus confirmed that it is the relationship between the State and the human rights violation taking place, rather than the location of the act, which is of importance to ascertain whether a state obligation has been breached.

A few years later, in 1989, the ECtHR heard the case of *Soering v United Kingdom*.[54] In this case, the United States requested extradition of Mr. Soering – a German national – to be tried for alleged murder. He had left the United States after the alleged crime and gone to the United Kingdom. Mr. Soering held that he was likely to be given the death penalty in the state of Virginia if extradited and found guilty, and that the conditions surrounding such

[51] *Sergio Euben Lopez Burgos v Uruguay*, UN Human Rights Committee, Communication, UN. Doc CCPR/C/13/D/52/1979, 29 July 1981 (*Lopez Burgos*), at 176.
[52] Ibid., para 12.2.
[53] Ibid., para 12.3.
[54] *Soering v the United Kingdom*, ECtHR Plenary, Judgment, No. 14038/88, 7 July 1989 (*Soering*).

sentencing would breach his rights under Article 3 ECHR.[55] The UK held that this article 'should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction'.[56] The Court held that:

> the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art. 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.[57]

However, the Court continued to say that '[t]hese considerations cannot […] absolve the Contracting Parties from responsibility under Article 3 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction.'[58] In its reasoning, the Court referred to the special character of the ECHR as a treaty for the 'collective enforcement of human rights and fundamental freedoms', the 'object and purpose of the Convention' and that the interpretation of it should be consistent with 'the general spirit' of the Convention.[59] On this basis, the Court found that the circumstances of the *Soering* case would 'give rise to a breach of Article 3(3)' if the applicant was extradited.[60] The Court confirmed that while Contracting States are not responsible for human rights violations committed by non-parties to the Convention, there are circumstances when a state can foresee that their actions may have negative consequences on an individual's human rights' enjoyment, and that carrying out such actions will trigger responsibility of the state. This is particularly so when the right in question is one of the non-derogable rights according to the Convention.[61]

These two early cases set the scene for treaty interpretation regarding the extraterritorial reach of human rights obligations of states. They represent the start of a process of consideration of the content of jurisdiction, how it relates to territory, and how it can extend beyond the physical boundaries of the ratifying state. These cases (some of which will be analysed below) raise questions of control over people and territory, and how acts and

[55] Article 3 ECHR provides the right to be free from torture, inhuman and degrading treatment or punishment.
[56] *Soering*, para 83.
[57] Ibid., para 86.
[58] Ibid.
[59] Ibid., para 87.
[60] Ibid., para 111.
[61] Ibid., para 88.

omissions of the authorities of a state may produce effects outside a state's territory which may cause human rights abuses and be the responsibility of the state.

It would lead too far in this chapter to carry out a comprehensive analysis of all the relevant cases. Therefore, the chapter concentrates on some of the key cases before the ECtHR and how they have developed the understanding of 'jurisdiction', and also how the concept of attribution is relevant.

X.3.3.1 Jurisdiction

Following the *Soering* case, the next major case before the ECtHR receiving significant attention for establishing that the obligations of the convention may reach beyond the territorial borders of the ratifying state is the *Loizidou v Turkey* case from 1995.[62] In this case, the complainant argued that Turkey had breached her rights according to Article 1 of Protocol 1[63] guaranteeing peaceful enjoyment of property. The occupation by Turkey of the Northern part of Cyprus resulted in Ms. Loizidou not being able to access her home and possessions. The government of Turkey argued that the Court did not have jurisdiction to hear the case as the alleged violations had taken place outside the territory of Turkey and therefore outside its jurisdiction.[64] The Court, however, did not accept this argument, as the large number of Turkish troops in Northern Cyprus clearly indicated Turkish control over the area.[65] It consequently found that Turkey had breached the Convention, and held that:

> in conformity with the relevant principles of international law governing State responsibility, […] the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[66]

[62] *Loizidou v Turkey*, ECtHR Grand Chamber, Judgment, No. 15318/89, 18 December 1996 (*Loizidou*).
[63] 1952 Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 9.
[64] Ibid., para 51.
[65] Ibid., para 56.
[66] Ibid., para 52.

Hence, the Court here established that effective control of an area outside its territory will extend the reach of jurisdiction within the meaning of Article 1 ECHR. Furthermore, such effective control can result from military occupation.

Building on this case, the Court, sitting in Grand Chamber, heard the case of *Banković and others v Belgium and others* and delivered its judgement in 2001.[67] This case was brought by survivors and relatives of deceased individuals of the NATO bombing of the television tower in Belgrade in 1999. The applicants held that the bombing and the resulting deaths represented violations of the right to life, as guaranteed by Article 2 ECHR, as well as violations of Articles 10 and 13.[68] The respondent governments contested the admissibility of the case on the basis that the alleged victims were not within the jurisdiction of the high contracting parties in the meaning of Article 1 ECHR.[69] After significant deliberations, the Court found that it did not have jurisdiction to hear the case on the basis that the actions taken by the European NATO member states happened outside the territory covered by the Convention, namely in the former Yugoslavia, and it was therefore outside the jurisdiction of the Court as understood by reference to Article 1. The case was consequently found inadmissible.[70] This conclusion was different from that of the *Loizidou* case as Cyprus is a high contracting state, just like Turkey, and hence both states involved were parties to the treaty. The Court, thus, made a distinction between the area covered by the treaty, and territory outside this geographic area. It also determined in *Banković* that individuals in such external geographic areas were not under effective control of the respondent governments when they carried out aerial attacks resulting in death and serious injury.

However, in spite of its conclusions in the *Banković* case, the Court confirmed that in exceptional circumstances the convention could have reach beyond the geographic territory of the members of the Council of Europe.[71]

Since Bankovic, there have been a number of other cases where the Court has found that such exceptional circumstances exist and that the Convention therefore applies. Most notably, in the cases of *Issa v Turkey*[72] and *Al Skeini v UK*[73] the Court found that a state's jurisdiction

[67] *Banković and Others v Belgium and Others*, ECtHR Grand Chamber, Admissibility, Decision, No. 52207/99, 12 December 2001 (*Banković*).
[68] Ibid., para 28; Article 10 guarantees the freedom of expression, Article 13 the right to an effective remedy.
[69] Ibid., para 31.
[70] Ibid., para 85.
[71] Ibid., para 67.
[72] *Issa v Turkey*, ECtHR Second Section, Judgement, No. 31821/96, 16 November 2004.

within the meaning of Article 1 ECHR could be triggered in situations of control both over territory and over persons within another state not party to the ECHR.[74] Similarly, in cases brought against Russia and Moldova,[75] the Court found that there were shared obligations for both Russia and Moldova for human rights violations that had taken place in Transdniestria – a region in Moldova where Russia has significant control. In all of these cases, the Court has confirmed that states may be under an obligation to respect the rights in the Convention in times of occupation or other military control over territory in another state.

In a more recent case involving military activity, the Court dealt with the question of whether a state other than the formal occupying power may be considered to exercise jurisdiction. In *Jaloud v the Netherlands*,[76] relatives of Mr. Jaloud brought the case after he was shot and killed by Dutch troops in Iraq in 2004. In this case, the Netherlands held that they could not be considered to be operating within their jurisdiction within the meaning of Article 1 ECHR, as they were not an occupying power, and their troops were deployed to Iraq on the basis of a UN Security Council Resolution. After careful consideration of the intricate structure of the international Stabilization Force in Iraq (SFIR) the Court found that:

> Although Netherlands troops were stationed in an area in south- eastern Iraq where SFIR forces were under the command of an officer from the United Kingdom, the Netherlands assumed responsibility for providing security in that area, to the exclusion of other participating States, and retained full command over its contingent there. [77] […] [Therefore] the Court cannot find that the Netherlands troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State.[78]

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[73] *Al-Skeini and Others v The United Kingdom*, ECtHR Grand Chamber, Judgement, No. 55721/07, 7 July 2011 (*Al-Skeini*).
[74] Ibid., para 133.
[75] *Ilaşcu and Others v Moldova and Russia*, ECtHR Grand Chamber, Judgment, No. 48787/99, 8th July 2004 (*Ilaşcu*);*Ivantoc and Others v Moldova and Russia*, ECtHR Fourth Section, Judgment, No. 23687/05, 15th November 2011; *Catan and Others v The Republic of Moldova and Russia*, ECtHR Grand Chamber, Judgment, No. 43370/04, 18454/06 and 8252/05, 19 October 2012; and *Mozer v The Republic of Moldova and Russia*, ECtHR Grand Chamber, Judgment, No. 11138/10, 23 February 2016.
[76] *Jaloud v the Netherlands*, ECtHR Grand Chamber, Merits and Just Satisfaction, Judgment, No. 47708/08, 20 November 2014, *(Jaloud).*
[77] Ibid., para 149.
[78] Ibid., para 151.

Consequently, the Court found that the Netherlands 'exercised its "jurisdiction"' within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.'[79]

In this case it can be argued that the Court showed an approach to the question of jurisdiction which is less formalistic in terms of formal power and more aimed at assessing the *de facto* situation on the ground.

On the basis of these and other cases that involve the military, the police or security personnel's activities in another state's territory, there is now a strong recognition that the Convention has extraterritorial reach. In fact, in situations of occupation or custodial or other control over individuals by a state party acting extraterritorially, the Court has found that the Convention regularly applies outside the territory of the ratifying state. However, the question becomes whether the jurisdictional reach is only applicable in situations where a state's military or law-enforcement personnel are involved. If this was the case, the question of extraterritorial obligation to protect, through the regulation of private business entities' operations abroad, would be largely responded to in the negative. Therefore, it is necessary to consider if other forms of states' international interactions will be covered by extraterritorial jurisdiction as well.

Staying with the ECHR, there are a number of other cases that have been heard by the (previous) Commission and Court that deal with complaints stemming from different forms of states' international interaction or cooperation. These have not received the same amount of attention from media and academic commentators, but they are still of interest to ascertain whether it is now commonly accepted that extraterritorial obligations go beyond the military/security spheres.

Referring to its own case law, the ECtHR has held that extraterritorial jurisdiction is exceptional, but may exist when 'the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or *through the consent, invitation, acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by the Government*'.[80] This position is confirmed in *Al Skeini*, and in this case the Court added that:

[79] Ibid., para 152.
[80] *Banković*, para 71 (emphasis added).

> where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.[81]

Thus, the Court itself recognises that it is not only in cases of military occupation that the extraterritorial obligations of the ratifying states may be engaged. For example, in *Drozd and Janosek v France and Spain*,[82] which considered whether France and Spain exercised jurisdiction in Andorra as a result of French and Spanish judges practicing in that country, the Court held that France and Spain could not be considered to exercise extraterritorial jurisdiction in this context, as the judges were not 'subject to supervision by the authorities of France and Spain'.[83] However, the Court accepted that if such supervision had been carried out, then France and Spain could have been responsible 'because of acts of their authorities producing effects outside their own territory'.[84] Furthermore, in *X and Y v Switzerland*,[85] concerning a treaty incorporating Lichtenstein into Switzerland's customs area, and where the question was whether decisions by the Swiss authorities had an effect outside Swiss territory, the then European Commission on Human Rights held that '[a]cts by Swiss authorities with effect in Liechtenstein bring all those to whom they apply under Swiss jurisdiction within the meaning of Article 1 of the Convention.'[86]

Similarly, the *Manoilescu and Dobrescu v Romania and Russia*[87] case concerned the restitution of property to two Romanian nationals. Their property had been transferred to the Romanian State after the Second World War, and was later subject to a property exchange with the Soviet Union (ultimately transferred to the Russian Federation). It was confirmed in 1994 that the property would be used by the Russian Embassy in Romania. The court found the complaint inadmissible, and the applicants had not been able to show that they were within the jurisdiction of the Russian Federation in this case. Nevertheless, the Court in its deliberations held that:

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[81] *Al-Skeini*, para 135.
[82] *Drozd and Janousek v France and Spain*, ECtHR Plenary, Judgment, No. 12747/87, 26 June 1992.
[83] Ibid., para 96.
[84] Ibid., para 91.
[85] *X and Y v Switzerland*, European Commission of Human Rights, Plenary, Admissibility, No. 7289/75 and 7349/76, 14 July 1977.
[86] Ibid., at 73.
[87] *Manoilescu and Dobrescu v Romania and Russia*, ECtHR Third Section, Decision, No. 60861/00, 3 March 2005.

> [e]ven in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[88]

Indeed, in this case, the Court said that the principle quoted above was a broadening of its earlier position that the exceptional circumstances only referred to situations of effective control through 'military occupation or through the consent, invitation or acquiescence of the government of that territory'.[89]

X.3.3.2 Attribution of Acts to the State

While it may be concluded that the Court has accepted that jurisdiction may extend beyond the territorial borders of a ratifying state, the above discussion has not dealt with one of the main conditions brought forward by the ECtHR, namely that of attribution. As quoted in the *Al Skeini* case, the Court held that 'the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State'.[90] When acts are carried out by the military or the police, the question of attribution to the state is relatively straightforward. However, if acts are done by private entities, the question becomes more complex. For the purpose of the present chapter, the question becomes whether the requirement of attribution to the state may be satisfied in situations of transnational corporations' behaviour abroad.

In the commentary to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts from 2001,[91] it is held that 'the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State',[92] and '[a]s a corollary, the conduct of private persons is

[88] Ibid., para 101.
[89] Ibid.
[90] *Al-Skeini*, para 135.
[91] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UN Doc. A/56/10, 2001.
[92] Ibid., at 38.

not as such attributable to the State'.[93] Thus, the regular understanding of acts or omissions attributable to the state would not be those engaged in by private parties, including private business enterprises, and it could be concluded that this understanding of attribution would prevent responsibility for a state related to the acts of private enterprises. However, the distinction between the actions of private parties and the state is not necessarily that firm. Notwithstanding the clear definition of attribution as quoted above, the commentary to the Articles also confirms that 'a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects',[94] and that the question of attribution relates both to actions and omissions.[95]

Attribution in the context of extraterritorial obligations should be seen in light of two concepts already mentioned: 'acts producing effects abroad' and 'due diligence'. In several cases, including the *Jaloud* case, the Court has held that 'a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory'.[96]

While it is rare that negative acts by TNCs can be directly attributed to the home state, their acts should be seen in the context of potential failure 'to take necessary measures to prevent those effects'.[97] If a state is in a position to regulate the conduct of a company's actions abroad, but fails to do so, and this omission results in human rights abuses, the question of responsibility upon the state may be raised. This is the approach taken by the UNGP where, in the commentary to the Principles, it is held that:

> [s]tates are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, *or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse*.[98]

On the basis of the brief consideration of the case law above, some general observations can be made. First, the ECtHR has confirmed that while jurisdiction is primarily territorial, there

[93] Ibid.
[94] Ibid.
[95] Ibid., at 35.
[96] *Jaloud*, para 133.
[97] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UN Doc. A/56/10, 2001 (see Commentary on Article 2, at 35)
[98] UNGP, at 3 (emphasis added).

are exceptional circumstances whereby the jurisdictional reach goes beyond the territory of the ratifying state, and indeed also the territory covered by the total membership of the Council of Europe. Second, these exceptional circumstances do not only cover situations of occupation or other forms of effective control over territory. Control over persons is also included, and so are actions of states that produce human rights effects outside their territory. Third, the Court has confirmed that contracting parties have a positive duty to take 'the diplomatic, economic, judicial or other measures that is in its power to take […] to secure […] the rights guaranteed by the Convention'.[99] Finally, attribution of actions may be made to states even if they have been carried out by private parties. The significance of these developments in case law for the question of obligations of states to regulate the conduct of TNCs will be further addressed in section X.4 below.

X.3.4 The United Nations Bodies

Most of the work of UN bodies in this area comes in the form of Concluding Observations to state reports, General Comments from UN Committees, or reports from Special Rapporteurs. While not considered legally binding decisions, such statements are considered to represent authoritative interpretations of the various treaties. There is a growing trend among the UN bodies to address extraterritorial obligations of states in these documents, including those related to states' regulation of the conduct of private parties. The Global Initiative for Economic, Social and Cultural Rights monitors UN pronouncements on extraterritorial human rights obligations, and has in its latest collection documented 41 references to such obligations since 2010.[100] These pronouncements come from a large variety of UN human rights bodies, including: the Committee on Economic, Social and Cultural Rights, The Human Rights Committee; the Committee on Elimination of Discrimination against Women; the Committee on Elimination of Racial Discrimination; the Committee on the Rights of the Child; several special rapporteurs (both on civil and political and on economic, social and cultural rights) through the Special Procedures, and the Universal Periodic Review.

As noted in section X.3.2 above, only the ICCPR and the CAT refer to both 'jurisdiction' and 'territory' in their general obligations provisions. The question raised in the interpretation of

[99] *Ilaşcu*, para 331.
[100] The Global Initiative for Economic, Social and Cultural Rights 2015.

these provisions is whether this wording implies that the two concepts should always be considered in conjunction with each other, or whether they are considered separate: 'jurisdiction' on the one hand and 'territory' on the other. If that were to be the case, one could expect that the wording used in the treaties would have been 'jurisdiction *or* territory' rather than 'jurisdiction *and* territory', as stated in the ICCPR. However, in General Comment No. 31, the UN Human Rights Committee does not take this view. Quite the contrary, they hold that:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[101]

This view confirms the position taken in the *Lopez Burgos* case, as discussed above.[102]

The UN Committee against Torture has also addressed the meaning of 'jurisdiction' and 'territory' in its General Comment on Article 2 of the Convention. They have not quite taken the same specific view on the separation of the two concepts as the UN Human Rights Committee has done. However, they clearly do not interpret these two concepts in a narrow or restrictive manner. The General Comment provides that:

> [t]he Committee […] understands that the concept of 'any territory under its jurisdiction,' linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination *subject to the de jure or de facto control* of a State party.[103]

Furthermore, the General Comment goes on to state that:

> Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also 'in any territory under its jurisdiction.' The Committee has recognized that 'any territory' includes *all areas*

[101] UN Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligations Imposed on State Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 10.
[102] See the *Lopez Burgos* case.
[103] UN Committee Against Torture, General Comment No. 2, Implementation of article 2 by States Parties, UN Doc CAT/C/GC/2, 24 January 2008, para 7 (emphasis added).

> *where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control*, in accordance with international law. The reference to 'any territory' in article 2 […], refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction 'when the alleged offender is a national of the State.' The Committee considers that the scope of 'territory' under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.[104]

As is evident from these two quotes, the Committee against Torture does not see the references to 'territory' and 'jurisdiction' in the Convention in any way to signify a strict adherence to the physical territorial boundaries of the ratifying state. They understand these terms with reference to both *de jure* and *de facto* control not only over territory, but indeed also over persons – and these persons may be in areas far away from the actual territory of the state, including in foreign states' territory in terms of peace keeping or detention during occupation. It is also emphasised that this control can be either direct or indirect.

These two committees monitor the implementation of treaties that have more restrictive language on territorial jurisdiction than the other treaties, including the ECHR as discussed above. Yet, they have accepted a broader interpretation of situations that may involve the jurisdiction of the state party in question. The way in which this may impact on the role of the state regarding the regulation of private parties, was also confirmed by the UN Human Rights Committee in paragraph 8 of General Comment No. 31.[105]

Beyond the question of jurisdiction, many of the UN human rights bodies have given attention to situations where states should take measures to protect individuals from negative effects of acts taken by private parties over which the state has control or significant influence. It is not possible to give a full account of the statements by these bodies in this article, but a few should be mentioned for illustration.

[104] Ibid., para 16 (emphasis added).
[105] UN Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligations Imposed on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004.

For instance, in its concluding observations from 2016 on the report from the United Kingdom, the CRC expressed its concern about the effect of the UK's development cooperation, where they contribute to 'for-profit schools', and that the right to education may be in jeopardy.[106] The UN Human Rights Committee in its concluding observations on the report by the United States in 2006, held that it 'notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of […] its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory'.[107]

The Special Rapporteur on the rights of peaceful assembly and of association held that states shall:

> (c) Take appropriate measures to meet extraterritorial obligations, particularly by providing access to remedy for victims of violations of the rights to freedom of peaceful assembly and of association; measures should include but are not limited to: […]
>
> > (ii) Enacting, implementing and enforcing laws that prohibit and provide penalties for conduct by corporations that violates human rights abroad;
> >
> > (iii) Ensuring that trade and other agreements on investment in natural resource exploitation activities, whether concluded bilaterally or multilaterally, recognize and protect the exercise of peaceful assembly and association rights for affected individuals and groups[.][108]

The UN Committee on Economic, Social and Cultural Rights held in a statement from 2011 that '[s]tates parties should […] take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the

[106] The Committee holds that: '[i]n the context of international development cooperation the Committee is concerned about the State party's funding of low-fee, private and informal schools run by for-profit business enterprises in recipient States. Rapid increase in the number of such schools may contribute to sub-standard education, less investment in free and quality public schools, and deepened inequalities in the recipient countries, leaving behind children who cannot afford even low-fee schools.'(para 17) and that'[[t]he Committee recommends that the State party ensure that its international development cooperation supports the recipient States in guaranteeing the right to free compulsory primary education for all, by prioritizing free and quality primary education in public schools, refraining from funding for-profit private schools, and facilitating registration and regulation of private schools.' (para 18), UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 12 July 2016.

[107] UN Human Rights Committee, Concluding Observations, United States of America, UN Doc CCPR/C/USA/CO/3, 18 December 2006, para 10.

[108] Maina Kiai, Special Rapporteur, Report on the rights to freedom of peaceful assembly and of association, UN Doc A/HRC/29/25, 28 April 2015, para 72.

sovereignty or diminishing the obligations of the host States under the Covenant.'[109] And in recent concluding observations on the report from Canada, the same Committee, held that:

> The Committee is concerned that the conduct of corporations registered or domiciled in the State party and operating abroad are, on occasions, negatively impacting on the enjoyment of Covenant rights by local populations. […] The Committee recommends that the State party strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in their activities abroad, including by requiring these corporations to conduct human rights impact assessments prior to making investment decisions. It also recommends that the State party introduce effective mechanisms to investigate complaints filed against these corporations, and adopt the necessary legislative measures so as to facilitate access to justice before domestic courts by victims of these corporations' conduct.[110]

In its Concluding Observations regarding China, the Committee expressed its concern 'about the lack of adequate and effective measures adopted by the State party to ensure that Chinese companies, both State-owned and private, respect economic, social and cultural rights, including when operating abroad' and recommended that China establish a regulatory framework for Chinese companies to 'ensure that their activities promote and do not negatively affect the enjoyment of economic, social and cultural human rights'; and that the country should '[a]dopt appropriate legislative and administrative measures to ensure the legal liability of companies and their subsidiaries operating in or managed from the State party's territory regarding violations of economic, social and cultural rights in the context of their projects abroad'.[111]

The UN Human Rights Committee has expressed its satisfaction that Germany has established the opportunity for remedies against German companies acting abroad when they are in contravention of relevant human rights standards. However, the Committee has noted that the standards may not always be sufficient. Therefore the State party was asked to set out clearly the expectation that all business enterprises 'domiciled in its territory and/or its

[109] UN Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties regarding the corporate sector and economic social and cultural rights, UN Doc E/C.12/2011/1, 12 July 2011, para 5.

[110] UN Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Canada, UN Doc E/C.12/CAN/CO/6, 23 March 2016, paras 15-16.

[111] UN Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China, UN Doc E/C.12/CHN/CO/2, 13 June 2014, para 13.

jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.'[112]

From the discussions above it is shown that the ECtHR has the most extensive case law when considering extraterritorial reach of jurisdiction, while the UN bodies have addressed specifically the question of jurisdiction for those treaties that have jurisdictional limitation, and have found that jurisdiction is not limited to territory. In addition to considering the specific issue of jurisdiction, other monitoring bodies in the UN have clearly taken the position that the obligation to protect includes states' obligations to ensure regulation of the conduct of private parties over which they exercise control or influence. This conclusion is in accordance with the approach taken by the drafters of the Maastricht Principles of Extraterritorial Obligations in the area of Economic, Social and Cultural Rights, which in its preamble states that 'the Maastricht Principles do not purport to establish new elements of human rights law. Rather, the Maastricht Principles clarify extraterritorial obligations of States on the basis of standing international law.'[113]

The final section of the article will consider how these findings may impact upon the new initiative to draft a treaty on business and human rights, which is currently being undertaken.

X.4 Impact on the New Treaty on Business and Human Rights

In order to link the question of jurisdiction and the obligation to protect, there are a number of different issues that need to be connected. The ECtHR has confirmed that jurisdiction is not uniquely territorial, and this is indeed in line with the common understanding of jurisdiction in international law, which accepts that prescriptive jurisdiction does not have territorial limitations, as long as it is exercised in accordance with international law.[114] Thus, states are

[112] UN Human Rights Committee, Concluding Observations on the sixth periodic report of Germany, UN Doc CCPR/C/DEU/CO/6, 12 November 2012, para16.

[113] Maastricht Principles on States' Extraterritorial Obligations in the area of Economic, Social and Cultural Rights, adopted by a group of experts in Maastricht in September 2011, http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23, accessed 27 January 2017, Preamble; See also De Schutter et al 2012.

[114] According to Dixon and McCorquodale: '[a]s a general rule, a State's prescriptive jurisdiction is unlimited and a State may legislate for any matter irrespective of where it occurs (even if in the territory of another State)

free to legislate or otherwise regulate for the conduct of TNCs when operating abroad. It is the right of states to include whatever they want in the legislation regulating the establishment or incorporation of businesses within their national legislative setting. This right to regulate was also confirmed in the commentary to the UNGP, as referred to above.[115] However, the right to regulate does not necessarily imply an obligation to regulate. Therefore, the understanding of jurisdiction as not preventing regulation is important, but not sufficient to generate an obligation. The source of such obligation is found in the tripartite classification of human rights obligations combined with the interpretation of the reach of the rights guaranteed in the various human rights treaties. As has been demonstrated above, the ECtHR and the UN human rights bodies are increasingly accepting that the obligation to protect includes obligations that go beyond the national physical borders of a ratifying state.

De Schutter argues that the human rights obligation to protect includes the obligation for states to ensure that TNCs do not breach human rights of individuals when they operate in a country other than their home state.[116] He criticises the weak formulation of the UNGP in this regard, and holds that a new legally binding instrument could clarify and be explicit on the extraterritorial reach of the obligation to protect.[117] If included, the new treaty will confirm existing obligations and make them explicit, rather than breaking new ground in human rights obligations.

Explicit recognition will normalise extraterritorial obligations even further than what they are now. There is still much state opposition to accepting these obligations, and making them explicit will demystify them and bring them into mainstream human rights discourse. The distinction between prescriptive and enforcement jurisdiction in relationship to regulation of TNCs will be useful in explaining what is expected of states in this context. To prescribe regulation of conduct for TNCs over which a state exercises authority no matter where these businesses operate is clearly within the jurisdiction of the home state. To enforce such regulation in situations where the host state fails to do so is also within the jurisdiction of the home state.

Furthermore, an inclusion of the obligation to protect (domestically as well as extraterritorially) will provide for the state's central role in ensuring that TNCs and other

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or the nationality of persons involved. […] Enforcement jurisdiction is, on the other hand, generally considered to be territorial' (Dixon and McCorquodale 2000, at 281).

[115] UNGP, at 3-4.

[116] De Schutter 2016, at 45.

[117] Ibid.

businesses do not violate human rights. One of the dangers with the proposed new treaty could be that the role of the state is taken out of the equation, and that the TNCs are given direct obligations based on the treaty only. In this respect, states may feel that they have done what they need to do to protect individuals from human rights violations carried out by the TNCs just by ratifying the treaty, and then leave it up to the TNCs and whatever implementation structures will be provided for in the treaty to deal with violations of human rights by TNCs.. Thus, by including the state and its obligations to regulate the conduct of the TNCs over which they exercise home-state jurisdiction explicitly, the treaty will ensure that states may be held accountable if they fail to regulate the conduct of TNCs and to hold these TNCs to such standards. This does not mean that TNCs may not be held directly accountable under the terms of the treaty; a combination of direct and indirect accountability of TNCs could be possible within one treaty in the same sense of subsidiarity as is employed in the Statute of the International Criminal Court.[118]

As has been argued throughout this chapter, the acceptance of extraterritorial obligations as part of already exciting human rights treaties is now commonly the case of the bodies implementing and supervising international human rights treaties. By making this explicit in the text of the new treaty it will not revolutionise human rights law, but it will bring universal protection forward. The fact that states may initially oppose this concept explicitly in a treaty does not mean that it is not already recognised in international law. After all, international human rights law aims to regulate the conduct of states, and has traditionally been altering the practice of states in how they treat individuals. The obligations that this legal regime carry will by necessity curtail the freedom of manoeuvre of states. It is therefore to be expected that they oppose what at times is perceived to be adding more obligations upon them. Consequently, it is necessary to emphasise that these are obligations that come from the object and purpose of the treaties they have already ratified. The globalization that has taken place over the past few decades makes a strengthening of the protection of individuals from human rights abuses committed both by states and non-state actors imperative. By including such obligations explicitly in the new treaty, the drafters can ensure that it remains relevant for the lives people lead in the twenty-first century.

X.5 Conclusions

[118] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Article 17.

International human rights law is dynamic and needs to respond to changing societal realities. Human rights treaties have been recognised as living instruments by courts and academics.[119] The recognition that human rights obligations may be extended to individuals other than those within the territorial boundaries of a state, has been developing over the past few decades. The work of the UN human rights bodies demonstrates that the extraterritorial application of the universal human rights treaties is now an integral part of their operations.

However, by emphasising that extraterritorial obligations are only relevant in exceptional circumstances, the ECtHR gives the impression that applying such obligations does not represent 'business as usual', but rather that it is only on rare occasions that states need to consider the effect of their decisions or actions, or omissions, on the human rights enjoyment of individuals beyond their borders. While the content of obligations may be of an extraterritorial nature, the use of such terminology by the Court may in fact underscore an exceptionalism that is not a reality in law. As has been demonstrated, the ECtHR and other international bodies now find, in a large variety of situations, that states can be held accountable for conduct beyond their borders, and the 'exceptional' seems to have become 'common practice'. This reality should be reflected in the new treaty on business and human rights.

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