MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

Linda Smids

Extraterritorial Jurisdiction and Corporate Accountability for Human Rights Violations

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Linda Smids

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Author: Linda Smids
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Abstract: The international human rights law accountability for transnational corporations has long been one of the most challenging questions for the realisation of internationally recognised human rights. The existing legal framework protecting human rights does not impose binding obligations on corporations. The existing challenges in holding corporations accountable for their human rights violations does not only derive from governance gaps in international human rights law, but also from the so called 'corporate veil' which creates obstacles for imposing responsibility on a transnational corporation and therefore also for the access to remedy for victims of powerful rights-violating corporate actors. The nature and legal personality of corporations under international human rights law creates opportunities for corporations with global operations to avoid respect towards human rights through operating through subsidiaries registered in states with less restrictive legislation. If the corporate veil can be pierced, a genuine connection could be found between a business-related human rights violation and the home state of a transnational corporation. The genuine connection between a conduct and a state can justify the exercise of extraterritorial jurisdiction as a method to impose accountability on a corporation in cases where the host state is incapable or unwilling to locally prosecute alleged human rights violations. The exercise of extraterritorial jurisdiction over human rights violations across borders does not only require a solid justification but is also rather restricted. One of the main restrictions arises from the relationship between jurisdiction and sovereignty. States have internationally recognised responsibilities and a positive obligation to protect human rights provided through various human rights treaties. International human rights treaties provide a notion of jurisdiction which can be extended to areas outside a state's territorial powers, if the state has effective control over the territory or the individuals subject to a conduct. This thesis provides an overview of the different methods to exercise extraterritorial jurisdiction and arguments why extraterritoriality could be used in situations where corporations violate human rights. The thesis starts by analysing the nature and existing duties of corporations, followed by an analysis of the prevailing principles for the exercise of extraterritorial jurisdiction. The doctrine of state responsibility and states' positive obligations will be discussed to understand which circumstances obligate a state to exercise extraterritorial jurisdiction or legitimise the exercise of it.
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List of Abbreviations

ACTA	Alien Tort Claims Act
BIT	Bilateral Investment Treaty
CRPD	Convention on the Rights of Persons with Disabilities
FTA	Foreign Trade Agreement
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Law Commission
ILO	International Labour Organisation
MNE	Multinational Enterprise
NGO	Non-governmental Organisation
OECD	Organization for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGP	United Nations Guiding Principles
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

1.1 Background

In September 2018, a campaign was launched to call for a Finnish law on mandatory human rights due diligence. A coalition of more than 100 companies, civil society organisations and trade unions work to remind Finnish politicians about a global trend towards binding regulation on business and human rights.[1] The proposal does not present details, but it can be construed to be focused on the due diligence of the transnational operations of Finnish companies. Some countries already have binding national business due diligence laws, but in most other countries these laws are seen as too limiting or impossible to implement. One of the reasons why states oppose national due diligence laws are the unwanted possible consequences, such as loss of competitive advantage and negative impact on the economy due to increasing amount of bureaucracy and higher supply costs in comparison to competitors. Corporate social responsibility (CSR) is becoming increasingly relevant for businesses due to better awareness among consumers, however, most of the binding obligations on CSR are still only based on an obligation posed on large undertakings to report non-financial information and therefore not robust enough.[2]

Already long before the idea of CSR had taken any real shape, a general understanding of human rights had been expressed through the 1948 Universal Declaration of Human Rights (UDHR). It was the first international document that in its preamble, also recognized responsibility for the realisation of human rights on "every organ of society"[3], meaning that also businesses should bear human rights responsibilities, even though the primary responsibility to protect and promote human rights is assigned on states. The due diligence duty, that Finland is attempting to make mandatory, is defined in the UN Guiding Principles for Business and Human Rights (UNGPs), and requires that companies should possess efficient tools and processes to identify, avoid and minimise

[1] https://ykkosketjuun.fi/
[2] 2014/95/EU. The directive in question is only binding for certain large undertakings.
[3] Preamble, Universal Declaration of Human Rights, 1948

the adverse impact of their business on human rights.[4] Human rights due diligence standards are also set forth in the 2014 International Labour Organization (ILO) Protocol to the 1930 Forced Labour Convention and the Organization for Economic Co-operation and Development (OECD) Guidelines, however, there are no binding treaties to hold businesses such as transnational corporations (TNCs) responsible under international law, and hence it fails to impose direct obligations on them. This failure to impose direct obligations has become more and more relevant, since TNCs have grown to be wealthier than entire countries.[5] The possibility of international binding treaties have been discussed and drafted by the UN, but there is still a lack of consensus between member states and the topic is found to be rather controversial.

The difficulty in imposing responsibility on perpetrators that violate human rights does not only derive from bad governance in host states and non-due diligence, but also from long supply chains which characterize present day international trade. The distance might give the perpetrator a chance to defend actions by lack of required knowledge or lack of control over the subsidiaries or suppliers. The topic of business' human rights due diligence has also gained attention among consumers after disasters such as the collapsing of the Rhana Plaza in 2013, killing at least 1132 people that worked in the garment industry[6] and through reports from varied non-governmental organisations (NGOs). The ILO has estimated that over 25 million people were held in forced labour in 2016.[7] This grown awareness has strengthened the global interest to seek ways to find justice for victims who have been exploited by private businesses. The premise is, that TNCs should have the capacity to exercise control and influence their subsidies, affiliates and supply chain abroad, even if it might be understood as unreasonable.

The economic power of huge TNCs might make it challenging for states to assert full control over policies which are essential for the fulfilment of their economic and social rights obligations, and therefore there might not be access to grievance mechanisms and

[4] UN Guiding Principles on Business and Human Rights 2011.
[5] World Justice Now made a study based on revenue figures from 2017 comparing governments and organisations and it showed that from the 200 most wealthy entities 157 were corporations.
[6] Bangladesh Move towards Employment injury Insurance: The Legacy of Rana Plaza, ILO 2018.
[7] Global estimates of modern slavery: forced labour and forced marriage, International Labour Office (ILO), Geneva, 2017.

remedy in accordance with the UNGPs.[8] Professor John Ruggie, the former UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises summarised the issue as follows:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.[9]

The domestic attempts to create more binding human rights standards are a result of the effort to try to bridge these above-mentioned governance gaps. Until more binding mechanism are created, it is important to try to solve the problem of these governance gaps by researching which mechanisms exist through which to hold corporations liable for their crimes. Therefore, it is necessary to discuss if there is a possibility to interpret international law with an approach that could extend human rights obligations to other actors than states and to actions outside a state's territory. There are several different methods for exploring ways to fill the governance gap which Ruggie refers to[10], but the aim of this thesis is to explore if states have extraterritorial responsibilities to protect human rights and if so, how extraterritorial jurisdiction could be applied to protect victims of corporate human rights violations.

According to Voiculescu and Yanacopulos, globalisation has shifted business operations away from local communities and consumers. They argue that the lack of connection or a link between state duties to provide, protect, promote and fulfil the needs of individuals or societies and the individual whose rights are harmed is apparent in cases where the one perpetrating the needs of individuals is a TNC.[11] Voiculescu and Yanacopulos point out that "there is also a perceived conceptual and legal dislocation of duties and

[8] UN Guiding Principles on Business and Human Rights 2011.
[9] Ruggie, "Protect, Respect and Remedy", supra note 374 at 3, para. 3.
[10] *See*, Simons, Penelope, *International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights,* 2012, for a deeper analysis of the governance gaps and critique towards Ruggie's approach on the underlying issues behind the gaps.
[11] Voiculescu & Yanacopulos, 2011, p.1-2.

responsibilities".[12] Initially, international human rights law was designed to protect individuals from omnipotent states, yet it has advanced to include a wider range of positive obligations. The state obligations, such as the obligation to provide access to an effective remedy is one of the main reasons why extraterritoriality should be researched.[13]

It is generally acknowledged that TNCs are not subjects of international human rights law and therefore do not bear direct duties of human rights. Researchers have come up with several different methods on how to impose obligation on TNCs and one normatively justified method is the concept of states' positive obligations and a state's duty to protect persons under its jurisdiction. The importance of the questions of responsibility and the horizontal application of human rights has become evident through the amount of human rights tort cases directed against TNCs.[14] Under international human rights law, states have a duty to take appropriate measures to prevent, and if the perpetration already occurred, investigate, punish and redress corporate-related abuse of the rights of individuals within the state's territory and/or (as relevant for this thesis) jurisdiction.[15] The difficulty for home states to establish jurisdiction over extraterritorial business-related human rights abuses has been an obstacle for redressing the abuses.

Globalisation has led to a situation where states do not only operate within their territory and jurisdiction, but also across national borders. Questions of jurisdiction must be discussed to understand the level of a state's obligation to protect and what kind of limitations it might have. States have an obligation to respect other states' sovereignty, even though they still have positive obligations under human rights law. Home states might have a central role in questions of due diligence over the corporations registered in their territory and in enforcing mechanisms which would improve access to remedy in situations where TNCs have violated human rights outside their home state jurisdictional area. Extraterritorial application of law raises both legal problems and problems of a practical nature, because it is complex to determine when a situation is located on a given

[12] Ibid., p. 2.
[13] The positive obligation to provide access to remedy is provided through several international human rights treaties, *see* e.g. International Covenant on Civil and Political Rights, Art. 2 (3) or International Convention on the Elimination of All Forms of Racial Discrimination Art. 6.
[14] Kapelańska-Pręgowska, 2015, p. 431.
[15] A/HRC/11/13/Add.1.

territory. The problem of defining a territory does not only include territorially present business operations which are governed from the other side of the world, but also financial markets, investment regimes and the global media which are difficult to locate to a specific area.

Some states have already tried to redress human rights violations through measures with extraterritorial implications that control companies, such as the US Alien Tort Claims Act (ACTA) or the French Corporate Duty of Vigilance Law. In 2018, heads of the Swedish company Lundin Petroleum were indicted for aiding and abetting war crimes and crimes against humanity committed during the second Sudanese civil war. The investigation in Sweden started from a report brought to the Swedish International Public Prosecution Office by the European Coalition for Oil in Sudan.[16] There are not many similar cases, so the indictment shows that litigation of human rights violations committed on the territory of a host state is not impossible and could work as a precedent in future judgements. The use of extraterritoriality has also gained support in different UN bodies and NGOs. They argue that states need to consider extraterritoriality to control companies registered under their territory and to fulfil their obligations under international human rights law.[17]

Numerous human rights bodies, as well as the International Court of Justice (ICJ), have confirmed the existence of extraterritorial obligations under human rights treaties.[18] According to the UN Charter, states should have "universal respect for, and observance of, human rights"[19] and take joint action to achieve this. This universal respect could be read as a positive obligation with an extraterritorial reach. The extraterritorial application of state responsibility can create circumstances where the home state positive obligation to protect human rights could be applied, and therefore also become a way to hold TNCs responsible for their harmful actions. Extraterritoriality can be seen as an instrument to ensure protection of human rights and the environment by companies with transnational

[16] https://trialinternational.org/latest-post/lundin-petroleum/.
[17] For example, the use of extraterritorial jurisdiction is strongly presented in the so called 'Zero Draft' (Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprices) drafted by the UN, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.
[18] See e.g., the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* Advisory Opinion of 2004.
[19] Article 56 of the UN Charter.

structures in a cross-border context. Usually, as will be discussed later in the chapter of sovereignty, the application of laws with an extraterritorial scope might lead to interstate disputes and therefore explain why states restrain from extraterritorial jurisdiction.[20] This relates to the idea of non-intervention, even if it is usually understood to apply in military context and contexts of the use of force.

1.2 Research question

The aim of this thesis is to research how extraterritorial jurisdiction and corporate accountability could interact to fill the gaps concerning business-related human rights violations. The research question is answered through exploring how a state's positive obligations to protect human rights could legitimate the exercise of extraterritorial jurisdiction in situations where a corporation is violating human rights across borders. Therefore, the question of extraterritorial application of human rights treaties and the question of determining jurisdiction must be discussed to further understand if states can be held responsible for human rights violations made by private actors such as corporations. Do states have a positive obligation to protect human rights extraterritorially? Can business-related human rights violations outside a state's territory be attributable to a state? What kind of circumstances legitimate the exercise of extraterritorial jurisdiction? How is extraterritorial jurisdiction limited? How does the corporate form affect the state responsibility or the exercise of extraterritorial jurisdiction? What are the future challenges which extraterritorial jurisdiction could be the answer to?

Through answering these questions, it can be assessed if states can be responsible for human rights violations committed by corporations and if a state's positive obligation to protect human rights can legitimate the exercise of extraterritorial jurisdiction in a manner which makes it possible to hold corporations accountable for their human rights violations.

[20] Ascensio, 2010, p. 15.

1.3 Material and method

This research will follow the legal doctrinal method and the findings will be based on analysing the existing law provided through human rights treaties and relevant case law, both from international and domestic courts. Conclusions will be made both through critical reviewing of existing legal grounds, *de lege lata*, and the obstacles in international law and the development to a more binding legal system *de lege ferenda*. Previous research on state extraterritorial responsibility to protect human rights and businesses' responsibility to respect human rights will be in the core of this thesis. To be able to understand the complex legal relationship between different entities, both states' and corporations' responsibilities will be discussed through scrutinizing the legal personality of corporations under international law and the relationship between states and private actors.

This thesis will start by introducing the issues of corporate human rights accountability to demonstrate how international human rights law fails to impose obligations on private actors and for this reason, the importance and relevance of the topic. The second chapter will discuss the nature of corporations under international law, the relevant issues with imposing binding obligations under international human rights law on corporations and the challenges that the corporate form can pose by acting as a 'veil' that might help parent companies avoid liability. Chapter three will discuss jurisdiction in general, such as the normative grounds of jurisdiction, its legitimacy and practicality, to analyse the main principles of jurisdiction before deepening the discussion to principles for both the exercise of extraterritorial jurisdiction and for jurisdictional restraint. The third chapter will also present the relationship between jurisdiction and sovereignty through asserting if extraterritorial jurisdiction interferes with a state's sovereign rights to jurisdiction on its territory. To further enlighten the different principles which help to establish a genuine connection between the exercise of extraterritorial jurisdiction and a business-related human rights violation, the territoriality principle, the nationality principle, the principle of universal jurisdiction, the effects principle and the principle of cooperation will be discussed as separate chapters following a chapter on reasons to refrain from exercising extraterritorial jurisdiction.

The fourth chapter will discuss the doctrine of state responsibility and the how the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts work as a general rule on how state responsibility can arise and how a conduct of a TNC could be attributable to a state. The rules of attribution are followed by a more detailed analysis of the doctrine of 'effective control'. Chapter five will present a general discussion on states positive obligations and how it could have an extraterritorial reach, followed by a more specific analysis on states' positive obligations to protect human rights provided by international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR) and how the relevant human rights treaties contribute to the notion of jurisdiction and the rules of exercising extraterritorial jurisdiction.

Previous cases from international courts and domestic mechanisms that attempt to enforce corporate accountability will be used thorough the thesis as examples and these mechanisms will be critically reviewed to understand the scope of existing principles and obligations. Enabling conditions regarding jurisdiction, collision of rules and applicable law will have a central role in this research to make it possible for the reader to understand how human rights could be protected in global corporate operations, which involve several different actors neglecting their obligations. Personally, the ultimate and more practical goal, in the end, would be to understand how extraterritorial jurisdiction could be exercised in these kind of supply chains and how it could be applied in a complex chain of operations including several different jurisdictions and how it could be an answer to contemporary issues regarding globalisation and human rights.

The soft law mechanisms will be discussed to understand how responsibility is drafted in them, how they present the scope of jurisdiction and if they could fill the governance gap in extraterritorial protection of human rights in the sense of forming customary norms. This thesis will not examine the effectiveness of business operations or other aspects of business management, such as CSR or risk management, other than aspects relevant to governance of business due diligence in relation to human rights and the corporate form in relation to the state that they operate or more importantly, are domiciled in. The

research will not include analysis of the role or criticism against international organisations such as the World Bank or WTO, even though they are important in the context of TNCs operations.

1.4 Definitions

The word 'jurisdiction' is probably the most central word in this thesis. States have obligations under international human rights law through human rights treaties which extend their obligations both to individuals within their territory and to individuals 'subject to their jurisdiction'. It is important to note that 'jurisdiction' as it is used in human rights treaties refers to the jurisdiction of a state, not the jurisdiction of a court.[21] Jurisdiction is the "power to make laws, decisions, or rules (prescriptive jurisdiction)"[22] and the "power to take executive or judicial action in pursuance of or consequent on the making of decisions or rules (respectively enforcement or adjudicative jurisdiction)".[23]

The term 'extraterritoriality', 'extraterritorial application of law' and 'exercise of extraterritorial jurisdiction' will all be used in this thesis, even though it is important to note that the term 'extraterritoriality' is somewhat broader and does not only refer to direct extraterritorial jurisdiction over actions or persons abroad. It can also refer to domestic measures with implications abroad such as public procurement policies or corporate codes of conduct with implications on operations abroad or more precisely, beyond a state's legally defined geographical borders.[24] The 'exercise of extraterritorial jurisdiction' refers to a state's attempt to apply its prescriptive, adjudicative or enforcement jurisdiction over a conduct or people outside its sovereign territorial power but which are subject to its legal acts.[25]

Another central term for this thesis is the word 'corporation'. A corporation is a legal entity carrying out business operations for profit, even though non-profit organisations

[21] McCorquodale & Simons, 2007, p. 602. These relevant treaties will be discussed later in this thesis.
[22] Crawford, 2012, p.456.
[23] Ibid.
[24] Bernaz, 2013, p. 496, *See* also, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/14/27, 9 April 2010, para. 49.
[25] Zalucki, 2015, p. 407.

also exist. A corporation has a separate legal personality from its owners meaning that the corporation has separate legal rights and obligations and the owners can only be held accountable to the extent of their investment.[26] Corporate human rights obligations derive from national legal orders and national corporate law principles.[27] This thesis will not differentiate between different company forms and the word 'corporation' is used generically and both private and public corporations are discussed in the thesis. Even though the main focus is on TNCs', this thesis will also discuss multinational and national corporations when relevant and to understand the relationship between the corporation and a state, the scope of its human rights due diligence and connection to extraterritoriality. The words 'corporation' and 'business' are used interchangeably to describe them and used while referring to business activities in general and it will be specified when a certain business form is relevant in the discussion.

[26] Černič, 2010, p. 10.
[27] Ibid., p. 37.

2. The Legal Personality and Duties of Corporations under International Human Rights Law

2.1 The Nature and Legal Personality of Corporations

According to the principles concerning subjects of public international law, corporations do not have international legal personality.[28] It can also be argued that transnational corporations are not subject to international law due to the lack of a harmonised global commercial law. Corporations need to have a nationality and follow the national principles and law for different types of companies in state they are registered in. Nationality can be derived through place of incorporation, which means that a legal person is created within the legal system of a state or that links to a particular state exist through which nationality can be decided. These links can be the corporations centre of administration or a natural or legal person who own the company.[29] The Treaty on the Functioning of the European Union article 54 provides a clearer view on the above-mentioned principles of the nationality of corporations:

> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.[30]

When it comes to regulating the actions of corporations abroad, there are international rules set through different trade agreements which strive to minimize differences in different legal systems that could cause international conflicts.[31]

Hansen discusses corporations in his article *The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap* and explains that the mainstream way to view TNCs under public international law have its origins in sources such as the *Barcelona Traction*, meaning that the multinational or transnational

[28] Crawford, 2012, p. 122.
[29] Crawford, 2012, p. 528.
[30] The Treaty of the Functioning of the European Union, Art. 54.
[31] Sevastik, 2009, p. 91.

corporation is seen as a series of separate corporate individuals and as "distinct nationals with no collective agency or identity".[32] He uses the word Multinational Enterprise (MNE) and explains that MNEs are more often viewed in soft law instruments and not as the direct topic of a declaratory treaty.[33] Hansen also raises the question how MNEs can have public international law rights such as through international investment law, but not exist as legal persons in public international law.

2.2 Can Corporations Have Duties Under International Law?

As discussed in the introduction, human rights treaties are only binding for states and therefore there are no binding legal obligations on corporations to protect human rights under international law.[34] International efforts have been made to draft legally binding rules, but they are still found to be too controversial. Before the UNGP, earlier drafting of binding rules for TNCs and human rights were not well welcomed among the business community which focused on the issue of the norms becoming binding and how mandatory compliance would change and violate the existing and accepted international practices which only bind states.[35] The OECD Guidelines addres MNEs' duty to contribute to sustainable development in the countries they operate in and to respect human rights. The Guidelines express the importance of refraining from seeking or accepting exceptions from a host state's regulatory framework[36] which speaks for the importance of exposing corporations to duties in circumstances where they seek to benefit from operating in countries which do not live up to their human rights obligations.

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[32] Hansen, 2010, p. 2, see also the case concerning the *Barcelona Traction*, in which the ICJ refused break through the corporate veil between company and shareholder. Only the company's state of incorporation was allowed to exercise diplomatic protection. *Barcelona Traction, Light and Power Company, Ltd.* (Belgium v. Spain), 1970 I.C.J. Reports, p. 3 at paras. 56-58.

[33] Hansen, 2010, p. 2. For a deeper analysis on individual's ability to posess rights undet international law, *see e.g.,* Parlett, Kate,The Individual in the Internatioanl Legal System, 2011.

[34] A/HRC/4/035, para. 44, "In conclusion, it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations. Even so, corporations are under growing scrutiny by the international human rights mechanisms. And while states have been unwilling to adopt binding international human rights standards for corporations, together with business and civil society they have drawn on some of these instruments in establishing soft law standards and initiatives. It seems likely, therefore, that these instruments will play a key role in any future development of defining corporate responsibility for human rights.".

[35] UNESCOR, 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN 4/Sub 2/2003/38/Rev 2. See also, Simons, 2012, p. 8.

[36] OECD Guidelines for Multinational Enterprises, II A 5., p. 19.

Hansen explains that MNEs are composed of multiple corporate persons and therefore their duties are also comprised of their components' duties.[37] Hansen raises the question on how corporations can have public international law rights such as through international investment law, but not exist as legal persons in public international law. He argues that investment agreements can be seen as *lex specialis* regimes and therefore parties can choose not to be part of broader public international law norms. He continues by arguing why *lex specialis* rationalization of investors' capacity for public international law rights raises problems and explains that if states recognize an entity's capacity for rights, then the state must also recognise the entity's legal personality, implying that it should not be seen as a *lex specialis* rule.[38]

Hansen compares corporate and natural persons on various legal levels and concludes that both of them are holding international law status as individuals and therefore he sees it as logical that both types of private persons are subject as private individuals to the same duties that customary international law holds for them. He argues that international legal personality can be found through looking at the rights of MNE investors:

> …states have implicitly granted MNEs the capacity for international legal personality by granting treaty-based rights to MNE investors. Such treaties enumerate substantive investor rights and grant investors the procedural rights required to enforce such substantive rights at international law through binding arbitration.[39]

Hansen explains that most of the private person's duties under customary international law are universally applicable peremptory *jus cogens* norms that affect private persons by imposing duties on individuals not to act in breach of the norms, even though the norms most directly govern state conduct.[40] The norms are accepted through the principle that custom creates law and have an undisputed place within public international law through treaties.[41] Through arguing that private persons could be responsible for

[37] Hansen, 2010, p. 39.
[38] Ibid. p. 3.
[39] Ibid., p. 72.
[40] Hansen, 2010, p. 40, *See also*, Farrell, Norman. "Attributing Criminal Liability to Corporate Actors." Journal of International Criminal Justice, vol. 8, no. 3, July 2010, p. 873-894.
[41] Hansen, p. 41, see also Vienna Convention on the Law of Treaties, supra note 73 art. 53.

violations of *jus cogens* norms, such as the prohibition of slavery, it could be assessed that corporate persons are breaching the duty they have under customary international law.

Private persons persons have been implicated in charges of crimes against humanity in international tribunals such as the International Military Tribunal at Nuremberg and cases such as *In re Holocaust Victim Assets Litigation*.[42] The crime against humanity, is described in the Rome Statute as "…a widespread or systematic attack directed against any civilian population" and "…pursuant to or in furtherance of a State or organizational policy to commit such attack".[43] The plaintiffs accused Swiss banks of collaborating in war crimes and crimes against humanity when they knowingly retained and concealed assets of Holocaust victims.[44] Under the World War II, the victims were subject to persecution by the Nazi regime, which included genocide, wholesale and systematic looting of personal and business property and slavery. The plaintiffs alleged that through their actions of knowingly aiding the Nazi regime, the Swiss institutions and companies could be seen to have aided those who were committing the crimes. The duty not to commit war crimes has been affirmed to apply on private person through the Nuremberg tribunal and several other international forums, such as the I.G. Farben Trial, which led to individual charges on the company officials.[45]

While discussing crimes of *jus cogens* nature, it is important to note that the Genocide Convention for example, clearly states that it also applies to private persons, and therefore it can be interpreted as something that strengthens the notion of private actors as capable of facing obligations under international human rights law.[46] There are no cases yet against corporate actors for committing genocide, but this should not be understood as if corporate persons would be excluded from the duty not to commit genocide. This also applies to the duty of not being complicit in genocide.[47] Both the wording and the

[42] In Re Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000).
[43] Rome Statute, art. 7 (1) and 7 (2).
[44] *In re Holocaust Victim Assets Litigation*, supra note 24.
[45] *See* e.g., Judgment, *Krauch et al.*, U.S. Military Tribunal VI, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. 8 William S. Hein & Co., 1997.
[46] The Convention on the Prevention and Punishment of the Crime of Genocide, art. 4.
[47] Ibid., art 3.

customary significance of the Genocide Convention argue strongly for the duty for both natural and corporate persons not to commit genocide.[48]

A breach of international law does not always require criminal capacity, since breaches of international law may also lead to civil proceedings or administrative proceeding. This has been suggested by US Alien Tort Claims Act (ATCA) court proceedings and various treaties, and therefore Hansen argues that "what determines the existence of legal duties is whether international law directly bestows specific duties on a certain class of entities, in this instance, private persons"[49]. The ATCA case *Kiobel v. Royal Dutch Petroleum* has been referred to as a turning point for extraterritoriality and the possibility to try corporate human rights violations. In 1993, a group of Nigerian nationals residing in the United States, filed a suit under the Alien Tort Statute and claimed that the Dutch oil company had aided and abetted the Nigerian Government in committing their crimes during Ogoni-protests against the company's oil exploration projects.

The Nigerian military forces were alleged of committing atrocities against the Ogoni people to allow Royal Dutch Petroleum to continue the exploration of oil in the region. The atrocities included violations of the law of nations, including raping, murdering, beating and making unlawful arrests to stop protesters.[50] The first question that the US Supreme Court had to answer, was whether multinational companies could be held liable under the Alien Tort Statute, but this question was later overruled by the question whether the court had jurisdiction to cover any foreign defendant's alleged crimes abroad.[51] Kapelanska-Pregowska refers to the uniqueness of the Statute, since it authorises "private parties to bring claims for violations of human rights norms, ATS litigation institutionalizes a role for individuals and other non-state actors in the definition and implementation of international law."[52] In 2019, a Dutch court ruled that it has jurisdiction over the case to determine whether Royal Dutch Shell was complicit in the

[48] Hansen, 2010, p. 56.
[49] Ibid., p. 47.
[50] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013). *See also*, Kapelańska-Pręgowska 2015, p. 417. Here it should be noted that the ATS offers a tool to try violations of international law rather than involving extraterritorial application of us law.
[51] *See*, Lustig, 2014.
[52] Kapelańska-Pręgowska 2015, p. 432.

crimes against the Ogoni environmental protesters. Human rights activists have heralded the decision as an important precedent for other victims of human rights abuses committed by corporations.[53] The *Kiobel* decision is particularly interesting for corporate responsibility in international law, hence even if the US Supreme Court did not establish jurisdiction over the case, the case still

> …opens up the possibility of adjudication over a much broader set of concerns, beyond 'the most heinous crimes' (through the use of regular torts) alongside the potential involvement of a plurality of actors (through the multiplicity of exercise of state jurisdiction by a variety of courts alongside the multiple mechanisms of transnational private regulation).[54]

Even if the Kiobel judgement had setbacks under the ATCA, transnational human rights tort litigation can still be as a possible way to impose liability on corporations for their human rights violations.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, for instance, sets out corporate criminality through its article 4 (3) which declares illegal transfer of hazardous waste to be a criminal and true specifying that the act can be done either by a natural or legal person. In its article 9 (5), the convention further calls for domestic legislation to prevent and punish illegal transport of substances by such persons (natural or legal persons).[55] Corporations can be concluded to have a capacity to hold rights and therefore also duties, since states sign investment treaties which extend rights to corporate investors and therefore, states have granted corporation a capacity to hold international rights, and hence its role as a part of customary international law can be seen to be supported by state practice and *opinio juris*.[56] The investment treaty rights and the customary law duties that corporations are able to possess as a group of several private corporate persons makes it possible to

[53] *See*, https://www.theguardian.com/global-development/2019/may/01/dutch-court-will-hear-widows-case-against-shell-over-deaths-of-ogoni-nine-esther-kiobel-victoria-bera-hague, https://www.amnesty.org/en/documents/afr44/6604/2017/en/.
[54] Lustig, 2014, p. 614.
[55] Basel Convention art. 4 (3) and 9 (5).
[56] Hansen, p. 73, in his annex II, Hansen demonstrates the existing bilateral investment treaties and notes that the vast majority of states have entered international investment treaties which extend rights to MNEs.

conclude that the ability to hold rights and duties shows that corporations can also be seen as legal persons under public international law.[57]

International investment agreements, such as bilateral investment treaties (BITs) and free trade agreements (FTAs), have been considered to create strong protections for foreign corporations in host states and can also be seen to constrain these host states from their regulatory freedoms. According to Simons, international investment agreements "…include no obligations for investors to comply with human rights standards and there are no mechanisms to regulate investor behaviour, nor are there any means for host states to counterclaim in any arbitral proceeding brought against them where the investor has committed, or been complicit in, grave violations of human rights.".[58] Usually these treaties lack tools that would provide the host state with help to ensure that the investment will be consistent with the principles of sustainable development and therefore, the treaties do not provide host states with means to address investor conducts with adverse impact on human rights.[59]

Ruggie expresses the importance of guidance and support for states as a means to global policy coherence and the importance of recommendations from human rights treaty bodies. He names peer learning as one way to help host states with their regulatory control over foreign investors. This could be done through sharing information and best practises. Home states could assist host states by providing technical or financial support which would be focused on the regulation, monitoring of compliance, and enforcement of human rights standards in the host state.[60]

Even though it has earlier been argued that corporations cannot directly be held responsible of human rights violations under international human rights law, it does not mean that corporations could not be held liable through other measures. The customary duty not to aid and/or abet enslavement was confirmed in 2005 in a lawsuit that led to a confidential settlement between a Californian oil company Unocal and a group of

[57] Hansen, 2010, p. 72.
[58] Simons, 2012, p. 18.
[59] Ibid.
[60] Ruggie, 2008, p.179, II, C., The co-operation between the home and the host state of a TNC would be especially important when there are extensive trade and investment links between the states in question.

Burmese plaintiffs. The settlement of the case concerned an ATCA litigation which asserted that Unocal aided, and abetted forced labour demanded by the Burmese government during the construction of infrastructure for a pipeline project maintained by Unocal.[61] The International Convention on Civil Liability for Oil Pollution Damage and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of the Council of Europe extends the reach of liability on legal persons and support the argument that corporations can have direct obligations under international law.[62]

In the case Boliden v. Arica, a group of plaintiffs from the town Arica in Chile, failed a claim against Boliden Mineral for health problems as a result of the dumping of Boliden's smelter sludge near the town in the 1980s. The Swedish Court ruled that because the actions of Boliden were done on the Swedish territory, since Boliden sold their waste to Chilean processing company. The Swedish rules for prescription of crimes should also be followed for the compensation claims. The court therefore ruled that the claim had become statute-barred.[63] This case is still important, since it demonstrates the possibility for civil claims with extraterritorial reach.

Like a number of other domestic initiatives with extraterritorial reach, the California Transparency and Supply Chain Act, which entered into force in January 2012, was passed by the State of California as an attempt to

> …ensure that large retailers and manufacturers provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains, educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, improve the lives of victims of slavery and human trafficking.[64]

The aim was therefore to strengthen the reporting process and through that, make it more meaningful for the public relations of a company. The responsibility to disclose supply chains and the implications of the company operations, including overseas operations,

[61] *Doe I v. Unocal Corp.*, 395 F.3d 932, 942-43 (9th Cir. 2002).
[62] Černič, 2010, p. 41.
[63] *Arica Victims KB v. Boliden*, Skellefteå Tingsrätt, 2018, https://www.business-humanrights.org/en/boliden-lawsuit-re-chile.
[64] California Transparency and Supply Chain Act, S.B. 657, § 2, subd. (j).

can be seen as a way to ensure the fulfilment of the rights of persons affected from the operations of a company. According to the Act, Section 3 (c):

> (c) The disclosure described in subdivision (a) shall, at a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following:
>
> (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
>
> (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
>
> (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
>
> (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
>
> (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.[65]

The obligations that the Transparency Act imposes might have direct effects in the state where products are produced, since the requirement to conduct audits, to provide certificates and the duty to train employees might have a direct effect for the realisation for the human rights in the other state. Even if these above listed efforts might lead to enhancing human rights, their initial role is to make it easier for consumers to make responsible choices, and therefore, the human rights of persons abroad might be overlooked in order to the corporation to disclose the minimum level of operations in order to avoid being held liable under customer protection laws. Still, these initiatives can be seen to raise awareness and corporations might see a profitable value in human rights due diligence through increased awareness or risks and possible losses in revenue. The Act can also therefore be considered as having an extraterritorial reach.

Hanson explains that "Ultimately, the validity of such arguments will be borne out by their perceived plausibility, and given the present challenges in enforcement, an MNE's breach of this duty will more likely be decided in the court of public opinion, than in a

[65] Ibid. section 3.

domestic or international law forum."[66]. This theory of public opinion is still something that can be seen to have launched change and enhanced the development of domestic human rights due diligence laws and international best practises. These soft law instruments reflect what may one day become adopted into hard law.

An issue which makes posing liability on corporations difficult, is proving that the corporation or its key officials had knowledge about the actions that led to a human rights violation. If a corporation has knowledge about aiding or abetting crimes against humanity, such as in the case of Lundin Oil, through funding a state which is commissioning crimes, the corporation is in breach of its duty under public international law not to commit crimes against humanity. Hansen illustrates this well by the following example:

> …if a state forcibly clears a tract of land of its civilian inhabitants, in order to offer this land as a mining concession deal, the company that knowingly funds the state's widespread attack upon a civilian population and forcible relocation, is likely committing crimes against humanity itself by knowingly aiding and abetting such crimes against humanity. [67]

This is a clear example of a business partnership with a state, but the same principle could be seen to apply in cases where a corporation knowingly merges with another company which is guilty of or associated in commissioning crimes such as a widespread attack upon a civilian population, due to the nature of the crime. Therefore, entering business partnerships with another business which is committing crimes of a *jus cogens* nature, will make the entering corporation guilty of aiding such crimes.[68] The example of the Swiss banks which aided the Nazi crimes against humanity could also be seen as an example of a case where a corporation becomes responsible for a crime due to knowingly aiding it. Through this, it can be concluded that TNCs have a duty under public international law not to commit or aid or abet crimes against humanity and therefore, it proves that corporations can for fact, possess responsibilities under public international law.

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[66] Hansen, 2010, p. 52.
[67] Hansen, 2010, p. 62.
[68] Ibid. p. 62, Vest, 2010, p. 859, Rome Statute of the InternationalCriminal Court, supra note 257 at art. 7 and art. 25 (3) c.

2.3 The Corporate Veil

When seeking to impose accountability on corporations, states might find it difficult to argue that there is a clear connection that would legitimise the exercise of jurisdiction, since a so called 'corporate veil' could be used by TNCs to avoid legal liability. According to De Schutter, the corporate veil could be 'pierced' in order to overcome the difficulty of the separation of legal entities.[69] What is interesting with the piercing of the corporate veil, is that often the economic reality and the power relations between the different entities might be in contrast with the circumstances that the mere corporate forms imply.

This was clearly illustrated in the case concerning the liability of Standard Oil in the Amoco Cadiz oil spill case, where the court found that the relationship between the parent and the subsidiary resulted in the parent company being held liable for the acts of its subsidiary, even if they had separate legal personality.[70] The District Court of Illinois adopted an approach which concluded that the parent corporation, Standard Oil, should be held liable for the environmental damage it had caused by an oil spill from a tanker outside the coast of France. Amoco was a wholly owned subsidiary of Standard Oil Company of Indiana and therefore, the court held that as a multinational corporation globally expanded through its subsidiaries and instrumentalities which carry out exploration, production, refining, transportation and sales, Standard Oil was responsible for the tortious acts of its subsidiaries. The court did not have any legislative mandate but decided that the degree of control of the parent corporation exercised over its subsidiaries proved that the parent and the subsidiaries were not separate legal personalities.[71] Yet, in *United States v. Bestfoods*, the Supreme Court then again found that the statutory provisions did not alter the common law principles of separate personhood.[72] Here it is important to note that these cases were addressed under the common law. Van Calster, in turn, explains that a presumption could be made that if a parent company holds all or almost all of the capital in a subsidiary which is guilty of committing an infringement of

[69] De Schutter, 2006, p. 36.
[70] *Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d 1279, 1984.
[71] *Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d 1279, 1984.
[72] *United States v. Bestfoods*, 524 U.S. 51, 70, 1998.

the EU competition policies, then the parent can be seen to exercise significant influence over its subsidiary.[73]

The possibility to pierce the corporate veil is important since it prohibits a parent corporation from shielding itself from liability behind the subsidiary, even though it still controls the actions of the subsidiary. De Schutter notes that under the doctrine of limited liability, the veil shields the parent company, since a shareholder in a corporation should only be held liable for the amount of the shareholders' investment, and when parent and subsidiary companies form two different entities, each with their own juridical personality, then the doctrine could be seen to protect the parent company even if it would be the sole shareholder of the subsidiary.[74] In a worst-case scenario, the corporation establishes a subsidiary with the mere purpose to avoid liability and hence the corporation can be rewarded from the difficulty to pierce the corporate veil.[75] For this reason, De Schutter finds a legal responsibility to monitor the actions of a subsidiary as the most advisable solution to prevent a parent corporation from shielding itself behind a subsidiary in cases of crimes it could have be seen as having control over. This would impose a direct obligation on the parent corporation. Therefore, a parent company should exercise due diligence and seek information about the behaviour of its subsidiary, to be able to avoid legal liability for the actions of its subsidiary.[76] If it can be proven by a reasonable effort that there was no reasonable knowledge over the violations, then there cannot be liability imposed on the parent.[77]

Often when dealing with questions of possibility for remedy, the question is linked to domestic law and the prevailing rules of jurisdictional competence. For states to be able to provide remedy, legal and other obstacles must be removed, including the obstacles created by the corporate form. When dealing with TNCs, the problem that has to be dealt with is the autonomous nature of their legal personality. The traditional view might be that parent companies cannot be held liable for remedy of actions of its subsidiaries abroad since they are two different legal persons. It is argued that there should be a

[73] Van Calster, 2014, p. 132.
[74] De Schutter, 2006, p. 36.
[75] See, Ibid., pp. 38-39.
[76] Ibid. pp. 44-45.
[77] Ibid., p. 40.

mechanism to make it possible for victims to follow the chain of liability to the parent if responsibilities cannot be assumed by a subsidiary or affiliate due to notions of control or dependence.[78] It is also argued that a supplementary base of jurisdiction could be introduced when justice is denied. This is only possible if it is established that the host country is not competent to try or bring the case to trial for the harmful actions done by a subsidiary or if the host state is unwilling to do so.[79] These are all obstacles which the nature of corporations create and which create a need to explore the possibility to exercise extraterritorial jurisdiction as a tool to hold corporations accountable through their home states.

[78] Ascensio, 2010, p. 10
[79] Ibid., p. 10

3. Use of Extraterritorial Jurisdiction Under International Law

3.1 Jurisdiction in General

To be able to understand the exercise of extraterritorial jurisdiction, it is necessary to shortly discuss jurisdiction in general. Jurisdiction has developed to become a central issue in international law through questions of states' use of control. A state's power has traditionally been considered to be limited to a certain territory, but as a result of globalisation, states have begun to act in different circumstances outside their territory and far beyond their territorial power.

Jurisdiction is usually regarded as a preliminary issue that has to be decided before a case can move forward. Jurisdiction of a court or as relevant for this thesis, the jurisdiction of a state, is normally confined to a certain territory and therefore it is important to research how jurisdiction could be applied outside that territory. Milanovic explains that the word 'jurisdiction' can both be seen to refer "…to the competence of a court or to that of any body which applies or interprets the law, to the jurisdiction of states to prescribe rules of their municipal law and to enforce them, or to the domestic jurisdiction of states, the domain in which they are to be free of outside interference"[80] but it can also be understood in a more general manner as a synonym for "power, authority, or control, either over people or over territory"[81]. Both the European Court of Human Rights (ECtHR) and the International Court of Justice (ICJ) have in their case law on extraterritorial application of law, proceeded from the assumption that the concept of jurisdiction in human rights treaties is the same concept of jurisdiction which exists in general international law, even though the notion of jurisdiction is actually interpreted in different ways.[82]

A state is prohibited from exercising its jurisdiction outside its territory unless an international treaty or customary law permits it to do so. When a conduct has effects on several different areas or states, then there might be several rivalling jurisdictions. In cases where there are multiple rivalling jurisdictions, the question of which jurisdiction

[80] Milanovic, 2011, p. 39.
[81] Ibid.
[82] Ibid., p. 21.

should be applied might become political, since if a case is dismissed on the grounds of jurisdiction, then the rivalling court might understand it as an attempt to undermine its authority.[83] The difficulty to claim jurisdiction could be argued to be one reason why the use of extraterritorial jurisdiction is so challenging and debated. Respect for another state's sovereignty is one of the main principles of international law and an important for maintaining good international relations and therefore claiming of jurisdiction over an extraterritorial conduct has to be justifiable.[84] The negative effects on international relations that extraterritoriality might have are the reason why common rules have been needed and as Ascensio argues, the principles of sovereignty, non-intervention and cooperation have "gradually led to the emergence of customary and treaty-based rules establishing bases of state jurisdiction".[85]

Questions of jurisdiction arose in the 1927 Lotus judgment of the Permanent Court of International Justice (Lotus case) which has often been challenged in legal theory. A French steamer S.S. Lotus and a Turkish steamer S. S. Bozkurt collided on the high seas and eight Turkish nationals aboard the Bozkurt drowned when the ship was torn apart by the Lotus. When Lotus later arrived in Constantinople, officers from both the French and the Turkish crews were arrested by the Turkish authorities. France objected this by claiming for its own jurisdiction since the crime happened at the high seas, but the court found that France did not have jurisdiction over the incident.[86]

The question that the Permanent Court of International Justice (PCIJ) had to answer was whether Turkey violated international law when the Turkish court exercised jurisdiction over a crime committed by a French national outside Turkey and should Turkey have asserted its use of jurisdiction by an existing rule of international law, or was it enough to assume that the absence of a prohibition which would have prevented the appliance of jurisdiction permitted it. The incident gave birth to a principle named after the case, the *Lotus Principle*, and according to it, what is not prohibited is permitted under

[83] Howell, 2018, p. 427.
[84] Crawford, 2012, 447.
[85] Ascensio, 2010, p. 3.
[86] The Case of the S.S. " S.S. Lotus" (France v. Turkey) PCIJ, 1927.

international law.[87] Another principle from the case is, that a state can exercise its jurisdiction within its territory and in any matter. This also applies to specific rules of international law that would permit it from doing so, but usually states do this with caution and are limited by the prohibitive rules of international law.

According to Zalucki, to be able to exercise extraterritorial jurisdiction, there has to be reasonable relation between the legitimate actual state of affairs and the jurisdiction that is applied.[88] He explains that two constituent components need to be fulfilled for reasonable relation. The first is a close relation between the states, the one that's jurisdiction is to be applied and the actual state of affairs. Zalucki continues that the second criterion is that there needs to be clear interest executed in good faith, so that the relation is accepted in accordance with international law.[89] The question of 'close relation' also varies when it comes to the legal matter that the state in question seeks to regulate. When examining the responsibility of non-state actors, this close relation might be difficult, or even impossible to argue for and apply. This issue relating to close relation is especially relevant, since the 'corporate veil' can act as a major obstacle for arguing that a close relation exists between a conduct and the state seeking to exercise its jurisdiction over its corporate national, or in other words, when discussing situations where a home state of a parent corporation seeks to exercise its jurisdiction with an extraterritorial reach.

It is more common that states exercise extraterritorial jurisdiction in particular fields of national law when it comes to persons, property or acts outside its territory, that is to say, criminal law and commercial law.[90] According to Ascensio, criminal law can impose universal jurisdiction through certain treaties, but this is usually done in accordance with the principle of *aut dedere aut judicare*, which means that a state should extradite a perpetrator if it does not prosecute the person in question. This principle only applies to

[87] PCIJ, Lotus, Judgment No. 9, 1927, Ser. A,. No 10, pp. 18-19, same question was later raised in cases such as… Nicaragua, 1986 I.C.J. at 135, and in the Fisheries Case (U.K. v. Nor.), (Dem. Rep. Congo v. Belg.), 2002 I.C.J.
[88] Załucki, 2015, p. 409. This could also be referred to as 'genuine connection', which is a cardinal rule for jurisdiction. *See,* Crawford, 2012, p. 457.
[89] Zalucki, 2015, p. 410.
[90] Ibid.

individuals and the subject should be present on the territory of the state that is exercising universal jurisdiction.[91] In matters concerning civil law, the issue of individuals as perpetrators has not been addressed through treaties, even if a criminal offense is also a civil offense (tort) and therefore the person in question or the entity the person is an agent of, might thereby incur non-contractual liability. But according to customary international law, universal jurisdiction could be authorised and applied to legal entities only in cases of core crimes.[92]

Milanovic explains that the Convention for the Protection of All Persons from Enforced Disappearance articles 9 (1) and (2) are well illustrative examples of the many ways to interpret the meaning of the word 'jurisdiction' under international law and state treatymaking practice:

> Article 9 (1)
>
> Each State Party shall take the necessary measures to establish its jurisdiction over the offence of enforced disappearance:
>
> (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is one of its nationals;
>
> (c) When the disappeared person is one of its nationals and the State Party considers it appropriate.[93]

The word 'jurisdiction' has two different meanings in this article, one in part (a) which refers to the territorial jurisdiction of a state and the other one being the meaning of jurisdiction as in "Each State Party shall take the necessary measures to establish its jurisdiction…" which refers to a more widely interpretable notion of jurisdiction.[94]

> Article 9 (2)

[91] Ascensio, 2010, p. 3.
[92] Ibid.
[93] Convention for the Protection of All Persons from Enforced Disappearances article 9 (1).
[94] Milanovic, p. 31-32.

> Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.[95]

Milanovic notes that the article 9 (2) mentions jurisdiction three times and every time with a different meaning and he mentions the second one as the most interesting to analyse. The first use of the word 'jurisdiction' refers to prescriptive jurisdiction, the third refers to the state consent-based jurisdiction of an international criminal court and the second use of the word refers to "a particular kind of factual power, authority, or control that a state has over a territory, and consequently over persons in that territory" [96] which can also be found in human rights treaties.

3.2 The Duty to Respect a State's Sovereignty and the Exercise of Extraterritorial Jurisdiction

As briefly mentioned, the extraterritorial exercise of a state's jurisdiction might emerge a conflict when the actual state of affairs chooses to take a situation that takes place abroad as a subject of its interests through applying its law.[97] Even though the actors in the situation might be solely or partially foreign subjects, the effects of their actions are distinguishable on the territory of the local state. An example of a situation like this could be human rights violations done by persons subject to a foreign jurisdiction, or as central for this thesis, corporations which are domiciled in another state than where their operations have negative effects on human rights.[98]

[95] Convention for the Protection of All Persons from Enforced Disappearances article 9 (2).
[96] Milanovic, 2011, p. 32. *See* also, *Loizidou v Turkey*, 1995, ECtHR, Application no. 15318/89, where the court held that the concept of 'jurisdiction', in accordance with the article 1of the ECHR is not restricted to the national territory of the contracting States and hence developed the notion of jurisdiction as the capability to have 'effective overall control over an area'.
[97] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.
[98] Bernaz, 2013, p. 496.

Jurisdiction and sovereignty have been perceived as interconnected, until globalisation blurred the more traditional picture of state sovereignty. Kapelańska-Pręgowska wonders why sovereignty still is adhered to even if is outdated as a result of globalisation, especially with respect to the functioning of TNCs.[99] Many states avoid the exercise of extraterritorial jurisdiction based on the risk of worsened bilateral relations, since the exercise of extraterritorial jurisdiction can be understood as an attempt to interfere in a host state's internal affairs. Therefore, the exercise of extraterritorial jurisdiction can also be understood as a lack of respect for a host state's sovereignty. Ascensio describes sovereignty as a situation where "a state has exclusive jurisdiction on its territory for acts of coercion."[100] However, there are areas where a state's jurisdiction is not exclusive. States can abjure the exclusivity out of their own will through treaty law or in cases of *jus cogens* norms, without it.[101]

According to public international law, the rule on state jurisdiction can be based on three main principles: sovereignty, non-intervention and cooperation.[102] Sovereignty is one of the most difficult aspects to be considered while discussing the expansion of duties through extraterritoriality. The principle of sovereignty explains the why states tend to restrict themselves when extraterritoriality could be applied, however, avoidance to exercise jurisdiction could be regarded as something that limits the state efforts to protect human rights. The principle of non-intervention restricts states from exercising their power outside their borders, however, it has been supposed that states use extraterritoriality through more or less formal agreements.[103] The prohibition to interfere in internal affairs of a state is defined under article 2, para. 4 of the Charter of the United Nations:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[104]

[99] Kapelańska-Pręgowska, 2015, p. 422.
[100] Ascensio 2010, p. 2.
[101] Crawford, 2012, p. 448-449 , *see also*, Kapelańska-Pręgowska, 2015, pp. 424-425.
[102] *See*, Crawford, 2012.
[103] *See*, *Corfou Channel (United Kingdom v. Albania)*, ICJ judgment of 9 April 1949.
[104] UN Charter, art 2 (4).

De Schutter argues that prescriptive extraterritorial jurisdiction is the least threatening form of extraterritorial jurisdiction for the sovereignty of the territorial state because it allows the territorial state to decide whether it accepts another state's attempt to apply its jurisdiction in a way that has effect on persons, acts or property on the territorial state's national territory.[105] He also notes that the fear of universal jurisdiction expanding to become a tool to authorize appliance of extraterritorial jurisdiction over international crimes is exaggerated and not a threat to the international legal order based on the sovereignty of states over their territory.[106]

Often in questions regarding possibility for remedy, authors refer to civil law and the prevailing rules of jurisdictional competence. When dealing with TNCs, the problem that has to be dealt with is the autonomous nature of legal personality. As discussed in chapter two, parent companies are not easily held liable for remedy of actions of its subsidiaries abroad. It is argued that there should be mechanism to make it possible for victims to follow the chain of liability to the parent company if responsibilities cannot be assumed by a subsidiary or affiliate due to notions of control or dependence.[107] It is also argued that a supplementary base of jurisdiction could be introduced when justice is denied. This is only possible if it is established that the host country is not competent to try or bring the case to trial for the harmful actions done by a subsidiary or if the host state is unwilling to do so.[108] A principle used in context of extraterritorial jurisdiction is the principle of *Forum necessitates*. It is an exceptional base of jurisdiction instituted by the Council Regulation 4/2009 of 18 December 2008 on maintenance obligations and permits EU Member States to have jurisdiction under the other criteria set forth in the regulation, where proceedings cannot 'reasonably' be initiated or conducted or if the proceedings are found impossible in a third State which the case is closely connected with.[109]

[105] De Schutter, 2006, p. 9
[106] Ibid., p. 10
[107] Ascensio, 2010, p. 10.
[108] Ibid.
[109] Council Regulation (EC) n°4-2009 of 18 December 2008, on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations (OJEU of 10 January 2009, L7/1), Article 7.

The fear that states' sovereignty might be infringed has also been present at the UN treaty negotiations concerning the UN Zero Draft, during which some host states expressed their concerns about the proposed treaty addressing domestic companies and not only TNCs. Others have addressed concerns about the Zero Draft not addressing corporations with a transnational nature enough.[110] Binding rules which would also apply to local companies could become crucial for states which still struggle with fulfilling internationally recognised human rights standards such as labour rights. The effort to protect human rights might therefore have reverse effects, since it would affect the comparative advantage of these states with cheap labour force and therefore lead to worsened living standards in for the affected people.

3.3 Rules for Claiming and Exercising Extraterritorial Jurisdiction

3.3.1 The Exercise of Extraterritorial Jurisdiction

According to international law, when a state seeks to exercise extraterritorial jurisdiction over a conduct in another state, it is necessary to establish a proper relation between the states.[111] The law of jurisdiction determines how far a state's laws, enforcement mechanisms and court competence can reach and is fixed either through domestic, international or EU law and exterritoriality can be described as a "legal doctrine that allows judicial systems to exercise authority beyond (outside) the typical jurisdiction".[112] In situations where corporations with complex structures, hidden under a corporate veil, operate through foreign-based subsidiaries, jurisdiction could be established on the basis of the principle of substantial effect or effective connection.[113]

Jurisdiction can be classified as prescriptive, enforcement or adjudicative jurisdiction. As Ireland-Piper explains it, there are some distinctions between the different types of jurisdiction:

[110] Lopez & Shea, 2015, p. 13.
[111] Zalucki, 2015, p. 408.
[112] Kapelańska-Pręgowska, 2015, p. 422.
[113] Crawford, 2012, p. 480.

> Prescriptive extraterritorial jurisdiction simply refers to the capacity of a State to legislate in respect of persons and/or conduct. Enforcement jurisdiction refers to the capacity, or otherwise, of that State to enforce compliance with those laws. Adjudicative jurisdiction refers to the ability of courts to adjudicate and resolve disputes.[114]

She argues that extraterritorial adjudicative or enforcement jurisdiction occur in situations where individuals are accused of extraterritorial offences or there are competing claims to jurisdiction between states. Only adjudicative or enforcement jurisdiction create a context where concerns for the right of individuals accused of extraterritorial offences or competing claims to jurisdiction between states can arise.[115]

An example of enforcement jurisdiction is when a state authority detains a person suspected for committing a crime. An example of a situation where adjudicative jurisdiction is exercised, is when a person is brought before a criminal court for trial. If to be exercised extraterritorially, adjudicatory jurisdiction seems to be least politically controversial.[116] De Schutter explains adjudicative extraterritorial jurisdiction as a possibility for states to "…attribute to its jurisdiction a power to adopt decisions which concern situations having arisen abroad…"[117]. He further clarifies that adjudicative extraterritorial jurisdiction occurs "…either where criminal procedures may lead to convictions for acts committed abroad or where civil courts declare themselves competent to adjudicate in proceedings which relate to extraterritorial situations."[118]

According to De Schutter, prescriptive jurisdiction is a state's ability to establish "…norms governing persons, property or conduct outside the national territory"[119] through adopting legislation that intends to have an extraterritorial effect. Prescriptive jurisdiction seeks to make certain forms of behaviour an offence wherever it takes place. The person suspected can be found on the national territory of the state with prescriptive jurisdiction or the state can request extradition of that person.[120] A practical example of prescriptive jurisdiction is the Canadian child-sex tourism law which applies to Canadian

[114] Ireland-Piper, 2010, p. 21.
[115] Ibid., pp. 21-22
[116] Kapelańska-Pręgowska, 2015, p. 423.
[117] De Schutter, 2006, p. 9
[118] Ibid.
[119] Ibid.
[120] Ibid.

citizens and permanent residents of Canada who engage in any of the prohibited sexual activities with a child abroad. These persons can also be prosecuted in Canada for their offences, if the offence did not lead to conviction in the foreign country.[121] Situations like these require efficient collaboration between states, otherwise it might be impossible to give effect to legislations with extraterritorial reach, unless the state has effective control over the persons or the property in question. The question of effective control will be further discussed later in chapter 4. The earlier mentioned Finnish mandatory due-diligence law could work in a same manner, as imposing obligations on Finnish companies which seeks to govern their transnational operations through the due diligence duty to oversee the operations abroad and to ensure compliance with the Finnish due diligence standards wherever the company operates.

The drafting of the so-called UN Zero Daft has brought up important questions about the scope of obligations included in the treaty. Bernaz argues that the issues dealt with in the drafting process were not only about whether states should adopt measures with extraterritorial implications, but also the actual exercise of direct universal civil jurisdiction by some states. A scenario with mandatory universal jurisdiction imposed on corporations for core crimes would seem impossible, yet the use of universal jurisdiction is not prohibited.[122] The Draft works as practical example on how jurisdiction could be defined if TNCs were bound by an existing treaty. Article 7 of the revised 'Zero Draft' of 2019, which now goes under the title of "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises", clarifies the suggested methods for deciding jurisdiction:

> Article 7. Adjudicative Jurisdiction
>
> 1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:
>
> a. such acts or omissions occurred; or
>
> b. the victims are domiciled; or

[121] https://travel.gc.ca/travelling/publications/child-crime
[122] Bernaz, 2013, p. 507

> c. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.
>
> 2. A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its:
>
> a. place of incorporation; or
>
> b. statutory seat; or
>
> c. central administration; or
>
> d. substantial business interests[123]

The scope which the Zero Draft provides is interesting, since it clarifies how the scope of jurisdiction would be defined if corporations would have a more binding human rights obligation under international law. The question of applicable law is defined in article 9.

> Article 9. Applicable law
>
> 1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court, including any rules of such law relating to conflict of laws.
>
> 2. All matters of substance regarding human rights law relevant to claims before the competent court may, in accordance with domestic law, be governed by the law of another State where:
>
> a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or
>
> b) the victim is domiciled; or c) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled
>
> 3. The (Legally Binding Instrument) does not prejudge the recognition and protection of any rights of victims that may be provided under applicable domestic law.[124]

It is interesting how the Treaty does not seek to impose a duty on businesses directly, but mandates states to implement methods which ensure that corporations comply with standards of care towards individuals who are affected by their business operations. The

[123] UN Revised Draft of 2019, Art. 7.
[124] Ibid., Art. 9.

Revised Draft gives states the freedom to specify the reach of the obligations imposed on companies in order to ensure that the draft does not impose unjust burdens on corporate actors, neither has the regulation to be uniform for all corporate actors and states would have a freedom to pay attention to the nature, risks and size on the company.[125] The revised draft tackles the problem of the corporate veil and supply chains through specifying the meaning of 'transnational character' in article 3 (2) of the proposed treaty:

> Article 3. Scope
>
> 1. This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.
>
> 2. For the purpose of paragraph 1 of this Article, a business activity is of a transnational character if:
>
> a. It is undertaken in more than one national jurisdiction or State; or
>
> b. It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or
>
> c. It is undertaken in one State but has substantial effect in another State.[126]

The problem of the corporate veil and parent companies eluding the regulation and profit from exploiting people and human rights through their control over the subsidiaries, spread around different national regulations, was the main reason why this article was chosen as the most central part to be changed and the new definition significantly broadens the scope of the treaty.[127] EU advocated strongly for the wording of 'all companies' to be included in the scope, since the earlier, more limited scope would not have been relevant in a contemporary context and also provided exceptions to publicly owned companies.[128]

[125] Ibid. Art 9., see also http://www.ejiltalk.org/modern-slavery-in-the-global-food-market-a-litmus-test-for-the-proposed-business-and-human-rights-treaty/
[126] UN Revised Draft of 2019, article 3.
[127] http://www.ejiltalk.org/bending-the-knee-or-extending-the-hand-to-industrial-nations-a-comment-on-the-new-draft-treaty-on-business-and-human-rights/.
[128] Ibid.

3.3.2 The Principle of Territory

While discussing extraterritorial jurisdiction, it is important to understand the notion of territoriality. Territoriality can be either subjective or objective. Subjective territoriality requires that the accused person is present in the territory in question at the time when the conduct was committed. Objective territoriality then again refers to the jurisdiction of a state, when a conduct only partially happened in a state's territory. Ireland-Piper gives examples of situations where these two different forms of territoriality might occur:

> An example of subjective territorial jurisdiction is a murder committed in the physical territory of State A. The arrest, trial and imprisonment of the perpetrator in State A are on the basis of territorial jurisdiction. An example of objective territorial jurisdiction takes place on the border between two states, State A and State B. A gun is fired across the border from State A into State B, where it causes injury. Although, the trigger was pulled in State A, the injury from the bullet occurred in State B. In that scenario, State B may assert jurisdiction on the basis of objective territorial jurisdiction.[129]

A governing principle is, that a state cannot take measures on the territory of another state through enforcement jurisdiction without the consent of the state which sovereign territory is in question.[130]

3.3.3 The Nationality Principle

When states exercise jurisdiction over their nationals, even in cases where the conduct which was made by a national occurred extraterritorially, then they are authorized by the nationality principle. The nationality principle can be divided to both *active* and *passive nationality*. When the person with the nationality of the state seeking to exercise extraterritorial jurisdiction is accused of being a perpetrator of an extraterritorial conduct, then jurisdiction could be asserted through 'active nationality'. If the national is a victim, then extraterritorial jurisdiction could be exercised in accordance with the principle of 'passive nationality'.[131] According to the passive personality principle, in some circumstances, a state is allowed to prohibit conducts which could harm its nationals,

[129] Ireland-Piper, 2010, p. 23.
[130] Crawford, 2012, p. 479.
[131] Ireland-Piper, 2010, p. 24.

even if the perpetrator is a national of a different state and the conduct takes place abroad.[132]

The use of the passive nationality principle could be seen as basis to assert extraterritorial jurisdiction, but it can also cause difficulties, hence a person subject to a state, or in the context of this thesis, a company, might not be aware of the nationality of the persons they are interacting with and therefore might not be aware of the legal framework in which a conduct may be asserted in. States have the right to choose how they legislate and prosecute their citizens as long as it does not collide with obligations attributed to states through different human rights conventions. De Schutter explains that the limits that states are facing with the use of prescriptive jurisdiction under public international law do not create an obstacle to the use of prescriptive jurisdiction as a tool to impose obligations on TNCs, since the form of extraterritorial jurisdiction could be justified under the principle of active personality in cases where the company has the nationality of the home state. This is especially justified in questions concerning attempts to address the operations of the parent company.[133]

The application of extraterritorial jurisdiction based on active nationality can be used as a way to ensure that crimes do not remain unpunished and that corporations are held liable for their human rights violations. In the same way, the nationality principle could be applied to situations where a state seeks to ensure that its nationals do not act in an unwanted way abroad where an offence might go punished.[134] De Schutter explains that the principle of active nationality can also be used as a gesture of solidarity:

> Therefore, the solidarity of the State of which the corporation is a national with the State where that corporation has been acting in violation of certain human rights norms which the host State was unable to prevent, should take the form either of cooperating in the execution of a judgment adopted by the national courts of the host State on the basis of any extraterritorial jurisdiction they may have exercised, or of ensuring that, through the active personality principle, the corporation will be found liable in the State of its nationality.[135]

[132] Milanovic, 2011, pp. 24-25.
[133] De Schutter, 2006, pp. 28-29.
[134] Ibid., p. 24.
[135] Ibid.

The principle of nationality becomes more challenging to apply in situations such as 'the race to the bottom' where companies choose to operate in states with the cheapest labour force, or 'flags of convenience' where a company chooses to register itself or its vessels in a country with the least prohibiting regulatory framework that they become subject to. De Schutter continues to explain that situations such as the previous might prompt deregulation when states seek to allure companies only for gaining tax income. Hence, the use of the place of incorporation as an determinant for jurisdiction might not match the reality of the operations and relationships a company has with other states.[136] Therefore, it could be argued that the existing legal system is insufficient, since the nationality principle might have negative consequences, such as choosing nationality based on the least prohibitive regulation, which might have crucial consequences on the realisation of human rights.

As a result of corporations seeking to operate in the states with least prohibitive jurisdictions, TNCs operate through subsidiaries to make their operations as profitable as possible. The corporate veil might become a crucial obstacle when seeking to apply the principle of active nationality on business-related human rights violations. The question of nationality becomes particularly difficult to specify, if the TNC is domiciled in one state and operating through as subsidiary in another. In situations where a subsidiary of a TNC has violated human rights and liability can be traced to the parent through establishing that it had control over the subsidiary, then extraterritorial jurisdiction could be exercised based on the principle of active personality, hence it can be justified through a clear connection or the 'nationality' of the forum state.

3.3.4 Universal jurisdiction

Universal jurisdiction can be defined as amounting "to the assertion of criminal jurisdiction by a state in the absence of any other generally recognized head of prescriptive jurisdiction."[137] Universal jurisdiction can also be described as a certain form for states to exercise their extraterritorial adjudicative power. [138] According to Ireland-

[136] Ibid., p. 34.
[137] Crawford, 2012, p. 467.
[138] Kapelańska-Pręgowska, 2015, p. 425.

Piper, "The universality principle refers to the right of States to assert jurisdiction over serious international crimes regardless of where the conduct occurs, or the nationality of the perpetrator(s)"[139] and she continues by clarifying that these crimes are usually "so offensive to international peace and security that all states are regarded as having a legitimate interest in their proscription and punishment".[140] Examples of crimes where the universality principle could be applied are war crimes and crimes against humanity.[141] When discussing questions concerning jurisdiction, a distinction should be made between extraterritorial jurisdiction and universal jurisdiction, which is only regarded as customary international law and should only be applied in situations concerning so called 'core cases'. Usually, the character of *jus cogens* norms justifies the exercise of universal jurisdiction, even if a connecting factor between the conduct and the forum state is absent.[142]

Universal jurisdiction can be conceived as conditional or absolute. Conditional universal jurisdiction requires that the accused perpetrator is present in the prosecuting state and the more controversial absolute scope of universal jurisdiction or 'universal jurisdiction in absentia' does not.[143] The principle of *aut dedere*, *aut judicare* – extradite or prosecute, imposes an obligation on states parties to international conventions, which seek to facilitate bringing perpetrators of international crimes to justice, to prosecute on the basis of national law and before national jurisdictions if a suspect of an international crime cannot be extradited.[144] Therefore, it could be argued that corporations, or corporate officials, which commit or become complicit in crimes of a *jus cogens* or *erga omnes* nature in a host state, could be tried before their national courts in cases where the host state is unable to prosecute the crimes. Universal jurisdiction is a possible legal means to combat impunity, although it is argued to be the most controversial way to apply criminal

[139] Ireland-Piper, 2010, p. 29.
[140] Ibid. See also the decision on *Democratic Republic of the Congo v. Belgium*, ICJ Reports 2002, p.3.
[141] Ireland-Piper, 2010, p.31. See discussion on the Nuremberg Industrial Tribunals, p. 14.
[142] De Schutter, 2006, p. 16.
[143] *See*, case concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14). Crawford, 2012, p. 469, Ireland-Piper, 2010, p. 30. For further reading, *see* Anthony J. Colangelo, The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes, 36 Georgetown Journal of International Law 537, 2005.
[144] Example of conventions which include this principle are United Nations Convention against Corruption, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Suppression of the Financing of Terrorism.

jurisdiction due to the possibility to exercise it without a clear connection between the crimes and the state exercising universal jurisdiction. [145]

3.3.5 The Effects Doctrine

The so called 'effects doctrine' could be applied in cross-border situations where an offence causes harmful effects in a state which seeks to enforce its prescriptive jurisdiction. In these situations, the state does not meet the criteria for the principle of territorial jurisdiction, but the offence has consequences on the territory of the state.[146] The effects principle is already used in situations of competition matters and might become a more central base to justify extraterritorial jurisdiction since it could be used in contexts of individual rights on the internet or against cybercrime.[147]

3.3.6 The Principle of Cooperation

The principle of cooperation requires states to settle conflicts relating to extraterritorial jurisdiction peacefully and in good faith.[148] The principle to cooperate is also listed in the Maastricht Principles on the Extraterritorial Obligations of States (Maastricht Principles):

> All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected.[149]

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[145] Christianti, 2017, p. 372. The Article 5 (2) of the Torture Convention provides that "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.".
[146] *See*, United States v Aluminium Co of America, 149 F.2.d 416, 443 (2nd Cir. 1945).
[147] *See*, Case C–131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González, 2014 and Dan Svantesson, 'The Extraterritoriality of EU Data Privacy Laws – Its Theoretical Justification and Its Practical Effect on U.S. Businesses' (2014), (50)(1) SJIL, 82.
[148] Ascensio, 2010, p. 3.
[149] Maastricht Principles no. 49. In 2007, a global network of CEOs and academics created a consortium called ETOs for human rights beyond borders. They seek to create awareness on an advance the implementation of States' extraterritorial obligations (ETOs) and the main terms of reference used by them are the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. The principles were issued in 2011 at a gathering organised by Maastricht University and the International Commission of Jurists, and its main purpose is to summarize the extraterritorial obligations of states under international law and to work as a reference for both civil society and international human rights bodies. The experts behind the principles consist of human rights experts such as former members of international and regional human rights bodies from different regions.

These above listed principles combined could work as a basis to justify extraterritorial application of state legal power. When it comes to crimes of a *jus cogens* nature, states should cooperate with each other to end or prevent war crimes and crimes against humanity and to assist each other in detecting, arresting and bringing suspected perpetrators to trial. The obligation of international cooperation is also referred to in the same manner in the Preamble to the Statute of the International Criminal Court.[150]

Situations where the host state seeks to hold a corporation liable for its violations might become challenging if the corporation is part of a bigger multinational group or led by a transnational parent corporation that is domiciled abroad. If a corporation is present on the state's territory where the violation happened, the corporation as a legal person cannot be extradited to another state in order to face prosecution. Hence, it is crucial that the home state and the host state cooperate in order to effectively impose sanctions on the corporation to avoid that its actions go unpunished. The host state might have difficulties with effective imposition of criminal liability on a foreign corporation and therefore, the willingness of a home state to cooperate might also be seen as an act of solidarity, as mentioned before.[151]

The obligation of international cooperation is strengthened in international law through the article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which requires that states parties take measures both individually and through international cooperation to achieve the full realisation of the rights recognized in the covenant and the article 11 (1) which requires states parties to take action to ensure the right to an adequate standard of living and to "recognize the importance of international cooperation based on free consent".[152] De Schutter also notes that the obligation to cooperate and international assistance is also found in two provisions under Part IV of the Covenant, which relates to the measures of implementation. These provisions specify the different forms of international action to be taken for the achievement of the ESC-rights and the use of information submitted by states to assist the different international

[150] De Schutter, 2006, p. 17, see also, *Rome Statute of the International Criminal Court*, p. 1.
[151] De Schutter, 2006, p.17-18.
[152] ICESCR, art 2 (1) and 11 (1).

bodies, promoting the rights laid down in the convention, to assess methods that contribute to effective and progressive implementation of the Covenant.[153]

Again, a central problem with the exercise of extraterritorial jurisdiction in cases concerning business operations, even if done in good faith with the aim to cooperate, is that it could be seen as depriving the host state's competitive advantage on the global markets.[154] This is a common obstacle in improving social and environmental standards in countries with less restrictive regulations. Still, cooperation between states is needed to prohibit negative externalities that derive from the actions of TNCs, even if the main violation only occurs on a specific territory. The obligation on each state to protect human rights, especially ESC-rights, is therefore important as result of interdependencies created by the transnational activities of TNCs. The international community should work together to strengthen possible sanctions on regulations and their enforcement on TNCs.

3.4 Principles of Jurisdictional Restraint

While there are several principles that legitimate the exercise of extraterritorial jurisdiction, there are also principles for restraining from it. Ireland-Piper lists principles for jurisdictional restraint: comity, genuine connection and reasonable jurisdiction. To start with comity, she explains it as follows:

> In essence, comity is concerned with relations between States. It seeks to strike a balance between the sovereign interests of an individual State on the one hand, and the reality that it is also a member of a broader community of States, on the other. In a jurisdictional context, the doctrine of comity may be used by a court to limit the reach of a State's laws in deference to another State that may have a stronger jurisdictional interest.[155]

There is agreement on the existence of the doctrine, even if it is academically and jurisprudentially disputed since it can both be seen as courtesy and goodwill more than a binding legal obligation.[156] The use of comity occurs more often in common law courts,

[153] De Schutter, 2006, p. 19, ICESCR art 22 and 23.
[154] See, De Schutter, 2011, p. 21.
[155] Ireland-Piper, 2010, p. 40.
[156] Ibid. p. 41.

such as in the United States than in civil-law jurisdictions.[157] The genuine connection principle is something that has already been discussed as a bases for establishing jurisdiction, but it can also be a restrictive principle, since it is a necessary element to determine nationality and the exercise of extraterritorial jurisdiction based on nationality. However, Ireland-Piper points out that in the case of *Barcelona Traction*, the ICJ could not specify a test for genuine connection and the principle does not absolute acceptance but can be used when resolving competing claims of jurisdiction between states. The *Barcelona Traction* also refers to reasonable jurisdiction through use of words that refer to reasonableness.[158] According to Ryngaert, the previously listed forms of jurisdictional restraint may have led to the identification of a reasonableness test of jurisdiction under international law and this reasonable jurisdiction can be seen to have formed *opinion juris*.[159]

Another principle of restraint on extraterritorial jurisdiction is the principle of proportionality. For example, a national who is a resident abroad "should not be constrained to violate the law of their place of residence"[160]. Overall, when exercising extraterritorial jurisdiction, especially in situations which lack a clear connecting factor between the forum state and the home state seeking to exercise its jurisdiction, it is preferable to refrain from using it in accordance with the principle of reasonableness and to respect the interests of the forum state, even though it might be done at the expense of protecting human rights.[161] The preservation of human rights can also be understood as a shared interest of every state and something that does not need a more specific link between a state and the place of violation. The character of certain internationally recognised human rights can justify the use of extraterritorial jurisdiction, even in situations where it would not otherwise be permissible.[162]

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[157] Ryngaert, 2008, pp. 137-138.
[158] Ireland-Piper, 2010, p. 43, see also, Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain) [1970] ICJ Rep 3, 105.
[159] Ryngaert, 2008.
[160] Crawford, 2012, p. 486.
[161] De Schutter, 2006, p. 47.
[162] A recent case which allowed the exercise of extraterritorial jurisdiction was the *Prosecute or Extradite* (Belgium v Senegal) 2012, ICJ Rep, (Habré decision). Belgium alleged that Senegal had failed to meet its international obligations under the Torture Convention by not prosecuting the perpetrator in Senegal or extraditing him.

The doctrine of forum non conveniens has been used in US courts of a reason to restrain from exercising extraterritorial jurisdiction. The doctrine stipulates that a court may decline its jurisdiction if it finds other forums more suitable for the matter in question and serve as a more convenient location for the trial. This is particularly important in cases where the barriers to access to remedy are caused by faults in judicial systems through inadequate judicial education and training, lack of independence, corruption or extreme caseloads. Arguments not to dismiss a case based on the principle on forum non conveniens are usually invoked through referring to the inadequacy of the alternative forum to provide remedy for the victim.[163]

[163] Kapelańska-Pręgowska, 2015, pp. 442-43.

4. State Responsibility and Rules of Attribution

4.1 The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts

The rules for state responsibility have been concluded by the International Law Commission (ILC) in 2001 in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[164] The ILC Articles are not binding but have been seen to have formed customary international law and under these articles, states can incur international responsibility for a breach of their international obligations, if the act can be attributed to the state. The article 2 express the different situations which constitute State responsibility:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) Is attributable to the State under international law; and
>
> (b) Constitutes a breach of an international obligation of the State.[165]

and article 2(b) can be understood to include the notion of state jurisdiction as seen in human rights treaties. The question that needs to be answered is this thesis is, whether states have an obligation to protect human rights with an extraterritorial reach and whether and how it is attributable to the state is cases where TNCs become guilty or complicit in human rights violations abroad.

International human rights law requires that states take measures against actions by non-state actors who violate the human rights of those within the territory of that state. These measures can be to control, regulate, investigate or prosecute and done through legislation or administrative practises. McCorquodale and Simons explain that "the actions by non-state actors do not have to be attributed to the state, rather this responsibility is part of the state's obligation to exercise due diligence to protect the human rights of all persons in a state's territory"[166] and continue by concluding that states breach their due diligence

[164] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10).
[165] ILC Draft Articles, Art. 2.
[166] McCorquodale & Simons, 2007, p. 618.

obligations by neglecting their obligations or acting in a way that made it possible for the corporation to act as it did.[167] This can be concluded as states having responsibilities over corporate actions, but whether the responsibility has an extraterritorial reach and whether it legitimates the exercise of extraterritorial jurisdiction needs to be further examined.

Previous cases can provide us with an understanding of situations where states have responsibilities which are extended outside their territorial borders. In the ICJ Advisory Opinion on the Wall, the court stated that Israel had obligations under the ICCPR, ICESCR and the Convention on the Rights of the Child (CRC) since the Israel exercised its jurisdiction over the occupied Palestinian territory, which it could be seen to have had control and authority over.[168] International human rights law does not impose a general obligation to exercise extraterritorial jurisdiction in order for states to protect and promote human rights outside their territory. Currently, the developments in international law have not yet reached a stage where states would have a clear obligation to control private actors, such as TNCs, that operate globally outside the state's national territory from violating the human rights of others.[169] As discussed earlier, an act must be attributable to a state so that state the international responsibility of a state may be engaged. The article 4 of the ILC articles defines when a conduct is considered as an act of a state:

> Article 4:
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[170]

These above-mentioned organs can be seen to include organs and officials such as police, military, immigration officials.[171] The article 5 of the ILC Articles specifies the meaning

[167] Ibid.
[168] Advisory Opinion on the Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, 2004.
[169] De Schutter, 2006, p. 18.
[170] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), Article 4.
[171] McCorquodale & Simons, 2007, p. 601.

of article 4 by explaining that a conduct of a person or entity, e.g. a corporation, which is exercising governmental authority can be considered as an act of that state.[172] An example of a corporation which could be seen to exercise governmental authority is a security company which is performing a state duty by the instruction of that state in question.

When corporations violate human rights, but the actions do not fulfil the criterions listed in article 4 concerning governmental authority, the corporation could still be considered as acting by the instruction of or under the effective control of a state. The article 8 of the ILC draft articles specify that acting under the direction or control of a state are factors which lead to state responsibility:

> Article 8. Conduct directed or controlled by a State
>
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[173]

Article 8 implies that a corporation which is acting under the direction or control of a state while carrying out a conduct, would make the state responsible for the conduct made by the corporation. Still, the ILC article 8 calls for a high level of control for state responsibility, and therefore it might be difficult to attribute a business-related human rights violation to a state. The ILC article 58 about individual responsibility could be applied if a corporate official commits an act under the instruction or control of a state.[174]

Altwicker presents a distinction about attribution which explains attribution as a question of who shall bear the burdens and benefits of an act or omission and who shall bear the remedial responsibility, that is to say, who needs to see that the situation is put right.[175] He presents two attribution scenarios derived from the law of state responsibility which

[172] ILC Draft Articles, Art 5: ”The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”.
[173] ILC Draft Articles, Art. 8.
[174] ARSIWA, Art. 58: ”These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”.
[175] Altwicker, 2018, p. 599.

are especially relevant to situations concerning extraterritorial situations: the exercise of governmental authority by non-state actors in cross-border contexts and situations of conducts which are directed or controlled by a state.[176] Altwicker points out that the ECtHR does not differentiate between the two above mentioned situations of attribution but uses a combination of them.[177] The ECtHR presents the factors it used to determine whether the company acts were attributable to the state in the case Liseytseva and Maslov v. Russia as follows:

> In assessing whether a company enjoyed sufficient operational and institutional independence from the State, the Court has taken into account a wide range of factors, none of which is determinative on its own. The key criteria used to determine whether the State was indeed responsible for such debts were as follows: the company's legal status (under public or private law); the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control)[178]

The rules the ECtHR listed are interesting, hence the use of these attributional factors could well be assessed to possible human rights violations by monopolies or partly state-owned companies. This finding is also interesting from the aspect of privatisation of public services, especially when a state still chooses to own a major part of a privatised company. What if a partly or fully state-owned corporation would fail to exercise due diligence towards its foreign suppliers? Could the failure to protect human rights in the supply chain raise state responsibility? This possibility to attribute private conduct to a state must be analysed through tests of attribution, that is to say, through analysing the concept of 'effective control'.

4.2 Effective Control

The negative obligation to respect human rights has no territorial limitations, but the positive responsibility to protect human rights is restricted to situations where a state has total control over and area, that is to say, 'effective control.' Milanovic describes 'effective control' as follows:

[176] Ibid., p. 600, see also, ILC Draft Articles, Art. 5 & 8.
[177] Ibid. p. 600.
[178] ECtHR, Liseytseva and Maslov v. Russia, Appl. no. 39483/05, Judgment of 9 October 2014, para.187.

> 'Effective control' is also a homonym—there is the effective control test for the purposes of attribution, as developed by the ICJ in Nicaragua; there is 'effective control' as sometimes used in humanitarian law to describe the threshold of the beginning of a belligerent occupation of a territory; there is effective (overall) control of an area as a test developed by the European Court for the purpose of determining a state's jurisdiction over territory; there is also effective control as used in international criminal law to describe the relationship a superior has to have over a subordinate so his command responsibility can be engaged.[179]

Jurisdiction is the actual exercise of control and authority by a state. A state's right in international law to exercise such authority within a specific territory is established by title or sovereignty. A state may have title over territory, but not have jurisdiction, i.e. de facto control, over it. The above-mentioned examples are difficult to relate to situations of business-related human rights violations and to situations where extraterritorial exercise of jurisdiction could be justified through the attributability of an offence to state responsibility. The ECtHR decision made in *Bankovic* can be regarded as a development towards a more accepting view on state responsibility in cases concerning situations where control is exercised outside a state's territorial area.[180] De Schutter argues that the circumstances where a state can be seen to be exercising 'effective control' are exceptional and it cannot be assumed that a state exercises such a control over persons or property abroad in the sense that it would amount to the state having jurisdiction over the actors. Therefore, he means such situations would rarely make the extension of the state's positive obligations, which are derived from binding human rights instruments, justifiable.[181]

The ECtHR can hear complaints by individuals of violations of the European Convention on Human Rights and Fundamental Freedoms (ECHR) in a regional context. The mandate of the court is originated in the ECHR and there have been several cases where extraterritorial application of the convention before the ECtHR has caused debate. In the case of *Al-Skeini and Others v the United Kingdon* (*Al-Skeini*), the ECtHR found that UK had obligations under the article 1 of the ECHR that applied in Iraq, since it could be seen have had effective control over the area and therefore also jurisdiction over the area and

[179] Milanovic, 2011, p. 52-53
[180] *See* Bankovic and Others v. Belgium and Others, European Court of Human Rights, Judgment of 12 December 2001.
[181] De Schutter, 2006, p. 18.

obligation towards the individuals under its jurisdiction. The UK failed to investigate the circumstances where Iraqi civilians were killed by UK soldiers and therefore the UK had breached its obligations under the ECHR.[182] Another case which supports the notion of jurisdiction not being restricted to the national territory of a state is the *Loizidou v. Turkey*, where the ECtHR held that "the concept of 'jurisdiction'…is not restricted to the national territory of the Contracting States" and that the "responsibility of a Contracting Party could also arise when… it exercises effective control of an area outside its national territory".[183]

Milanovic notes that the approach that the British court took in the *Al-Skeini* case before the ECtHR ruling was unsatisfactory, since even if there was no doubt that the killings were attributable to the UK, the court still found that the UK did not have jurisdiction over the victims or the occupied area of Basra. He means that the approach which the British court took could be interpreted as the lack of a forceful reason to impose jurisdiction in cases where a state has a negative obligation to refrain from doing harm.[184] Milanovic also argues that:

> …textual interpretation the word 'jurisdiction' in various human rights treaties refers to a power that a state exercises over a territory, and perhaps also over individuals. When the state obtains this power it must, with due diligence, fulfil its obligation to secure or ensure the human rights of all persons within its jurisdiction. This power is a question of fact, of actual authority and control. Despite its name, it is not a legal competence, and it has absolutely nothing to do with that other notion of jurisdiction in international law which delimits the municipal legal systems of states. It is moreover not directly related to the concept of attribution in the law of state responsibility, even though both jurisdiction and attribution can be based on the same set of facts.[185]

[182] *Al-Skeini and Others v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011). For a different approach of the ECtHR, *see*, *Bankovic and Others v Belgium and Others* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 12 December 2001) where the ECtHR declared the application inadmissible because it could not find a jurisdictional connection between the victims and the respondent states. The victims were citizens of the Federal Republic of Yugoslavia and the respondents were members of the NATO, that was responsible for the bombing of a radio and television station which killed a number of people.
[183] *Loizidou v. Turkey*, (European Court of Human Rights, Application No. 15318/89, Judgement of 18 December 1996, para. 52).
[184] Milanovic, 2011, p. 51.
[185] Ibid., p. 53.

Therefore, the state responsibility as a contracting party to several human rights treaties providing this above-mentioned notion of jurisdiction, can be understood to impose an obligation to protect human rights with an extraterritorial reach. The human rights treaties which provide the positive obligation to protect human rights with an extraterritorial reach will be further discussed in the next chapter now when the notion of effective control as a measure of influence or power has been defined and it has been established that states can have extraterritorial responsibilities under international law and that responsibility can arise from a private conduct.

A conclusion can be made that the possibility to apply the effective control doctrine is limited, since even if the international human rights jurisprudence shows that States can exercise effective control over individuals or territory outside their sovereign reach, these are all in situations where states exercise military of administrative control.[186] The next chapter will describe how treaties such as the ICESCR impose an obligation on states to protect individuals in situations where jurisdiction can be established in accordance with the principle of effective control, however, the problem is that most of the situations where corporations violate the ESC rights of individuals are in situations which do not consist of states exercising military control. Violations done by non-state actors can only be attributable to a state if the person or entity is acting with a mandate or clear instructions from that state, in accordance with the earlier mentioned rules of attribution.

[186] *See*, Smita Narula in Langford, Malcom et al. (eds.), Global Justice State Duties The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law, 2014, p. 125.

5. State Obligation to Protect Human Rights with an Extraterritorial Reach

5.1 Extraterritorial Obligations of States

The question of the extraterritorial reach of states' positive obligations has become relevant through globalisation and the emerged role of TNCs, NGOs and other non-state actors such as terrorist groups. All these actors play a great international role and the role of TNCs can even be seen to have grown as states privatise their traditional roles in a growing trend. Therefore, the nature of these global actors makes it difficult to attribute a specific act to a state. Milanovic expresses the necessity to establish state responsibility in situations where states fail to implement positive obligation under human rights treaties:

> It would still be necessary to establish that the particular act that is alleged to be a human rights violation is attributable to the state. Or, even if the act in question is not attributable to the state, its responsibility may also arise for its failure to implement positive obligations under human rights treaties, e.g. to prevent human rights violations even by third parties.[187]

In this chapter, the main principles of state positive obligations will be shortly introduced to be able to draw conclusions from the different obligations imposed on states and its relevance on the exercise of extraterritorial jurisdiction. States have a positive obligation to protect human rights of individuals within their jurisdiction and this positive obligation will indirectly apply to conducts of private actors. In these situations, the state is acting as a guarantor.[188]

Obligations of states are necessary to be discussed, hence in many cases, the responsibility and jurisdiction are clearly interlinked, even though their meaning should not be mixed. As discussed above, the attribution of an act to a state can lead to state responsibility and attribution is a question of state control over the perpetrators of a human rights violation. Jurisdiction is a question of a state's control over the victims of human rights violations through its agents or control over the territory where the victims

[187] Milanovic, 2011, p. 52
[188] Crawford, 2012, p. 655.

are located.[189] As already established, state obligations under international human rights law are not confined to the state territory since the obligations are extended through international human rights treaties. According to Kapelańska-Pręgowska:

> It is widely acknowledged that traditionally, international human rights law was designed to protect individuals from omnipotent States and its authorities/officials. With time, the scope of state obligations evolved and widened, encompassing a more sophisticated range of positive obligations. As a consequence, if human rights or humanitarian law is violated (no matter, by a state or a nonstate actor), authorities are under an obligation to provide victims access to an effective remedy. If a State fails to afford the necessary redress, the victim may turn to competent international courts. However, there are areas either where international fora do not have competence (jurisdiction), or where their remedial powers are limited.[190]

The state obligation to 'protect' human rights is defined as a duty to ensure that corporations 'respect' human rights of individuals. Karp argues that the idea of holding states responsible for failing to protect is, as a concept, an attempt to constitute "human-rights-responsible agents, who can fail to count as such and therefore fail at their responsibility, even if there is no clear link to harm"[191]. The concept of states' positive obligations and their duty to protect individuals under their jurisdiction is normative justified *de lege lata* and according to this idea, corporations could be held accountable for their behaviour through regulations in host states, through preventive action against harmful behaviour or through criminal law provision and law enforcement.[192] Unfortunately, as discussed earlier in the introduction, host states might fail their duty to protect and therefore home state jurisdiction should be applied. Therefore, an extraterritorial obligation to protect could be used in cases where corporations based in its territory violate human rights in its cross-border activities.[193] An example of a transnational obligation to protect is the obligation derived from the ILC's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.[194] Altwicker argues that states also have a "transnational human rights obligation to protect persons within its own territory against harmful effects resulting from transnational activities by

[189] Milanovic, 2011, p. 41 and 51.
[190] Kapelańska-Pręgowska, 2015, p. 418.
[191] Karp, 2015, pp. 159-160.
[192] Kapelańska-Pręgowska, 2015, p. 431.
[193] Altwicker, 2018, p. 604.
[194] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001).

foreign actors outside its effective control"[195]. Examples of transnational activities by foreign actors could consist of breaches of data privacy or cybercrime. Altwicker also notes that the obligation to protect must be interpreted without imposing excessive burden on authorities and that it could therefore be applied as the standard of due diligence.[196]

According to the Maastricht Principles," 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."[197] The principles explain that the state obligation to respect, to protect and to fulfil its human rights obligations is encompassed through extraterritorial obligations. The principles explain the basic obligations in a clear way through gathering and interpreting the extraterritorial obligations to protect human rights from relevant human rights treaties such as the ICCPR, ICESCR and the UN Charter.

Human rights treaties usually include at least two different types of obligations of states: the negative obligation to respect human rights and the positive obligation to secure the human rights of persons within its jurisdiction. The negative obligation seeks to regulate the actions of state organs, agents or other persons whose acts are attributable to the state and the positive obligation seeks to ensure that states act to prevent human rights violations made by third parties, such as other states, private actors such as corporations or other non-state groups.[198] These obligations might be in contrast with the general state duty under international law not to act in such a way as to cause harm outside its territory and meanwhile ensuring that it respects the territorial integrity and independence of another:

> From a practical as well as a legal perspective, the organs of a State generally perform legislative, judicial or enforcement functions only within the territory of a State. Principles of international law relating to the territorial integrity and independence of States prevent the organs of one State from being physically present or performing their functions in the territory of another State without the consent of the latter State.[199]

[195] Altwicker, 2018, p. 604
[196] Ibid.
[197] The Maastricht Principles on the Extraterritorial Obligations of States, 2011, p.3.
[198] Milanovic, 2011, p. 46.
[199] UN International Law Commission, Report of the International Law Commission, Annex E, U.N. Doc. A/61/10 (2006). p. 519.

Chambers divides human rights into rights of immediate realisation and rights of progressive realisation. Rights of progressive realisation, such as labour rights or the right to health, are rights that the host state should protect but can choose to stay in minimum standards to use it for economic prosper and therefore it is included in the state's sovereign right to choose to do so.[200] If the rights in question would be of a more immediate realisation such as the right to life, then a home state could be seen to be allowed to regulate and adjudicate extraterritorially over a crime, if the host state chooses not to. If a company knowingly exposes a worker to conditions where the worker dies as a result of the company's lack of due diligence, then the company could be seen to be responsible for the violation of the workers right to life. The host state has an obligation to investigate suspicious deaths under the duty to protect and therefore it should not be able to oppose another state with a clear connection to the company from taking over the investigations under the responsibility to protect.[201]

The Human Rights Committee (HRC) and the treaty monitoring body for the ICCPR have noted that the only situation when human rights violations by corporations can be imputed to a state is when the state has failed to prevent fundamental human rights violations due to insufficient measures taken to protect human rights.[202] Domestic legislation must be in place to prohibit corporate activities with negative effects on human rights and a way to monitor these activities. Where the state has taken all adequate measures to fulfil their obligation to 'prevent, punish, investigate or redress the harm'[203] then the violation done by a corporation cannot be attributed to the state.

Simons emphasises the value of Ruggie's work, hence it has helped to map the governance-gaps and contributed to the global dialogue on corporate accountability and the ongoing policy framework process.[204] Ruggie's framework is based on three pillars:

[200] Chambers, 2018, p. 34.
[201] Ibid.
[202] HRC, General Comment 31, UN Doc. CCPR/C/21/Rev.I/Add.13 (2004). Cernic, 2010, p. 96.
[203] HRC, General Comment 31, para. 8. Cernic 2010, p. 96.
[204] Simons, 2012, p. 9.

> General principles These Guiding Principles are grounded in recognition of:
>
> (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
>
> (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
>
> (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.[205]

which consists of the advanced state duty to protect human rights under international law, the responsibility of businesses to respect human rights (to do no harm) and the development of a system that enables access to remedy for victims of corporate violations of human rights.[206] The two first pillars, about disentangling of the respective human rights obligations of states under international human rights law and the moral responsibility of corporations to respect human rights, present relevant policy areas which are important for ensuring that corporations respect human rights in their operations. These two chapters also provide ideas for grievance mechanism guidelines for both states and corporations on how to implement the relevant policies. The principles which states should follow to in order to meet their duty to protect are listed as follows:

> In meeting their duty to protect, States should:
>
> (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
>
> (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
>
> (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
>
> (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.[207]

Part (a) might speak for domestic due diligence laws but does not imply any extraterritorial reach for the principles.

[205] UN Doc. A/HRC/17/31, Annex, p.6.
[206] UN Doc. A/HRC/17/31.
[207] UN Doc. A/HRC/17/31, 1 B para 3.

The Committee on Economic, Social and Cultural Rights has suggested that states party to the Covenant have an obligation to prevent human rights violations that are committed outside their territorial space by third parties, if the third party falls under their jurisdiction, such as companies registered on the territory of the state in question. This was affirmed through General Comment No. 14 on the highest attainable standard on health which was adopted in 2000. The Committee stated that in order to comply with their international obligations in accordance with article 12 of the Convention, "States parties have to…prevent third parties from violating the right to health in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law"[208]. Here, most importantly, is the notion of 'legal means', even if the referring to influencing the third parties might be a more subtle way to prevent violations. Legal measures could include civil litigation and influencing could be done through reporting initiatives posed on companies or tools to offer guidance to managing due diligence in supply chains, and therefore also have an considerable extraterritorial effect.

Corporate operations do not only have effects on human rights but might also be seen to enable violations by third parties such as states or military groups. In these cases, corporations can be seen to be complicit to human rights violations. Corporate complicity is described in the Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes.[209] McCorquodale discusses the possibility to hold a home state legally responsible in cases where corporations become complicit to human rights violations, hence states may incur responsibility under international law when a violation by a non-state actor, such as a company is attributable to the state.[210] What is interesting here, is that McCorquodale argues that the home state could be seen as complicit to the activities of the non-state actor, since if a home state actively supports a company's global activities, then the support might amount to complicity. As also discussed above in chapter four, the violation should fit the group of activities which constitute internationally wrongful acts so that a corporation could be held legally responsible for

[208] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, Para 39.
[209] Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes.
[210] McCorquodale, 2014, pp. 60-61.

its human rights violations. If a state can be found to have supported this action, then the state could be seen as internationally responsible for the actions of the corporation.[211] Chambers refers to the findings of McCorquodale while drawing her well describing conclusions:

> If McCorquodale is correct and the home state can be held legally responsible for certain corporate misconduct in which it plays a part, then it must be entitled to regulate the company's overseas operations to try to prevent this misconduct. But the level of home state active support varies from, at one end of the continuum, 100% state ownership of the business to, at the other end, a more minor role such as diplomatic and consular support for the business. The level of active support that could expose the home state to potential legal responsibility for the company's actions would, it is submitted, need to be very high, but the premise that there may be international law consequences for the home state if it fails to act in relation to its corporate nationals and their associates is potentially an important one for this evaluation of the legality of the home state's intervention.[212]

Sometimes it might be difficult to prove that a corporation is complicit, hence its officials might defend themselves by claiming that it was forced to act as they did.[213] Corporate officials raised this dence at the Nuremberg industrialist trials by arguing that the Nazi state forced them to commit crimes.

5.2 States' Positive Obligations to Protect Human Rights Provided Through Human Rights Treaties

5.2.1 Positive Obligations of States

According to article 29 of the Vienna Convention on the Law of Treaties which reads "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".[214] This can be asserted as not reinforcing extraterritorial application of treaties. Yet, no presumption can be made neither against or for extraterritorial application of treaties, hence usually the possibility

[211] *See,* chapter 4, and McCorquodale and Simons, 2007, p. 614.
[212] Chambers, 2014, p. 31.
[213] Bilsky and Davidson, 2012, p. 34. For more detailed analysis of the Nuremberg industrialist tribunals, *see,* Lustig, D., *The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Franz Neumann's Behemoth at the Industrialist Trials*, 43 New York University Journal of International Law and Politics, 2011.
[214] Article 29 VCLT.

to apply law extraterritorially can be found in the text of each particular treaty. Article 56 of the UN Charter states that ”All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”[215] and the article 55 of the Charter explains the ”conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”[216] Simply interpreted, it could be understood that the Charter could justify extraterritorial application of law when an actor relating to the state's jurisdiction acts in a way that violates the well-being in another state.

The positive responsibility to protect could be used as a motive for extraterritorial application of law and is often debated when discussing the global operations of TNCs. According to the UN Guiding Principles:

> At 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. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.[217]

The principles work as a soft law mechanism arguing that human rights treaties could justify state action though recognized jurisdiction. One example of such treaty is the Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, where it is stated that the convention does not limit the application to the exercise of jurisdiction.[218] Therefore it could be argued, that provisions such as this might justify the appliance of law extraterritorially.

Most of the existing human rights treaties contain provisions specifying the scope of application of States parties' obligations, but the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not. Narula explains therefore that there are

[215] U.N. Charter art. 56, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945).
[216] Ibid. art 55.
[217] UN Guiding Principles, principle 2, p. 3-4.
[218] Art. 2, Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979.

two arguments addressing how extraterritorial obligations of states might be read into the ICESCR; through 'effective control' or through international cooperation.[219] States party to the convention must respect and ensure the rights laid down in the covenant and this applies also to actors who can be seen acting under the effective control of that state, even if situated outside the state territory.[220] Narula defines 'Effective economic control' as control over economic policies or markets outside states territories.[221] By applying the theory of effective control, there could be some ground to justify extraterritorial application of law, if it can be argued that a TNC violating human rights is under the effective economic control, for example through state financing or subventions. This same question of control arose while discussing the human rights violations made by persons or organisations acting under the direct control of or under the instruction of a state and therefore as attributable to the State.[222] Still, effective economic control is rather far reached and should be proved through unified standards.

Narula continues discussing the application of the duty to protect ESC-rights extraterritorially by explaining that states have extraterritorial duties under the ICESCR, since the extraterritorial application of the covenant could be seen as crucial for the effective implementation of the treaty.[223] This is also backed up by Ibrahim Kanalan, who argues that basic principles have been implemented in many UN conventions such as the International Covenant on Civil and Political Rights (ICCPR) and the ICESR, and therefore "…the commitment to human rights, their extraordinary rule and function, and their respect and fulfilment cannot be limited to the relation between a state and the individuals subject to its jurisdiction."[224] He makes a valid point while arguing that the very nature of human rights and their role as universal basis of justice, freedom and peace would be paradoxical if their application would be limited to the sphere of the jurisdiction

[219] Narula, 2011, p. 7.
[220] *See*, HRC, General Coment No 31 (n 26 above) para 10 , HRC, *Comments of the Human Rights Committee: Republic of Bosnia-Herzegovina* (1992), UN doc. CCPR/C/79/Add.14 (1992), para. 4. This confirmed that the Republic of Bosnia-Herzegovina was legally responsible for acts in territory over which it had factual and effective control.
[221] Narula, 2011, p. 17.
[222] Ibid. p. 7.
[223] Narula, 2011, p. 6, referring to UNHRC, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter : the role of development cooperation and food aid in realizing the right to adequate food : moving from charity to obligation (Tenth Session, 2009) UN Doc. A/HRC/10/5.
[224] Kanalan, 2018, p. 59.

of the state in question. This argument is also supported by the ICJ that has categorically rejected the argument that human rights treaties would only apply on states own territory.[225] The Wall Opinion, is a good example of a situation where the ICJ held that jurisdiction can sometimes be exercised outside a state's national territory, even though jurisdiction of states is primarily territorial, if that is what is requires for the object and purpose of the ICCPR to be fulfilled and therefore require states to comply with its provisions.[226]

Since the interest in this thesis is to research corporate accountability, it is also interesting to look at the role of private actors in human rights conventions and whether they might have responsibilities. To mention as an example, one convention that establishes private person responsibility is the Apartheid Convention by naming "organisations, institutions and individuals" and this can be read as the convention posing obligations for the crime of apartheid and/or the aiding and abetting of it on both corporate persons as well as natural persons. Systematic race discrimination is also prohibited universally though customary international *jus cogens* norms, and therefore, the crime of apartheid could also be seen to allow extraterritorial application of law as a measure to prohibit or punish the crime.[227] Still, conventions such as the Apartheid Convention have not been drafted with legal persons in mind and therefore home states do not have an obligation to investigate or impose sanctions on corporations suspected of human rights violations.[228]

5.2.2 Human Rights Treaties with a Jurisdictional Clause

There are treaties that include a jurisdictional clause, such as the ECHR and the ICCPR. Jurisdiction clauses were not included in the earliest treaties to be drafted, but were long included in the treaty practice of states.[229] The previously discussed article 1 of the ECHR contains a jurisdiction clause that states the following: "The High Contracting Parties

[225] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70.
[226] *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136.
[227] The Apartheid Convention. Even if the crime of apartheid was conceptualized with South Africa in mind, its appliance has not been limited geographically and it has been endorsed in other treaties.
[228] De Schutter, p. 17.
[229] Milanovic, 2011, p. 38.

shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"[230] and with emphasis on everyone, the article could be interpreted as allowing extraterritorial application to protect individuals outside the state territory. The Article 2(1) ICCPR is rather different from the ECHR and is more specific: "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 recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[231], even though the most important difference is the wording "within its territory", that is missing from the ECHR article 1 and from other human rights treaties. The wording still continues with "subject to its jurisdiction", which gives rooms for an interpretation that the convention could be applied also outside a Member State's territory. Some treaties include clauses only for specific obligations instead of a single applicability clause for the whole treaty.[232]

There are also treaties with no jurisdiction clause nor any other clause defining their territorial scope of application, most notably the ICESCR, CEDAW and the Convention on the Rights of Persons with Disabilities (CRPD). As discussed above, usually a state's jurisdiction extends only to its own territory and territories which the state can be having effective control over. Bernaz argues that treaties which do not include jurisdictional clauses would "…actually entail a state obligation to prevent and punish corporate human rights violations committed abroad."[233] Therefore treaties such as the ICESCR could be seen to be protecting human rights from corporate abuses more effectively than the ones with jurisdictional clauses. Milanovic notes that:

[230] ECHR, art. 1.
[231] ICCPR, art. 2 (1).
[232] The first treaty to include jurisdictional clauses for specific obligations was the 1969 Convention on the Elimination of All Forms of Racial Discrimination (CERD), which provides in its Article 3 that "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction". Article 6, which guarantees the right to an effective remedy against racial discrimination, and Article 14, which regulates the submission of individual petitions to the CERD Committee also include jurisdictional clauses. No other provision of the CERD, particularly Articles 2 and 5 which protect a wide range of substantive rights, has any sort of territorial limitation.
[233] Bernaz, 2013, p. 504.

> In the jurisdiction clauses of all relevant treaties [i.e. human rights treaties] the notion of the state's jurisdiction is textually tied to the emergence of the state's obligation. It is a threshold criterion which determines whether the state incurs obligations under the treaty, and consequently whether any particular act of the state can be characterized as internationally wrongful.[234]

and hence it could be argued that the treaties alone, which include a jurisdictional clause, are vague in creating an obligation for states to prevent and punish human rights violations committed extraterritorially. Bernaz explains that the victims outside a state's territory should not be seen as subject to the state's jurisdiction and therefore the state does not owe them any legal obligation.[235] Still, according to the different notions of jurisdiction explained above, some human rights treaties include jurisdiction clauses which refer "to persons within or subject to the state's jurisdiction"[236] instead of territories and therefore, these clauses can be understood "as defining a particular king of relationship between a state and an individual"[237] which leaves room for interpretation. Hence, as discussed earlier concerning principles for jurisdiction and in the chapter about effective control, jurisdiction could also be derived from the exercise of control over a territory or control and authority over a person or persons and property.[238]

The content and intentions of treaties can change through judicial activism, meaning that judges can consciously strive to interpret the legal acts in a way which changes their meaning. This does not only apply to provisions which define the scope of the rights, but also to the scope of the application of the treaties.[239] The different meaning of wordings in human rights treaties could be analysed further, however, most important for this thesis is understanding the importance of jurisdictional clauses and what it means to a state's obligation to protect human rights with an extraterritorial reach.

[234] Milanovic, 2011, p. 46.
[235] Bernaz, 2013, p. 504.
[236] Milanovic, 2011, p. 33.
[237] Ibid, see, ECHR art. 1 and ICCPR art. 2(1).
[238] See, Milanovic, 2011, p.33 and e.g., Issa v. Turkey, App. No. 31821/96, Judgment, 16 November 2004.
[239] Karska & Karski, 2015, p. 398.

7. Conclusions

The exercise of extraterritorial jurisdiction as a means to impose accountability is a frequently explored concept, even though it can be found to be limited. The complexity of cross-border situations has made it challenging for legal scholars to conclude primary ways to legitimise the exercise of extraterritorial jurisdiction, even if the existing principles provide us with a framework for situations which could permit states to enforce their jurisdiction on TNCs for their human rights violations. The autonomous nature of TNCs and the lack of binding human rights obligations on corporations create governance gaps in relation to the realisation of human rights. Even if extraterritorial jurisdiction could be exercised based on active nationality, the often mentioned 'corporate veil' could still act as an obstacle for arguing for a reasonable relation between a home state of a corporation and an extraterritorial conduct made through a subsidiary.

The previous research and jurisprudence in international law can be interpreted in a way which makes it possible to argue that states are under an obligation to act extraterritorially if they by doing so could prevent and punish human rights violations committed by corporations registered in their territories, even though this view is still quite controversial and far reached. The principles governing the exercise of extraterritorial jurisdiction offer a range of possibilities to establish a reasonable relation between a state and an extraterritorial conduct. However, the doctrine of state responsibility and the rules of attribution speak for stricter rules on for imposing responsibility on a state for an extraterritorial conduct of its corporate national.

Still, through the findings of this thesis, it could be concluded that states have obligations wherever their actions have human rights effect. States influence human rights not only locally and nationally, but also globally and transnationally. The question of attribution has an important role in cases where an extraterritorial conduct could result to state responsibility for an internationally wrongful act. The ILC articles work as a good basis for defining elements of attribution. It could be concluded that if acts by TNCs are made as actors under the effective control or on the instructions of the state, then the action can

lead to state responsibility. For actions to be made by persons or entities with 'effective control', the actions should be seen empowered by the State or exercised with elements of governmental authority. What is interesting, is that if the notion of 'effective control' could be extended to apply in situations where a publicly owned corporation could be regarded as acting as with the instruction of state, since the state has a clear interest in the operations of the company and the company's operations and possible human rights violations would be enabled through the financial assistance from the home state. In these kinds of circumstances, it would be necessary to have clear rules over what constitutes effective economic control, e.g. which number of shares should a state own.

A distinct issue is whether situations where a corporate does not act under the control of a state and no obligation to protect internationally recognized human rights exist, create situations where adoption of extraterritorial measures is allowed.[240] Can extraterritoriality be justified through a state's due diligence duty to protect human rights? The liberty to exercise extraterritorial jurisdiction in order to contribute to the protection of internationally recognized human rights might be difficult to argue. De Schutter explains that the existence of an positive obligation under international law to control corporations does not matter, since the state's liberty is more legitimate that the limited situations under which a state should exercise extraterritorial jurisdiction.[241] The exercise of extraterritorial jurisdiction can still be seen reasonable and justified, hence the state applying law extraterritorially seeks to protect globally recognised human rights and its actions should be seen to be in the interest of all states who are bound by international human rights treaties. In accordance with the rule that was developed in the Lotus case on what is not prohibited is allowed, a conclusion could be drawn that even of an obligation does not exist, it does not still consequently have to mean that certain forms of extraterritorial jurisdiction would be prohibited.

Even though the argument of avoiding extraterritorial jurisdiction in order to respect the fundamental principle of sovereignty and non-intervention in another state's affairs has been repeated in this thesis, internationally recognised human rights such as declared in

[240] De Schutter, 2006, p. 22.
[241] Ibid.

UDHR, have been seen as something that limits state sovereignty and therefore according to De Schutter, "cannot be said to belong to the exclusive national jurisdiction of the territorial State".[242] The positive obligations provided by human treaties through the interpretable notion of jurisdiction makes it possible for a state to have jurisdiction even outside its sovereign territorial borders. One thing that is clear is that international crimes such as genocide, crimes against humanity, war crimes, torture and forced disappearances impose an obligation on states to establish their jurisdiction over these kinds of 'core crimes' wherever the conduct takes place and regardless of the nationality of the perpetrator or the victims. The only requirement is that the persons accused of the crimes are found on their national territory. The protection of human rights through extraterritorial jurisdiction based on the universality principle can be regarded to be more justified than exercising jurisdiction as a mere act of solidarity.

If States use extraterritorial measures as a means to regulate the activities of foreign investors in the host states, they are not imposing any obligation for the host state to comply with the norms itself but seeks to control the investors who are domiciled in under their national jurisdiction. It is still important to note that host states are free to legislate upon activities on their national territory and choose if they impose duties of compliance on the companies that are doing business under their territorial area, as long as the state complies with internationally recognized human rights norms.[243]

As can be concluded from the previous discussion, typically, the one seeking to exercise extraterritorial jurisdiction is the home state of the parent company and therefore the company can also be seen to have the nationality of that state which is seeking to regulate the operations of the company in questions or its subsidiaries. This is rather important since international law does not yet obligate states to adopt such measures or to use adjudicative extraterritorial jurisdiction, even if it might be seen as the best available way to enhance the accountability of corporations. This use of extraterritorial jurisdiction under the principle of active personality can be justified, especially in cases where the home state seeks to address a parent company.[244] These cases are also easier to justify

[242] De Schutter, 2006, p. 28.
[243] Ibid. p. 28.
[244] Ibid., p. 28-29.

hence there might not be a need to split the corporate veil. Existing cases, such as the Amoco Cadiz oil spill case, prove that even if a corporate veil exists, parent corporation can still be held liable for their actions through piercing of the veil. This can be done through a set of measures, one being providing evidence of the parent exercising control over its subsidiary or an evident number of shares in the subsidiary.

What makes the use of extraterritoriality as an instrument particularly interesting, is the fact that usually the main goal is to hold human rights perpetrators accountable for their crimes and through enforcing home state jurisdiction, provide victims of human rights abuses committed abroad with effective remedy, when the host state has failed to do so. The victims of human rights violations have a right to justice and compensation for being exploited by companies. Various methods have been proposed to increase international cooperation and the UN draft treaty is an example of the existing willingness to come to a conclusion of binding global rules for businesses and human rights, even if the drafting process has also unveiled the existing unwillingness to impose binding obligations. Another method to contribute to the collision of interests would be a possibility for consultation between states and regulators. Consultations could be done through measures such as statements of interests. Even if applying law with extraterritorial effects might not be as diplomatic as subtle efforts on consultation, it might be a justified way to protect human rights also beyond a state's own territory.

The absence of effective mechanism to oversee corporate actions in a country where a TNC is operating is one of the main reasons why the imposing accountability on corporations is as difficult as it is. One method for the countries where a TNC is registered to hold corporations accountable would be adoption of regulation to force companies to report on the human rights impacts of their and their subsidiaries operations abroad. This would be a method that states might be keener to embrace than the direct exercising of extraterritorial jurisdiction.[245] An example of a reporting regulation like this would be the Finnish mandatory human rights due diligence law, as mentioned in the introduction of this thesis. Another example of measures with extraterritorial reach would be for state to require that corporations set up compliance units with functions that reach to all

[245] Bernaz, 2013, p. 494.

operations. These unit would oversee the compliance of the company operations both with the laws and regulations of the state where the company operates[246], even though this might lead to the company exploiting possible weaker standards in the country of operations. Therefore, the compliance unit could also oversee if the company's operations are in line with human rights standards, even though Bernaz does not argue that states should monitor the daily operation of corporations, hence states actually possess a great degree of control over corporations, especially smaller ones which therefore depend of interaction and help of a state.[247]

One way could be to impose human rights requirements to procurement contracts. Public procurement could therefore have a great impact in the home state, hence human rights due diligence in a company would mean being eligible for the public procurement process and therefore lead to positive human rights impacts with an extraterritorial reach. Most importantly, public money would not be spent on corporations which do not respect human rights in their operations.[248] Yet, a recent trend of privatizing traditional governmental institutions has led to the issue of governmental tasks being 'outsourced' to the more fluid area of regulation and hence making it more difficult to make a distinction between acts of private entities and governmental organisations. Ruggie expresses the concern on this topic through his principles through pointing out that privatising services does not mean that it relinquishes the existing human rights obligations imposed on them under international human rights law.

A good example of how national attempts to enforce business due diligence might fail is the UK Modern Slavery Act. It mandates a 'slavery and human trafficking statement', which does not demand enough from companies, since it does not demand enough of the company in relation to what should be reported or addressed substantively to comply with the obligation to inform external stakeholders.[249] Another issue could be the problem that

[246] Scheffer, D., & Kaeb, C. (2011b). The five levels of CSR compliance: The resiliency of corporate liability under the alien tort statute and the case for a counterattack strategy in compliance theory. Berkeley Journal of International Law, 29, 334, 380.
[247] Bernaz, 2013, p. 497.
[248] Ibid., p.498, see also the example of the Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final 2011/0438 (COD), 20 December 2011.
[249] Chambers, 2018, p. 37.

many of the domestic attempts seek to oblige companies to disclose their operation through reporting, but these reports might become greenwashing since customers can be seen to lack the information and tools needed to understand the true meaning of the reports and factual situation in buried deep in supply chains.

Altwicker uses the concept of 'transnationalisation' and argues that it has led to increased cooperation on an international level and developed and taken new forms, such as collaborations involving several states and non-state actors. He calls this form of cooperation 'transnational composite acts' and highlights the problem that these acts of cooperation bring with them, since they might lead to a situation where responsibility is shared in situations with negative impacts on human rights.[250] These situations where responsibility is shared create difficulties when it comes to attribution to a state, questions of jurisdiction or dispute settlement.[251] At the moment, international law does not impose an obligation on states to adopt extraterritorial legislation, but due to the lack of other binding measures, extraterritorial adjudicative action or other subtler measures are the best available option to enhance business accountability on human rights violations. The use of extraterritorial jurisdiction is useful when transnational crimes have to be regulated. Crimes such as drug-trafficking, money-laundering, human trafficking and as mentioned in this thesis in relation to the Canadian child sex law, child-sex tourism. All these crimes have an international effect and cannot be confined to territorial borders and therefore the relevant legal frameworks must have a broader reach. Already the fact that corporate persons are mentioned in international binding instruments is significant, because it can be seen to reflect a deepening acknowledgement of corporate actors under the international legal system and highlight the importance of developing a way to hold corporations responsible for their crimes. According to Ruggie, states should not assume that state inaction to foster business respect for human rights is something that businesses prefer or benefit from, and therefore refrain from considering combinations of measures, national and international, mandatory and voluntary, to enhance human rights and protect them from violations made by businesses.[252]

[250] Altwicker, 2018, p. 594.
[251] Ibid.
[252] A/HRC/17/31, B, 3, commentary.

It feels important to underline that in the end, the most important principles of the exercise of extraterritorial jurisdiction is to respect the principles of sovereignty, non- intervention and cooperation, as required by public international law. The principle of cooperation is rather interesting, since it can both be praised for opening doors for acts of solidarity and meanwhile be criticised of being a method to pose imperialistic policies on developing states. It is also important to assess whether states seek to apply extraterritorial jurisdiction in order to protect human rights or is it only a pretext to pursue other domestic policies which would protect the home states economy. Measures to protect domestic jobs in countries with high labour costs could be seen as a possible reason why a home state would seek to impose stricter standards in another state with weaker labour rights.[253]

While discussing international cooperation as a gesture of solidarity, it is important to remember that international assistance and cooperation might also be seen as imperialistic and the use of extraterritorial jurisdiction as a gesture of cooperation might not always be positively welcomed. One example is the recent fires in the Amazon rainforest in Brazil. The international community offered financial aid to manage and put out the fires, but the president of Brazil refused the assistance at first.[254] The fires do not only cause a massive environmental catastrophe that impacts the whole planet, but also force the citizens of Brazil, including indigenous people, to escape from their area of habitation. TNCs have a big impact on the deforestation in Brazil and if other states ought to regulate activities of TNCs operating in Brazil, it could be understood as distrust against the ability of the territorial state to effectively protect their own population. However, if a similar situation would be a result of a corporation's actions under the effective control of a foreign state, then the home state of the company would be responsible to stop the corporate actions to fulfil its positive human rights obligations and therefore extraterritoriality could be seen as an instrument to ensure protection of human rights and the environment from business-related violation in a cross-border context.

[253] Langford, 2013, p. 208.
[254] https://www.theguardian.com/world/2019/aug/27/amazon-fires-brazil-to-reject-20m-pledged-by-g7.

Summary in Swedish – Svensk sammanfattning

Extraterritoriell jurisdiktion och företagens ansvar för mänskliga rättigheter

I nuläget är många företag verksamma på en global nivå och företagen är även aktiva i länder där det förekommer inskränkningar av mänskliga rättigheter. Att bedriva verksamhet i dessa länder innebär stora utmaningar och företagen riskerar att stötta odemokratiska samhällsstrukturer med sin verksamhet. Syftet med avhandlingen är att utforska ifall staternas skyldigheter att skydda mänskliga rättigheter kan anses berättiga staters bruk av sin lagstiftningsmakt utanför sitt territoriala område. Forskningens mål är att besvara frågan om hur dessa skyldigheter kan utvidgas till människorättskränkningar som privata aktörer gjort sig skyldig till, såsom transnationella företag. Frågan är speciellt viktig, för att i nuläget utgör folkrätten ingen skyldighet för andra aktörer än stater att skydda mänskliga rättigheter, vilket medför att transnationella företag inte kan anses vara ansvariga inom folkrätten för människorättskränkningar. De existerande riktlinjerna för företag består av icke bindande principer såsom FN:s vägledandeande principer för företag och mänskliga rättigheter samt OECD:s riktlinjer för multinationella företag.[255]

Stiftandet av lagar med extraterritoriella konsekvenser eller dömande av människorättskränkningar i företagets hemland kan berättigas genom den positiva skyldigheten hos stater att skydda mänskliga rättigheter. För att kunna utöva extraterritoriell jurisdiktion måste en stat först komma underfund ifall situationen ifråga utgörs av omständigheter där tillämpning av extraterritoriella åtgärder kan accepteras i enlighet med folkrätten. I de artiklar om statsansvar för folkrättsstridiga handlingar som FN:s folkrättskommissions gett ut beskrivs situationer där internationella brott gjorda av privata aktörer eller organisationer kan attribueras till en stat.[256] Reglerna för tillskrivandet av statsansvar kan tolkas som att brott som begåtts av personer som anses handla under en stats effektiva kontroll, kan anses som handlingar vilka kan attribueras till en stat. Tillskrivandet av statsansvar i situationer där företag kränker internationellt godkända mänskliga rättigheter kan ses som ett sätt för offren att erhålla gottgörelse.

[255] UN Doc. A/HRC/17/3, OECD:s riktlinjer för multinationella företag 2011
[256] UN Doc. A/RES/56/83 (2001)

Stiftandet av lagar med extraterritoriella konsekvenser berörs av flera olika folkrättsliga principer, såsom nationalitetsprincipen om både aktiv och passiv nationalitet, territorialprincipen, principen om samarbete och principen om universell jurisdiktion. Principer för att undvika användandet av extraterritoriell jurisdiktion inkluderar respekt mot andra länders territoriella integritet och suveränitetsprincipen i enlighet med FN-stadgans artikel 2 (4).[257] Med suveränitet avses staters exklusiva rätt till jurisdiktion inom sina statliga gränser. Många länder undviker extraterritoriellt bruk av sin lagstiftandemakt på grund av risken för politiska konflikter och försämrade internationella relationer. Extraterritoriella metoder att ingripa i t.ex. arbetsförhållanden i utvecklingsländer har också tolkats som imperialistiska och som ett protektionistiskt sätt att försöka häva låginkomstländers konkurrensfördel och genom detta driva produktion tillbaka till hemlandet.

Det som blir centralt för avhandlingen är förhållandet mellan företagen och staten. Ett problem är svårigheten att attribuera företaget till staten och därigenom finna ett sätt att hitta tillräcklig koppling mellan hemstaten och brottet, som skulle godtaga användandet av extraterritoriell lagstiftning. För att kunna avgöra ifall en handling gjorts under en stats effektiva kontroll, måste man överväga vilken nivå av kontroll som utgör effektiv kontroll. Tidigare fall som *Bankovic* eller *Al-Skeini* fungerar som exempelfall av situationer där Europeiska människorättsdomstolen beslutit i enlighet med Europeiska människorättskonventionen artikel 1, att ett brott kan tillskrivas en stats extraterritoriella skyldighet att skydda mänskliga rättigheter.

Ett annat centralt problem för användandet av extraterritoriell lagstiftning och med ansvarsskyldighet hos multinationella företag är företagens juridiska form och svårigheten att utvidga ersättningsansvaret till att omfatta fysiska och juridiska personer. Vissa fall, som t.ex. fallet gällande Standard Oils skadeståndsansvar efter att dotterbolaget Amoco Cadiz orsakade en oljekatastrof utanför Frankrikes kust, kan anses fungera som exempelfall av situationer där en domstol beslutit att splittra den så kallade ’bolagsslöjan’ (corporate veil) och haft möjligheten att tillämpa principen om

[257] FN-Stadgan, Art. 2 (4)

ansvarsgenombrott.[258] Frågan on kontroll angår inte bara staters kontroll över företag, utan även moderbolagens beslutsmakt och kontroll över dotterbolagen. Ifall moderbolagen med ett lands nationalitet kan anses vara skyldig över ett människorättsbrott som dotterbolaget gjort i ett annat land, kan det anses finnas en koppling mellan brottet och moderbolagets hemland och en koppling som godtaga bruket av extraterritoriell jurisdiktion.

Avslutningsvis kan det konstateras att på grund av avsaknaden av existerande folkrättsliga mekanismer för att tillskriva ansvar för företags människorättskränkningar, kan andra mer tillgängliga åtgärder anses viktiga för att undvika situationer där kränkningar uppkommer. Dessa åtgärder innebär omsorgsfull efterföljning av nationella lagar som berör mänskliga rättigheter i de länder där verksamhet bedrivs, följandet av internationella riktlinjer, samarbetning med icke-statliga organisationer på de marknader där företaget är verksamt och noggrann företagsbesiktning av potentiella affärspartners för att undvika delaktighet i brott.

[258] Se fallet *Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d 1279, 1984

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