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‘Home State Duty to Protect in Business and Human Rights Through the Prism of Extraterritorial Jurisdiction’

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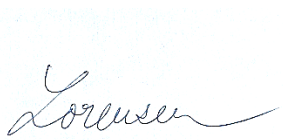

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disertantka

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Introduction

Issue and Context

In the last half-century, the global economy has shifted from an international to a globalized one.[1] Since the early 1990s, scholars have been talking of hyper-globalization.[2] International trade and investments have risen rapidly; business production has become increasingly fragmented, spanning across different sectors and countries, and complex global supply chains have developed, employing millions of people worldwide.[3]

Globalization has also advanced the rise of large (transnational) corporations. In 2007, the United Nations Conference on Trade and Development reported an estimated 77,000 transnational corporations worldwide, with more than 770,000 foreign affiliates.[4] These numbers have undoubtedly increased since then.

Corporations have become the new global power players, in some respects more powerful than states. A 2017 study by the University of Amsterdam ("UvA study") compared the economic power of states and corporations and found that the global 100 comprised 71 corporations. While the top of the list included nine countries that will unlikely be topped by any corporation in the foreseeable future, it is surprising that, for example, Walmart had higher revenues than Australia.[5]

Through private investment and the creation of employment opportunities, corporations have substantially contributed to increased standard of living and decreased poverty worldwide.[6]

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[1] Alexandra Nicula, Amalia Nicula, 'Development of transnational corporations in the world: opportunities and threats' [2015] 2 Progress in Economic Sciences 280, p. 280.
[2] Edward Anderson, Samuel Obeng, 'Globalisation and government spending: Evidence for the 'hyper-globalisation' of the 1990s and 2000s' [2020] 44 World Economy 1144, p. 1144.
[3] John Sherman III, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' [2020] Corporate Responsibility Initiative Working Paper No. 71 <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf> last accessed 01.02.2024, p. 6.
[4] United Nations Conference on Trade and Development (UNCTAD), 'The Universe of the Largest Transnational Corporations' (2017) UN Doc. UNCTAD/ITE/IIA/2007/2, p. 3.
[5] Milan Babić, Jan Fichtner, Eelke M. Heemskerk, 'States versus Corporations: Rethinking the Power of Business in International Politics' [2017] 52(4) The International Spectator 20, pp. 20, 27-28.
[6] Committee on Economic, Social and Cultural Rights (CESCR) 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business

Due to their power to bring progress and prosperity, states began competing with each other to offer corporations the most attractive conditions for settling in their territories.[7] However, such competition is at the expense of the local communities, as weak social, environmental, and labour standards are being upheld.[8]

Over the years, corporations have demonstrated that their global business activities are closely linked with serious violations of virtually *all* human rights. Corporations may, for example, violate the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, the right to assembly, or the right to just and favourable conditions of work. The most emblematic instances of corporate human rights violations include the explosion of Union Carbide's pesticide plant in 1984 in Bhopal, India; [9] Shell's complicity in widespread human rights abuses in Nigeria's Ogoniland in the 1990s, which culminated in the execution of Ken Saro-Wiwa,[10] and the 2013 collapse of the Rana-Plaza textile factory in Dhaka, Pakistan, supplying major Western brands.[11]

Because of the widespread business-related human rights abuse, a business and human rights agenda began developing in the early 1970s. However, the early initiatives were sporadic and academic research extremely limited. A more coordinated international business and human rights movement emerged in the mid-1990s following the death of Ken Saro-Wiwa. In 1998, the UN initiated the drafting of the first comprehensive business and human rights instrument,

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activities' (2017) UN Doc. E/C.12/GC/24, para. 1; John Sherman III, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' p. 5.

[7] Katarina Weilert, 'Taming the Untamable? Transnational Corporations in United Nations Law and Practice' in Armin von Bogdandy, Rüdiger Wolfrum (eds.) *Max Planck Yearbook of United Nations Law* (Koninklijke Brill NV 2010), pp. 448 – 449.

[8] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities' [2018] 23 Deakin Law Review 13, p. 23.

[9] Encyclopaedia Britannica, 'Bhopal Disaster' (Encyclopaedia Britannica Inc. 2024) <https://www.britannica.com/science/disaster> last accessed 17.05.2024; Hannah Ellis-Petersen, 'Bhopal's tragedy has not stopped: the urban disaster still claiming lives 35 years on' (The Guardian 2019) <https://www.theguardian.com/cities/2019/dec/08/bhopals-tragedy-has-not-stopped-the-urban-disaster-still-claiming-lives-35-years-on> last accessed 17.05.2024.

[10] John Sherman III, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' pp. 5-6; Amnesty International, 'Investigate Shell for complicity in murder, rape and torture' (Amnesty International 2017) < https://www.amnesty.org/en/latest/press-release/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/> last accessed 15.05.2024.

[11] Thaslima Begum, "A nightmare I couldn't wake up from': half of Rana Plaza survivors unable to work 10 years after disaster' (The Guardian 2023) <https://www.theguardian.com/global-development/2023/apr/28/a-nightmare-i-couldnt-wake-up-from-half-of-rana-plaza-survivors-unable-to-work-10-years-after-disaster> last accessed 17.05.2024; International Federation for Human Rights Odhikar (FIDH), 'One Year After the Rana Plaza Catastrophe: Slow Progress and Insufficient Compensation' (2014) <https://www.europarl.europa.eu/meetdocs/2014_2019/documents/droi/dv/46_fidhbdranaplaza_/46_fidhbdranaplaza_en.pdf> last accessed 17.05.2024.

the 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights' ("UN Draft Norms").[12] This solution was meant to attribute human rights obligations directly to corporations[13] but was abandoned in the process.

In 2005, the position of the "UN Special Representative on the issue of human rights and transnational corporations and other business enterprises" was created, and John Ruggie was appointed as the first mandate holder. Throughout its mandate, Ruggie adopted several reports, many of which are cited throughout this dissertation. His efforts culminated in 2011 with the adoption of the non-binding UN Guiding Principles on Business and Human Rights ("UN Guiding Principles").[14] The UN Guiding Principles were unanimously endorsed by the UN Human Rights Council and constitute the most important international business and human rights instruments to date.[15]

The unanimous adoption of the UN Guiding Principles has been a significant milestone in the business and human rights sphere. The UN Guiding Principles provided clarity and a common platform for action that did not exist before 2011. They also contributed to promoting respect for human rights in the business context and conceptualised the concept of human rights due diligence.[16]

Despite their positive impact, however, their first decade in existence also clearly demonstrated that a voluntary approach was insufficient to close the governance gap in the business and human rights sphere.[17] The international community began recognizing that mandatory measures are, in fact, necessary for the effective protection of human rights from business-

[12] Florian Wettstein, 'The history of 'business and human rights' and its relationship with corporate social responsibility' in Surya Deva, David Birchall (eds.) *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020), pp. 25-29.
[13] Julie Campagna, 'United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts binding Law on the Global Rule Makers' [2004] 37 John Marshall Law Review 1205, p. 1205.
[14] Florian Wettstein, 'The history of 'business and human rights' and its relationship with corporate social responsibility', p. 29.
[15] Organisation for Economic Co-operation and Development (OECD), 'About the OECD Guidelines for Multinational Enterprises' (OECD 2017) < https://mneguidelines.oecd.org/about/> last accessed 17.05.2024, p. 2.
[16] Human Rights Council (HRC), 'Guiding Principles on Business and Human Rights at 10: taking stock of the first decade, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (22.04.2021) UN Doc. A/HRC/47/39, Summary, paras. 1, 18, 116.
[17] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35, p. 38.

related violations.[18] In 2014, the Human Rights Council actually established an open-ended intergovernmental working group with a mandate to elaborate on an international legally binding instrument. While its latest 2023 draft is "negotiation-ready",[19] the adoption thereof is currently unlikely due to the lack of necessary consensus among states.[20]

According to current international human rights law, only states may incur direct human rights obligations. Ergo, only they have the authority to compel human rights compliance of corporations, e.g., through domestic regulation.[21] They do so by means of adopting preventive measures in view of a duty to protect, one of the three principal obligations in international human rights law.[22]

Traditionally, the duty to protect from corporate human rights abuse is attributed to the state in whose territory the human rights violation in question has occurred. As these states usually host foreign corporations and their subsidiaries, they are referred to in this dissertation as "host states". In practice, this is mainly developing states. Problematically, developing states are also the least equipped to exert power against more powerful (transnational) corporations.[23]

On the one hand, host states may lack the governance capacities to address business-related human rights concerns. On the other hand, they may be unwilling to regulate and control the human rights impacts of corporations, as a lenient legal and economic environment provides competitive advantages, and the adoption and enforcement of strong protective standards may lead to the withdrawal of business.[24] Considering the positive impact of corporate investment

[18] E.g., HRC, 'Guiding Principles on Business and Human Rights at 10: taking stock of the first decade, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' para. 33.
[19] Surya Deva, 'BHR Symposium: The Business and Human Rights Treaty in 2020-The Draft is "Negotiation-Ready", but are States Ready?' (Opinio Juris 2020) < http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/> last accessed 15.06.2024.
[20] HRC, 'Report on the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (26.12.2023) UN Doc. A/HRC/55/59, para. 28.
[21] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities', pp. 13 – 14.
[22] Economic and Social Council, Commission on Human Rights 'The New International Economic Order and the Promotion of Human Rights, Report on the right to adequate food as a human right submitted by Mr. Asbjørn Eide, Special Rapporteur' (07.07.1987) UN Doc E/CN.4/Sub.2/1987/23, paras. 170 – 181.
[23] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities', pp. 13 – 14.
[24]Antal Berkes, 'Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights' in Yannick Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar Publishing 2018).

on the host states' prosperity described above, their impetus for protecting human rights is weak.

Because of the host states' inability and unwillingness to protect human rights, human rights bodies and scholars have begun placing a duty to protect on the "home states" of corporations. This practice has two main advantages. Firstly, it is the home state in which a parent company of a transnational corporation is located. Home states thus have the capacity to influence the more powerful global player, which is out of a host state's reach.[25]

Secondly, home states are usually developed countries, which are more likely to have the effective means and technical expertise to regulate and control the activities of their corporate nationals even when they act extraterritorially.[26] Statistics show that over 70% of transnational corporations are established in either the United States, Great Britain, France, Germany, or Japan.[27] These five countries belong to the most developed countries in the world. The UvA study cited above has, in fact, placed all of those countries at the top of the list of the most economically powerful entities.[28]

Research Aim and Contribution

In view of the above, this dissertation aims to address whether home states have the right or duty to assert influence over home-based corporations and their conduct abroad by means of home state regulation to prevent extraterritorial human rights violations. While this dissertation is an academic, not an activist project, its goal is to further contribute towards the strengthening of corporate accountability for human rights violations, as far as existing international human rights law permits. Thus, this dissertation is to be understood as a part of the overall effort to enhance international human rights law protections in the business and human rights sphere.

[25] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities', p. 23.
[26] Antal Berkes, 'Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights'.
[27] Tatiana Podolskaya, Daria Alekseeva, 'The Influence of Transnational Corporations on the Current Trends in the World Economy' [2021] 2 The EUrASEANs: journal on global socio-economic dynamics 18, p. 12.
[28] Milan Babić, Jan Fichtner, Eelke M. Heemskerk, 'States versus Corporations: Rethinking the Power of Business in International Politics', pp. 20, 27-28.

The study of a home state duty to protect from extraterritorial human rights violations of corporations is in its infancy,[29] necessitating a further academic inquiry. In the absence of a legally binding instrument in the sphere of business and human rights, there is currently no consensus on the existence of such a duty with regard to corporations. While most human rights scholars and activists argue that such a duty may already be attributed as a matter of existing international human rights law,[30] other prominent scholars strongly oppose such views.[31] Problematically, most available studies on both sides of the spectrum are too narrow, outdated, or otherwise inaccurate.

Human rights scholars examined an extraterritorial home state duty to protect in journal articles and chapter contributions, the limited scope of which made it impossible to address the complexities of the law on this issue satisfactorily.[32] They relied on either regional (mainly European) or UN perspectives, failing to provide a global account.[33] They focused on general

[29] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' [2011] 27 South African Journal on Human Rights 249, p. 256 (citations omitted).

[30] E.g., Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' [2015] 1 Business and Human Rights Journal 41, p. 45; Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35, p. 37; Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations' [2013] Sydney Law School Research Paper No. 12/71, p. 22. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149921> last accessed 19.02.2024; Tara Van Ho, 'Obligations of international assistance and cooperation in the context of investment law' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 328; Khulekani Moyo, 'Corruption, human rights and extraterritorial obligations' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), pp. 313, 323.

[31] E.g., Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' [2018] 3 Business and Human Rights Journal 47, p. 72; Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' [2020] 9 ESIL Reflections <https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/> last accessed 20.02.2024; Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' [2011] 11 Human Rights Law Review 1, p. 31; Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' [2013] 117 Journal of Business Ethics 493, p. 507.

[32] E.g., Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' [2018] 3 Business and Human Rights Journal 47; Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations' [2013] Sydney Law School Research Paper No. 12/71 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149921> last accessed 19.02.2024.

[33] E.g, Elena Pribytkova, 'Extraterritorial obligations in the United Nations system: UN treaty bodies' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022); Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' [2011] 11 Human Rights Law Review 1; Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights' [2021] 82 QIL 53 <http://www.qil-qdi.org/extraterritorial-jurisdiction-a-dialogue-between-international-human-rights-bodies-forthcoming/> last accessed 01.02.2024.

international law viewpoints rather than providing a unique business and human rights perspective.[34] They used primary sources without questioning their legal significance.[35] Also frequently driven by confirmation bias, they failed to consider the basic legal concepts on which the emergence of such a duty depends.[36]

This dissertation seeks to rectify the unsatisfactory state of business and human rights scholarship, as described above. It aims to provide one of the most extensive studies of a home state duty to protect currently available. In doing so, it seeks to systematically clarify the status of such a duty and provide a groundwork for future studies and mandatory business and human rights initiatives.

Methodology

This dissertation examines a home state duty to protect from extraterritorial human rights violations of corporations located within the home state's territory. While transnational corporations are arguably the biggest threat to universal human rights guarantees, this dissertation is not limited to human rights violations of transnational corporations. It addresses all business entities operating transnationally. It focuses on the prevention of corporate human rights violations by means of domestic regulation, not on access to remedies.

This dissertation considers a duty to protect with regard to all business-related human rights violations committed at peace-time. It does not address international crimes. Furthermore, it only addresses human rights violations that are extraterritorial, i.e., affect foreign victims

[34] E.g., Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011); Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' [2013] 7 Law and Ethics of Human Rights 47; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' [2020] 21 German Law Journal 385.

[35] E.g., Antal Berkes, 'Cross-border Pollution' in Gibney M, Erdem Türkelli G, Krajewski M, Vandenhole W, (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022); Daniel Augenstein, David Kinley, When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations' [2013] Sydney Law School Research Paper No. 12/71 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149921> last accessed 19.02.2024.

[36] E.g., Ibrahim Kanalan, 'Extraterritorial State Obligations Beyond the Concept of Jurisdiction' [2018] 19 German Law Journal 43; Olivier de Schutter De Schutter O, 'Towards a New Treaty on Business and Human Rights' [2015] 1 Business and Human Rights Journal 41; Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' [2018] 3 Business and Human Rights Journal 47.

abroad. This is because individuals within a state's territory are subject to domestic duties and a home state's nationals outside its territory are usually not affected by business-related human rights violations in host states.

In examining an extraterritorial home state duty to protect in the business and human rights sphere, this dissertation seeks to answer three main research questions. Firstly, does international human rights law assign a mandatory home state *duty* to protect from corporate, extraterritorial human rights violations? Secondly, do home states have the *right* to exercise human rights protections vis-à-vis such extraterritorial conduct, even without a mandatory duty? Thirdly, *how* can a recommended/mandatory extraterritorial home state duty to protect be attributed in the business and human rights sphere?

In answering these questions, this dissertation avails itself of the doctrinal method. It identifies, interprets, and applies existing law – both soft and hard. Occasionally, it also argues for desirable changes. However, any reliance on the normative method is secondary because this dissertation aims to analyse the law as is, not as it ought to be. As referred to above, this is, in fact, one of the main contributions of this dissertation. Business and human rights scholars too frequently overindulge in normative considerations without clarifying the available law, a mistake this dissertation does not wish to repeat.

In addressing the meaning and scope of an extraterritorial home state duty to protect, its permissibility, and attribution, this dissertation relies primarily on international human rights jurisprudence. Human rights jurisprudence is currently the most authoritative primary source available in the business and human rights sphere. While treaty law is relied on throughout this dissertation as much as possible, it usually only includes references regarding general international human rights law considerations. This dissertation relies primarily on the following treaties: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the United Nations Convention on the Rights of the Child; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention for the Protection of All Persons from Enforced Disappearance; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the European Convention for the Protection of

Human Rights and Fundamental Freedoms; The American Convention on Human Rights; and the African Charter on Human and Peoples' Rights.

Existing customary international law establishing an extraterritorial duty to protect in the business and human rights sphere proved irrelevant. This is likely because, as noted by Marko Milanović, it is impossible to disentangle the "limitations on human rights as prescribed in treaties from any customary substantive rules of human rights law." [37] In other words, it is highly "unlikely that states have assumed more extensive obligations under customary human rights law than they have done under treaty law."[38]

This dissertation analyses all human rights jurisprudence, which it identifies as pertinent to the issue at hand. It addresses general comments/recommendations, concluding observations to state parties' reports, and individual communications of UN bodies interpreting the core human rights conventions. This includes particularly the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, and the Committee on the Elimination of Racial Discrimination.

Furthermore, in its analysis of human rights jurisprudence, this dissertation examines advisory opinions and binding judgments of the International Court of Justice and regional human rights courts. As far as regional human rights systems are concerned, this dissertation focuses on the three main systems: the European, as organized within the Council of Europe; the Inter-American, as organized within the Organization of American States; and the African, as organized within the African Union.[39] In line therewith, this dissertation interprets the views of the European Court of Human Rights, the Inter-American Court of Human Rights, the now-defunct European Commission of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights.

Finally, this dissertation also refers to a UN Security Council Resolution and to relevant soft law instruments, including the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights, the UN Guiding Principles on Business and Human Rights, and the Maastricht

[37] Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011) p. 3.
[38] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 3.
[39] Rhona K. M. Smith, *International Human Rights* (Oxford University Press 2014) p. 88.

Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. It does not refer to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct because these Guidelines provide recommendations to corporations, not states.

While this dissertation seeks to position itself as broadly as possible, the European human rights system is the richest and most developed regional system.[40] As such, it is often the primary point of reference. Within each system, preference is generally given to the source with the highest authority. This includes binding judgments of regional courts and general comments/recommendations of UN treaty interpreting bodies.

This dissertation also relies on reports from international and regional bodies to support its analysis and interpretive approaches. It uses reports from the UN Human Rights Council, the UN Economic and Social Council, the UN Special Rapporteurs, the International Law Commission, and the Venice Commission. This dissertation also relies on scholarly authorities. It frequently compares and contrasts scholarly positions and considers their strengths and weaknesses to ensure the most accurate findings. It also relies on these sources to demonstrate new tendencies in international human rights law, such as the emerging trend in favour of an extraterritorial home state duty to protect.

As reflected in the title, this dissertation addresses a home state duty to protect through the prism of extraterritorial *jurisdiction*. In substance, it is the exercise of jurisdiction that either permits or compels the exercise of extraterritorial protections by means of home state regulation. Thus, the importance of defining the term and its identifying factors is fundamental.

This dissertation addresses jurisdiction as a concept of public international law and international human rights law. While international human rights law is a specialist system falling within the scope of the public international law system,[41] the meaning of jurisdiction differs in both systems. Problematically, this distinction is frequently disregarded in human

[40] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 4.
[41] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (18.07.2006) UN Doc. A/CN.4/L.702, p. 12.

rights jurisprudence and academic writings, leading to confusion in an already complex field of study.

The analysis of jurisdiction revolves around *extraterritoriality.* The issue of extraterritoriality is fundamental to this dissertation, as this dissertation examines a home state's right/duty to protect from corporate human rights abuse abroad, most frequently realized by means of domestic regulation producing extraterritorial effects. This dissertation assesses the extent to which an extraterritorial corporate conduct is actually subject to extraterritorial jurisdiction in public international law and international human rights law respectively and how this affects the applicable jurisdictional rules and the emergence of a right/duty to exercise extraterritorial protections.

This dissertation focuses on the emergence of an extraterritorial duty to protect in the business and human rights sphere rather than to engage with the question of responsibility should such a duty be violated. However, to the extent to which responsibility is mentioned throughout this dissertation, it refers to *human rights* responsibility, not to state responsibility for internationally wrongful acts. The attribution of private conduct to states is thus out of scope for reasons explained later.

As this dissertation is a research project in the field of international human rights law, it typically avoids reference to domestic law and international environmental law. Nevertheless, some references thereto are included to the extent to which they are specifically relevant to the broader business and human rights debate. This dissertation likewise avoids the discussion of the obligation of international cooperation and assistance. While this obligation shows potential in the business and human rights sphere in general, it does not relate to the unilateral adoption of home state regulation examined in this dissertation.

Structure

In view of the above, Chapter 1 analyses the extraterritorial duty to protect by means of domestic regulation. It defines the duty to protect in international human rights law in general and the business and human rights sphere in particular. It examines the extent to which universal and regional human rights bodies have recognized its extraterritorial dimension and

assesses the normative significance of their views. This Chapter also considers relevant scholarly sources and demonstrates the emergence of a trend in academia in favour of a mandatory extraterritorial home state duty to protect. After assessing the collective evidence, it concludes that such a duty is not yet mandatory.

In the absence of a mandatory duty, Chapter 2 addresses the permissibility of exercising extraterritorial protections by means of domestic regulation. It determines this question to be a matter of jurisdiction in public international law, a concept around which Chapter 2 revolves. It analyses the extent to which home state regulation vis-à-vis the extraterritorial conduct of companies located within a home state's territory is subject to the limitations of extraterritorial jurisdiction in public international law. The relevant jurisdictional principles are introduced and their applicability to home state's protections from corporate human rights abuses assessed. This dissertation then observes that a home state's exercise of human rights protections is conditionally permissible.

Finally, Chapter 3 determines how a future mandatory home state duty to protect may be attributed based on existing international human rights law principles. It begins with a general analysis of the extraterritorial application of human rights treaties and determines whether an extraterritorial home state duty to protect is foreseen in human rights treaty texts. It continues with the analysis of jurisdiction in international human rights law, as the *threshold* criterion for extraterritorial obligations to arise.

In defining jurisdiction in international human rights law and determining its permissive principles, this dissertation relies primarily on human rights jurisprudence. It introduces three models that have taken shape in human rights jurisprudence: the spatial, personal, and cause-and-effect models. The applicability of each model to the business and human rights scenario of this dissertation is examined. The cause-and-effect model of jurisdiction is analysed in great detail, because it is the only model finding applicability in the context of business and human rights. This dissertation actually provides one of the most detailed accounts of this jurisdictional model in academic literature.

1. Chapter: Home State Duty to Protect in International Human Rights Law

1.1 Introduction

A home state duty to protect is increasingly explored in human rights fora and doctrine as a potential means for strengthening human rights protections in the business and human rights sphere. It provides a practical solution to the inefficiency of human rights guarantees, as it tackles the host state's inability and unwillingness to protect human rights from more powerful (transnational) corporations operating within their territories. While it is not the only means of addressing corporate impunity for human rights violations, it is the only solution anchored in existing international human rights law.

It is in view thereof that this Chapter explores the concept of a home state duty to protect and clarifies its meaning and scope in international human rights law in general and the business and human rights sphere in particular. An obligation to protect, referred to as a duty to protect in the business and human rights sphere, is well established in international human rights law. It is, in fact, one of the three primary state obligations through which international human rights law is operationalized.

This dissertation delves into the issue of human rights protections from corporate extraterritorial human rights violations, which impact victims *abroad*. Therefore, the *extraterritorial* dimension of the duty takes centre stage. This Chapter draws primarily on human rights jurisprudence, which is the most authoritative primary source currently available.

This Chapter identifies and analyses the jurisprudence of UN treaty interpreting bodies, including the Committee on Economic, Social and Cultural Rights ("CESCR"), the Human Rights Committee ("CCPR"), the Committee on the Rights of the Child ("CRC"); the Committee on the Elimination of Discrimination Against Women ("CEDAW Committee"), and the Committee on the Elimination of Racial Discrimination ("CERD"). Furthermore, it analyses views of regional human rights bodies, including the Inter-American Court of Human Rights ("IACtHR"), the European Court of Human Rights ("ECtHR"), and the African Commission on Human and Peoples' Rights ("ACmHPR"). It also examines other relevant

views, including the UN Guiding Principles on Business and Human Rights, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, and a UN Security Council Resolution. This Chapter addresses the extent to which a common approach is recognized by the above human rights bodies and instruments, as well as the extent to which such an approach is applicable in the business and human rights sphere. Finally, it delves into the implications of the human rights bodies' recognition of an extraterritorial home state duty to protect.

1.2 The Duty to Protect as a State Obligation

International human rights obligations are obligations of states. States are the primary subjects of international human rights law,[42] its main addressees, and the primary duty bearers.[43] Because international human rights law does not have a direct horizontal effect,[44] non-state actors, including corporations, are not subjects of international human rights law. As a consequence, they do not have any direct obligations under international human rights law despite being capable of violating internationally recognized human rights.[45]

According to the accepted doctrine, states have three types of human rights obligations: the obligation to respect, the obligation to protect, and the obligation to fulfil.[46] The obligation to

[42] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities' [2018] 23 Deakin Law Review 13, p.17.
[43] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 2; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 1.; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev. 5 (ACHPR) Art. 1; Olivier de Schutter, *International Human Rights Law*, (e-Book, 3rd edition, Cambridge University Press 2019) p. 215.
[44] CCPR, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 8.
[45] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities' p.17.
[46] Economic and Social Council, Commission on Human Rights, 'The New International Economic Order and the Promotion of Human Rights, Report on the right to adequate food as a human right submitted by Mr. Asbjørn Eide, Special Rapporteur' (07.07.1987) UN Doc E/CN.4/Sub.2/1987/23, paras. 170 - 181; United Nations Committee on Economic, Social and Cultural Rights (CESCR), 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (2017) UN Doc. E/C.12/GC/24, para. 10; United Nations Committee on the Rights of the Child (CRC), 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights' (2013) UN Doc. CRC/C/GC/16; para. 25; Sigrun Skogly, 'Global human rights obligations' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) p. 29.

respect, a negative obligation, requires states and their agents to refrain from interfering with or curtailing human rights.[47] Because the conduct of corporations is typically not attributable to states, the obligation to respect is out of the scope of this dissertation.[48]

The obligations to protect and fulfil are both positive obligations. The obligation to fulfil requires a state to implement comprehensive measures to establish legal, institutional, and procedural bases for the full realization of human rights.[49] In some cases, a state may even be obligated to provide goods and services essential to the enjoyment of the protected rights.[50] The obligation to fulfil is the most controversial human rights obligation[51] and likewise out of the scope of this dissertation.

The obligation to protect, referred to as a "duty to protect" in the business and human rights sphere and this dissertation, requires states to protect human rights holders from human rights violations of non-state actors. As a result, the duty to protect is the focus of the business and human rights sphere in general[52] and this dissertation in particular. The source of the duty is human rights treaties, most prominently the European Convention on Human Rights ("ECHR"), the Universal Declaration of Human Rights ("UDHR"), the American Convention on Human Rights ("ACHR"), the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Soft law instruments in the business and human rights sphere, including the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights ("Protect, Respect, Remedy Framework")[53] and the UN Guiding Principles on Business and Human Rights ("UN Guiding Principles"),[54] also further the understanding of a duty to protect.

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[47] Dinah Shelton, Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013), p. 2; Olivier de Schutter, *International Human Rights Law*, (e-Book, 3rd edition, Cambridge University Press 2019) p.588.
[48] Čestmír Čepelka, Pavel Šturma, *Mezinárodní právo veřejné* (2nd edition, C. H. Beck 2018), p. 392; Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' [2018] 3 Business and Human Rights Journal 47, p. 63.
[49] Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection* (e-Book, 2nd edition Oxford University Press 2019) p. 88.
[50] CESCR, 'General comment No. 24', para. 23.
[51] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' [2011] 27 South African Journal on Human Rights 249, p. 276.
[52] CESCR, 'General comment No. 24', para. 10.
[53] Human Rights Council (HRC), 'Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (07.04.2008) UN Doc. A/HRC/8/5.
[54] HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc. A/HRC/17/31.

Human rights treaties recognize the duty to protect both explicitly and tacitly. Starting with the latter, the ECHR and the UDHR oblige states to "secure" the enjoyment of human rights and freedoms.[55] This is a tacit recognition, as the treaties do not explicitly mention the duty to protect neither any of its functional equivalents. However, because the obligation to secure human rights may never be fulfilled when the human rights of individuals are not protected against harmful acts of non-state actors, the duty to protect is implied.[56]

Contrary thereto, the ACHR,[57] the ICCPR,[58] and the ICESCR[59] recognize a duty to protect explicitly.[60] While they do not use the term "duty to protect", they require states to "ensure" the enjoyment of human rights, a term generally considered functionally equivalent to a duty to protect.[61] As elaborated on by the CCPR, human rights obligations may only be "fully discharged if individuals are protected not just against violations of [human] rights by its agents, but also against acts committed by *private persons or entities* that would impair the enjoyment of [human] rights insofar as they are amenable to application between private persons or entities."[62]

The assertion of a duty to protect in international human rights law is now indisputable.[63] This is also confirmed by the UN Guiding Principles, according to which a duty to "protect against

[55] ECHR, Art. 1; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Preamble.
[56] Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection*, pp. 95-96; European Court of Human Rights (ECtHR), *Case of Cyprus v. Turkey* (Judgment) (2001) App. No. 25781/94, para. 81; ECtHR, *Isaak and others v. Turkey* (Decision as to the Admissibility) (2006) App. No. 44587/98, p. 20.
[57] The American Convention on Human Rights "Pact of San Jose, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) No. 17955 (ACHR), Art. 1.
[58] ICCPR, Art. 2 (1).
[59] ICESCR, Art. 3.
[60] E.g., Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011) p. 212.
[61] CCPR, 'General comment No. 34, Article 19: Freedoms of opinion and expression' (2011) UN Doc. CCPR/C/GC/34, para. 7; CCPR, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 8; CESCR, 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', para. 14; CESCR, 'General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights) UN Doc. E/C.12/GC/25, para. 41; Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights* (Advisory Opinion) (2017) OC-23/17, para. 118; HRC, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22.04.2009) UN Doc. A/HRC/11/13, para. 13.
[62] CCPR, 'General comment no. 31 [80], The nature of the general legal obligations imposed on States Parties to the Covenant' (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 8 (emphasis added).
[63] Dinah Shelton, Ariel Gould, 'Positive and Negative Obligations' p. 3; Olivier de Schutter, *International Human Rights Law*, pp. 580, 840.

human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises"[64] is states' international human rights law obligation.[65] In the business and human rights sphere, the duty to protect is recognized as one of three main pillars defining the necessary actions to be taken by states and businesses. These pillars also include the corporate responsibility to respect human rights and the need to provide effective access to remedies.[66]

1.2.1 Protected Rights under the Duty to Protect

States may incur a duty to protect only vis-à-vis specific human rights.[67] The list of the protected rights depends on the treaty that guarantees their protection. Because of the multitude of internationally recognized human rights, this dissertation does not catalogue all rights but rather focuses on the general categorization of human rights. Thus, to the extent to which the generic term "human rights" is mentioned in this dissertation, it refers to all human rights recognized in the International Bill of Human Rights.[68]

The most common categorization of human rights is into civil and political rights and economic, social, and cultural rights. As a result of Cold War tensions,[69] this categorization has been replicated in the ICCPR and the ICESCR, as well as their European counterparts, the European ECHR[70] and the European Social Charter ("ESC").[71] While the distinction between civil and political rights and economic, social, and cultural rights persists in the above documents, in practice, it is now considered obsolete. International human rights law has returned to the initial approach adopted under the UDHR, according to which human rights are "universal, indivisible […] interdependent and interrelated".[72] Newer human rights

[64] HRC, 'Guiding Principles on Business and Human Rights', Principle 1.
[65] HRC, 'Guiding Principles on Business and Human Rights', Commentary to Principle 1.
[66] HRC, 'Protect, Respect and Remedy: a Framework for Business and Human Rights Report' (2008); HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'.
[67] E.g., ICCPR; ICESCR.
[68] The International Bill of Rights consists of the UDHR, the ICESCR, the ICCPR and its two Optional Protocols.
[69] UN Human Rights Office of the High Commissioner, 'Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?' (OHCHR 1996 - 2014) < https://www.ohchr.org/en/human-rights/economic-social-cultural-rights/escr-vs-civil-political-rights> last accessed 25.02.2024.
[70] The ECHR protects civil and political rights.
[71] The ESC protects economic, social and cultural rights.
[72] Vienna Declaration and Programme of Action (adopted on 25 June 1993) UN Doc. A/CONF.157/23, Art. I. 5.

conventions, including the Convention on the Rights of the Child ("UNCRC")[73] and the Convention on the Rights of Persons with Disabilities ("CRPD"),[74] embody this universal approach to human rights.

The abandoned distinction between civil and political rights and economic, social, and cultural rights also led to a shift in the understanding of which rights may trigger negative and positive obligations in international human rights law. Initially, it was presumed that the exercise of the negative obligation to respect human rights is limited to civil and political rights, while the exercise of the positive obligations to protect and to fulfil is limited to economic, social, and cultural rights. This is no longer true, as both negative and positive obligations arise vis-à-vis all internationally recognized human rights.[75] This shift is fundamental to the business and human rights sphere, as it signifies that a duty to protect from harmful corporate conduct may arise with regard to all rights, including those historically classified as civil and political.

Even if business activities impact particularly economic rights,[76] the capacity of corporations to violate all human rights is undisputed. As emphasized by the UN Guiding Principles, corporations "have an impact on virtually the entire spectrum of internationally recognized human rights".[77] From the civil and political rights category, business activities may, for example, affect the right to life, the right to privacy, the right to a fair trial, the right not to be subjected to slavery, servitude, or forced labour.[78] From the economic, social, and cultural rights category, they may affect the right to work, the right to just and favourable conditions of work, the right to form and join trade unions, or the right to health, food, water, or social security.[79]

[73] United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
[74] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).
[75] Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection*, p. 89.
[76] CESCR, 'General comment No. 24', para. 1.
[77] HRC, 'Guiding Principles on Business and Human Rights', Principle 12, Commentary.
[78] Please note that the above list is not exhaustive. For a detailed summary and the analysis of business impacts on specific rights, see: https://www.ungpreporting.org/resources/how-businesses-impact-human-rights/.
[79] CESCR, 'General comment No. 24', para. 2.

1.2.2 General Scope of a Duty to Protect

The duty to protect compels states to prevent, punish, investigate, and redress human rights violations by *all* non-state actors,[80] including (transnational) corporations.[81] Thus, a duty to protect is both a preventive and a remedial duty. States exercise their duty to protect through regulatory measures and their enforcement.[82] While all kinds of regulatory measures - legislative, political, administrative, judicial, or educative - are envisaged,[83] *legislative* measures are the most fundamental for the effective realization of the duty to protect.

The primacy of legislative measures is underscored in texts of several human rights treaties. For instance, the ICCPR states that "[w]here not already provided for by existing legislative or other measures, [state parties undertake] to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[84] According to the CCPR, this means that states are "required on ratification to make […] changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant", unless already protected in domestic law.[85]

Similarly to the ICCPR, the ACHR asserts that to the extent to which the "exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt […] such legislative or other measures".[86] Finally, the text of the ICESCR likewise underscores the significance of legislative measures,

[80] CCPR, 'General Comment No. 31', para. 8; HRC, 'Protect, Respect and Remedy: a Framework for Business and Human Rights Report' (2008), para. 18; Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection*, p. 102; HRC 'Guiding Principles on Business and Human Rights' Principle 1.
[81] Olivier de Schutter, *International Human Rights Law*, p. 811; CESCR, 'General comment No. 24', para. 11.
[82] E.g., HRC, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009), para. 14; CESCR, 'General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (27 April 2016) UN Doc. E/C.12/GC/23, para. 70; CESCR, 'General comment No. 24', para. 31; Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection*, p. 88.
[83] CESCR, '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)' (11 August 2000) UN Doc. E/C.12/2000/4, para. 39; CESCR 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (2003) UN Doc. E/C.12/2002/11, para. 33; CCPR, 'General Comment No. 31', para. 7; ETO Consortium 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2013) <https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf> last accessed 17.02.2024, para. 24.
[84] ICCPR, Art. 2(2).
[85] CCPR, 'General Comment No. 31', para. 13.
[86] ACHR, Art. 2.

by noting that the full realization of the Covenant rights should be taken by "all appropriate means, including *particularly* the adoption of legislative measures."[87]
The above emphasis on legislative measures is sometimes interpreted as suggesting a duty to legislate. Because legislation is not the only means of discharging a duty to protect, the existence of a duty to legislate is unlikely. Nevertheless, lacunae in domestic legislation can contribute to a state's violation of a duty to protect.[88]

Regulation is also critical to ensure human rights protections in the business and human rights sphere. The Protect, Respect, Remedy Framework notes that while states have discretion in implementing the duty to protect, regulation is the most appropriate means of doing so.[89] Under the UN Guiding Principles, a successful discharge of the duty to protect also necessitates appropriate steps to be taken through effective policies, including legislation and other regulations.[90]

The duty to protect is a standard of *conduct*, not a standard of result.[91] A successful discharge of a duty to protect is thus based on a state's tangible efforts to prevent human rights violations rather than the actual success of such efforts.[92] States may not be held "responsible for human rights abuse [of non-state actors] per se, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs."[93] A significant aspect of the duty to protect is thus the duty of due diligence.[94]

The standard of due diligence requires a state to take only such measures as may be *reasonably* necessary to prevent or address the potential human rights violations.[95] The criterion of reasonableness is fundamental in the attribution of a duty to protect in general, as human rights

[87] ICESCR, Art. 2(1), (emphasis added).
[88] Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection*, p. 104.
[89] HRC, 'Protect, Respect and Remedy: a Framework for Business and Human Rights Report' (2008), para. 18.
[90] HRC, 'Guiding Principles on Business and Human Rights', Principle 1 (emphasis added).
[91] HRC, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009), para. 14.
[92] Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice' p. 30; Dinah Shelton, Ariel Gould, 'Positive and Negative Obligations' pp. 5-6; Dinah Shelton, Ariel Gould, 'Positive and Negative Obligations' pp. 5-6.
[93] HRC, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009), para. 14; similar conclusion reached in CRC, 'General comment No. 16', para. 28.
[94] CCPR, 'General comment no. 36', para. 7; CESCR, 'General comment No. 24', para.15; CCPR, 'General comment no. 31', para. 8; Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice' p. 30.
[95] CRC, 'General comment No. 16', para. 28; IACtHR, *Advisory Opinion OC-23/17,* paras. 118-120.

bodies have specified that protective measures should only be taken in relation to reasonably foreseeable violations[96] and only if such violations have reasonably foreseeable impacts on human rights.[97] While reasonableness is often used in human rights jurisprudence to limit an overly extensive reach of a duty to protect, its exact meaning has not been clarified in human rights jurisprudence.

According to scholarly interpretations, reasonableness denotes that only such measures should be taken that do not impose a disproportionate burden.[98] Reasonableness is also said to move in a broad spectrum. On the one side of the spectrum, there is the expectation of extensive and active protection of an individual´s enjoyment of human rights, and on the other, a state's right to remain passive and allow private freedoms to collide with each other.[99]

Finally, the duty to protect is usually born by states in the territories of which the relevant human rights violations have occurred.[100] In the business and human rights sphere, these are frequently *host states*, the ability/willingness of which to protect human rights in practice is questioned by this dissertation. While the extraterritorial dimension of the duty to protect remains unsettled in international human rights law,[101] there is no reason to conclude that a duty to protect is limited to domestic situations.[102] This is also implied in the UN Guiding Principles, according to which states should compel businesses to respect human rights throughout their global operations, not only with their territories.[103] The extraterritorial dimension of the duty to protect, as relevant to this dissertation, is addressed below.

[96] CESCR, 'General comment No. 24', para. 32.
[97] CCPR, 'General comment No. 36', para. 22.
[98] Olivier de Schutter, *International Human Rights Law*, pp. 880-881.
[99] Olivier de Schutter, *International Human Rights Law*, p. 857.
[100] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities' p. 19.
[101] HRC, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009), para. 15.
[102] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' p. 275, citations omitted.
[103] HRC, 'Guiding Principles on Business and Human Rights', Principle 2.

1.3 Extraterritorial Dimension of a Duty to Protect

The above section clarified the scope of a territorial duty to protect. It emphasized that it is well ingrained in international human rights law in general and the business and human rights sphere in particular. Based on this duty, host states must address human rights violations committed by corporations within their territories. However, when host states lack the capacity to prevent and redress such violations, a question of a *home state* duty to protect emerges.

The aim of a home state duty to protect is to prevent and redress human rights violations in *host states.* A home state duty to protect is, therefore, synonymous with an extraterritorial duty to protect.[104] This section determines the extent to which an extraterritorial home state duty to protect was recognized in international human rights law based on human rights jurisprudence. It examines the scope of such a duty and its mandatory nature.

It is important to note that the emergence of an extraterritorial duty to protect depends a state's exercise of extraterritorial jurisdiction. The concept of extraterritorial jurisdiction is addressed in Chapters 2 and 3, along with a detailed analysis of the meaning of extraterritoriality. It is crucial to emphasize that there is no general presumption against an extraterritorial duty to protect in either public international law or international human rights law. Nevertheless, an extraterritorial duty to protect is likewise not explicitly recognized in treaty law, constituting a significant limitation of this research.

In addressing the extraterritoriality of a home state duty to protect, this Chapter relies on human rights jurisprudence as the most authoritative primary source available. It analyses significant outputs of UN human rights bodies, including general comments/general recommendations, concluding observations to state parties' reports, and individual communications. It introduces other relevant sources, including decisions of regional human rights courts and bodies, a UN Security Council Resolution, the UN Guiding Principles, and the Maastricht Principles on Extraterritorial Obligations of States. By embracing a *global* perspective rather than a regional or domestic one, this Chapter constitutes one of the most exhaustive accounts of jurisprudence on the extraterritorial home state duty to protect in the business and human rights sphere.

[104] E.g., CESCR, 'General Comment No. 19 The right to social security (art. 9)' (4 February 2008) UN Doc. E/C.12/GC/19, para. 54; CESCR, 'General Comment No. 24' para. 18.

Despite the evident drawbacks of relying on human rights jurisprudence, the identified views provide significant insights into the emergence of an extraterritorial duty to protect in general and the business and human rights sphere in particular.

1.3.1 Extraterritorial Duty to Protect within the UN Human Rights System

UN human rights treaty interpreting bodies have become the primary arbiters of states' extraterritorial duty to protect.[105] As demonstrated in due course, they developed a common approach to an extraterritorial duty to protect. The views of the following UN treaty bodies will be analysed below and in this chronology: the CESCR implementing the ICESCR; the CCPR implementing the ICCPR; the CRC implementing the UNCRC; the CEDAW Committee implementing the UN Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"); and the CERD implementing the International Convention on the Elimination of All Forms of Discrimination of Racial Discrimination ("ICERD").

UN human rights treaty interpreting bodies share a common mandate to interpret their constituent human rights treaties through general comments/recommendations, monitor state parties' compliance, and issue recommendations in their concluding observations and considerations of individual complaints.[106] Despite considerable unanimity, some differences persist because of their distinct constituent instruments and diverse experience of work.[107] As a result, the approach of human rights bodies is often similar but rarely identical.

The constituent instruments of the above bodies amount to the most widely ratified human rights treaties, granting the bodies' views authority. The ICESCR has been ratified by 171 states, the ICCPR by 173 states, the UNCRC by 196 states, the UNCEDAW by 189 states, and

[105] Conall Mallory, 'A second coming of extraterritorial jurisdiction at the European Court of Human Rights' [2021] 82 QIL <http://www.qil-qdi.org/a-second-coming-of-extraterritorial-jurisdiction-at-the-european-court-of-human-rights/> last accessed 01.02.2024, p. 48.
[106] Office of the United Nations High Commissioner for Human Rights (OHCHR), *Working with the United Nations Human Rights Programme, A Handbook for Civil Society* (OHCHR 2008) <https://www.ohchr.org/sites/default/files/AboutUs/CivilSociety/Documents/Handbook_en.pdf> last accessed 16.02.2024, pp. 39-43.
[107] Elena Pribytkova, 'Extraterritorial obligations in the United Nations system: UN treaty bodies' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), pp. 95-96.

the ICERD by 182 states.[108] Interpretations of these treaties thus have an almost universal reach. This is especially true for general comments/recommendations, which do not address a specific state party and, therefore, allow for a universal application.[109] As the above constituent treaties also encompass the entire catalogue of internationally recognized rights,[110] an extraterritorial duty to protect may potentially be without limitations. Whether this is indeed the case is determined below.

Committee on Economic, Social, and Cultural Rights (CESCR)

The CESCR established itself as one of the first and most prolific human rights bodies to comment on the extraterritorial dimension of the duty to protect. Because of its focus on economic rights, the CESCR has issued many of its views within the specific context of the business and human rights sphere. This is also why CESCR has provided the most detailed account of a home state duty to protect to date, as demonstrated below.

The CESCR recognized an *extraterritorial* duty to protect for the first time in 1999. In its General Comment No. 12 on the right to adequate food, the Committee noted that to implement their commitment under the ICESCR, state parties to the Covenant should also take steps to protect the right to food in *other* countries.[111] The CESCR reaffirmed the extraterritorial dimension of a duty to protect in 2000. In its General Comment No. 14 on the right to health, the Committee emphasized that "[t]o comply with their international obligations in relation to article 12, States parties have to […] prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law."[112] By

[108] OHCHR, 'Status of Ratification Interactive Dashboard' (OHCHR 1996 - 2014) <https://indicators.ohchr.org/> last accessed 16.02.2024.
[109] Kasey McCall-Smith, 'Interpreting International Human Rights Standards – Treaty Body General Comments in Domestic Courts' [2015] University of Edinburg School of Law Research Paper Series No. 3, p. 4.
[110] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1996, entered into force 3 January 1976) 993 UNTS 3; United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1248 UNTS 13; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.
[111] CESCR, 'General comment No. 12 (Twentieth session, 1999) The right to adequate food (art.11)' (1999) UN Doc. E/C.12/1999/5, para 36.
[112] CESCR, 'General comment No. 14', para. 39.

making the extraterritorial duty to protect conditional on a state's capacity to influence non-state actors, the CESCR indicated its understanding of an extraterritorial duty to protect to equal a home state duty to protect.

In its subsequent General Comment No. 15 on the right to water from 2003, the Committee already positioned the duty to protect in the business and human rights sphere. Accordingly, "[s]teps should be taken by States parties to prevent their own citizens and *companies* from violating the right to water of individuals and communities in other countries." [113] The CESCR thereby limited the exercise of an extraterritorial duty to protect to a state's nationals, a criterion which became more pronounced over the years. Based on this criterion, the Committee established the state's capacity "to influence other third parties to respect the right, through legal or political means […] in accordance with the Charter of the United Nations and applicable international law."[114]

In General Comment No. 19 on the right to social security from 2008, the CESCR used the term 'extraterritorial' in connection with the duty to protect for the first time.[115] The Committee emphasized that "States parties should *extraterritorially* protect the right to social security by preventing their own citizens and national entities from violating this right in other countries."[116] The CESCR thereby definitely acknowledged that when home states exercise human rights protections from human rights violations of their nationals, they exercise an extraterritorial duty to protect. This is a significant conclusion, as the extraterritoriality of a home state duty to protect is frequently questioned. The CESCR also reaffirmed that any measures taken to influence non-state actors should be in "accordance with the Charter of the United Nations and applicable international law".[117]

In 2011, shortly after the adoption of the UN Guiding Principles, the CESCR issued its first *business and human rights* focused-output: the Statement on the obligations of States parties regarding the corporate sector and economic, social, and cultural rights.[118] Pursuant to the

[113] CESCR, 'General comment No. 15', para. 33 (emphasis added).
[114] CESCR, 'General comment No. 15', para. 33 (emphasis added).
[115] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' [2013] 117 Journal of Business Ethics 493, p. 504.
[116] CESCR, 'General Comment No. 19', para. 54 (emphasis added).
[117] CESCR, 'General Comment No. 19', para. 54.
[118] CESCR, 'Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights' (12 July 2011) UN Doc. E/C.12/2011/1.

Statement, "State parties should […] take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction."[119]

In General Comment No. 23 on the right to just and favourable conditions of work from 2016, the CESCR finally detailed the scope of an extraterritorial duty to protect. It emphasized that "States parties should introduce appropriate measures to ensure that non-State actors domiciled in the State party are accountable for violations of the right to just and favourable conditions of work extraterritorially"[120]. The CESCR specified that appropriate measures include *legislative* measures. It noted that such measures should clarify that states' "nationals, as well as enterprises domiciled in their territory and/or jurisdiction, are required to respect the right to just and favourable conditions of work throughout their operations extraterritorially".[121]

While all the above outputs have contributed to the clarification of the extraterritorial dimension of a duty to protect, the Committee's most relevant output is its 2017 General comment No. 24 on State obligations in the context of business activities. It is the Committee's first General comment that addresses the business and human rights sphere in general and not a particular human right. In reference to the above outputs, the CESCR reaffirmed that a duty to protect has an extraterritorial dimension, i.e., applies "both with respect to situations on the State's national territory, and *outside* the national territory."[122] The CESCR then reiterated that in discharging their extraterritorial duty to protect, states are required to take any steps necessary to prevent reasonably foreseeable[123] human rights violations abroad by corporations. [124] Accordingly, such steps include adopting "legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities".[125]

The CESCR determined that an extraterritorial duty to protect arises vis-à-vis all corporations incorporated under a state party's law or with a statutory seat, central administration, or principal place of business on the national territory.[126] However, the CESCR did not limit the

[119] CESCR, 'Statement on the obligations of States parties regarding the corporate sector', para. 5.
[120] CESCR, 'General comment No. 23', para. 70.
[121] CESCR, 'General comment No. 23', para. 70.
[122] CESCR, 'General comment No. 24', para. 10 (emphasis added).
[123] CESCR, 'General comment No. 24', para. 32.
[124] CESCR, 'General comment No. 24', para. 26 (citations omitted).
[125] CESCR, 'General comment No. 24', para. 14.
[126] CESCR, 'General comment No. 24', para. 26.

exercise of extraterritorial protections only with regard to those entities. It noted that states should "deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights."[127] Pursuant to the Committee, such an exercise of an extraterritorial duty to protect does not infringe upon the sovereignty of host states,[128] an aspect addressed in detail in Chapter 2.

In 2020, the CESCR issued its General comment No. 25, in which it noted that the scope of a duty to protect "requires States parties to adopt measures to prevent any person or entity from interfering with [human rights]."[129] The Committee recognized that while "States parties have a wide margin of discretion in selecting the steps they consider most appropriate to achieve the full realization of all economic, social and cultural rights",[130] they have an "extraterritorial obligation to *regulate* and monitor the conduct of multinational companies."[131] This is highly relevant, as it is the first time that the CESCR has equated an extraterritorial duty to protect with an extraterritorial duty to regulate in the context of business and human rights.

Finally, the CESCR also issued a Statement on "Human Rights and Climate Change", together with the CRC, the CEDAW Committee, the Committee on the Rights of Persons with Disabilities ("CRPD"), and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CMW") in 2020.[132] In the Statement, the human rights bodies have jointly consolidated an extraterritorial duty to protect by means of regulation,[133] as they reiterated that "States must regulate private actors, including by holding them accountable for harm they generate both domestically and *extraterritorially*."[134] They also noted that failure to "take measures to prevent foreseeable human rights harm caused by

[127] CESCR, 'General comment No. 24', para. 33.
[128] CESCR, 'General comment No. 24', para. 26.
[129] CESCR 'General comment No. 25', para. 43.
[130] CESCR 'General comment No. 25', para. 85.
[131] CESCR 'General comment No. 25', para. 84 (citations omitted, emphasis added).
[132] CESCR, CRC, CEDAW-Com, CRPD, CMW, 'Statement on human rights and climate change: joint statement / by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities' (14 May 2020) UN Doc. HRI/2019/1.
[133] CESCR, CRC, CEDAW-Com, CRPD, CMW, 'Statement on human rights and climate change', para. 10.
[134] CESCR, CRC, CEDAW-Com, CRPD, CMW, 'Statement on human rights and climate change', para. 12 (emphasis added).

climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations."[135]

Human Rights Committee (CCPR)

The CCPR also addressed the extraterritorial scope of a duty to protect in its interpretations of the ICCPR, albeit less extensively than the CESCR. In its General comment No. 31 on the nature of the general legal obligations imposed on States Parties to the Covenant from 2004, the CCPR noted for the first time, that subject to specific conditions, states must ensure (protect) Covenant rights of even those individuals situated *outside* the states' territories. The CCPR emphasized that states must take appropriate measures to prevent and redress human rights violations also by *private* entities.[136]

In 2015, the CCPR put the above principles into practice in its Concluding observations to Canada's periodic report. The Committee recommended that Canada should "enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction […] respect human rights standards when operating *abroad*".[137] Thereby, the Committee stipulated that Canada has an extraterritorial duty to protect human rights from violations of Canadian corporate nationals. The CCPR endorsed the same view also in its 2017 decision concerning the individual communication No. 2285/2013. It found that states have an obligation to ensure that rights under the Covenant are "not impaired by extraterritorial activities conducted by enterprises under its jurisdiction".[138]

Most relevantly, the CCPR consolidated an extraterritorial duty to protect in its 2018 General comment No. 36 on the right to life.[139] The CCPR reaffirmed that state must protect the Covenant rights of all persons within their jurisdiction, including those outside their territories.[140] The Committee emphasized that states may only successfully discharge such an

[135] CESCR, CRC, CEDAW-Com, CRPD, CMW, 'Statement on human rights and climate change', para. 10.
[136] CCPR, 'General comment no. 31', para. 8.
[137] CCPR, 'Concluding observations on the sixth periodic report of Canada' (13 August 2015) UN Doc. CCPR/C/CAN/CO/6, para. 6 (a) (emphasis added).
[138] CCPR, 'Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013' (7 December 2017) UN Doc. CCPR/C/120/D/2285/2013, para. 6.5.
[139] CCPR, 'General comment No. 36 on article 6: right to life' (3 September 2019) UN Doc. CCPR/C/GC/36.
[140] CCPR, 'General comment No. 36', para. 63.

extraterritorial duty to protect if they take appropriate *legislative* and other measures that ensure that all activities taking place in whole or in part within their territories/jurisdictions are consistent with Article 6 on the right to life.[141]

Relevantly, the CCPR included within the scope of "all activities" also the activities of corporate entities "based" in states' territories.[142] Nevertheless, the CCPR did not elaborate on the exact legal meaning of such a basis. It is thus uncertain whether, under the ICCPR, a company based in a state's territory is a company incorporate, registered, or domiciled within the state's territory or also a company operating within the state's market.

The CCPR likewise underscored the relevance of adopting legislative measures in the discharge of an extraterritorial duty to protect. However, it also underscored that the adoption of domestic legislation is not the only measure conforming to a duty to protect. Finally, the CCPR asserted an extraterritorial duty to protect only from such corporate activities that have a direct and reasonably foreseeable impact on individuals' right to life.[143] The CCPR thereby underscored the relevance of *reasonableness* for the exercise of extraterritorial protections and explicitly limited the exercise of a duty to protect to the *right to life*.

Committee on the Rights of the Child (CRC)

The CRC established an extraterritorial duty to protect children's rights for the first time in 2013 in its General comment No. 16 on State obligations regarding the impact of the business sector on children's rights.[144] General comment No. 16 is, in fact, the first general comment of a UN treaty interpreting body to have been explicitly issued in view of business and human rights. Remarkably, the Committee observed that an extraterritorial duty to protect children's rights extraterritorially also from corporate human rights violations may already be attributed pursuant to existing international law.[145]

[141] CCPR, 'General comment No. 36', para. 22.
[142] CCPR, 'General comment No. 36', para. 22.
[143] CCPR, 'General comment No. 36', para. 22.
[144] CRC, 'General comment No. 16', paras. 39 – 40.
[145] CRC, 'General comment No. 16', paras. 39, 28.

The Committee established that states must "take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights."[146] Accordingly, "such measures can encompass the passing of law and regulation, their monitoring and enforcement, and policy adoption that frame how business enterprises can impact on children's rights."[147] Relevantly to this dissertation, the CRC also explicitly stipulated the emergence of a home state duty to protect. It highlighted that because the UNCRC has been almost universally ratified, the "realization of its provisions should be of major and equal concern to both host and *home* States of business enterprises."[148]

Similarly to the CESCR and the CCPR above, the CRC limited the exercise of a home state duty to protect to situations where a *reasonable* link between the home state and the conduct concerned may be established. Accordingly, such a link exists when "a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned."[149] Furthermore, the CRC emphasized that the emergence of a home state duty to protect does not diminish host state obligations under the Convention and that all measures adopted in view of a home state duty to protect must, in any case, be in conformity with the Charter of the United Nations and general international law.[150]

The CRC reaffirmed its understanding of a home state duty to protect in its 2019 Concluding Observations on the periodic reports of Australia. In an explicit reference to General comment No. 16, the Committee recommended Australia to "[e]nsure the legal accountability of Australian companies and their subsidiaries for violations of children's rights, including in relation to the environment and health, committed within the State party or *overseas* by businesses *domiciled* in its territory."[151]

Finally, in 2020, the CRC, the CESCR, the CEDAW, the CRPD, and the CMW collectively issued a joint Statement on Human Rights and Climate Change.[152] As elaborated previously,

[146] CRC, 'General comment No. 16', para. 28.
[147] CRC, 'General comment No. 16', para. 28.
[148] CRC 'General comment No. 16' para. 41 (emphasis added).
[149] CRC 'General comment No. 16' para. 43.
[150] CRC 'General comment No. 16' para. 43.
[151] CRC 'Concluding observations on the combined fifth and sixth periodic reports of Australia' (1 November 2019) UN Doc. CRC/C/AUS/CO/5-6, para 17 (a) (emphasis added).
[152] CESCR, CRC, CEDAW-Com, CRPD, CMW, 'Statement on human rights and climate change'.

this Statement likewise established an extraterritorial state duty to protect.[153] This is significant, as it reaffirms both the CRC's standpoint and a general recognition of an extraterritorial duty to protect among UN human rights treaty interpreting bodies.

Committee on the Elimination of Discrimination against Women (CEDAW Committee)

The CEDAW Committee also contributed to the consolidation of an extraterritorial duty to protect in the business and human rights sphere. Its first view on the extraterritorial dimension of a duty to protect is its 2010 General Recommendation No. 28 on the core obligations of state parties under the Convention. The Committee emphasized that states are obliged to take all appropriate measures to ensure the effective protection of women against human rights violations by any person, organization, or *enterprise*,[154] even when they operate *extraterritorially*.[155]

Accordingly, states must prevent, prohibit, and punish such extraterritorial Convention violations.[156] They must also "'pursue by all appropriate means' a policy of eliminating discrimination against women."[157] While this gives states great flexibility, "such a policy must comprise constitutional and legislative guarantees, including an alignment with legal provisions at the domestic level and an amendment of conflicting legal provisions."[158] The CEDAW Committee's formulation thus suggests that an extraterritorial duty to protect likewise constitutes a duty to legislate.

The relevance of legislative solutions for realizing a duty to protect is further demonstrated in CEDAW Committee's Concluding observations to states' periodic reports. In an explicit reference to General recommendation No. 28, the Committee noted vis-à-vis Switzerland and Canada that both states shall "[s]trengthen [their] legislation governing the conduct of

[153] CESCR, CRC, CEDAW-Com, CRPD, CMW, 'Statement on human rights and climate change', para. 12 (emphasis added).
[154] Committee on the Elimination of Discrimination against Women (CEDAW-Com), 'General recommendation No. 28' (2010) UN Doc. CEDAW/C/GC/28, para. 36.
[155] CEDAW-Com, 'General recommendation No. 28', para. 36 (emphasis added).
[156] CEDAW-Com, 'General recommendation No. 28', para. 37.
[157] CEDAW-Com, 'General recommendation No. 28', para. 23.
[158] CEDAW-Com, 'General recommendation No. 28', para. 25.

corporations registered or domiciled in the State party in relation to their activities abroad."[159] Thus, the CEDAW Committee also implied the emergence of a *home state* duty to protect from human rights violations of corporations registered or domiciled within the State's territory, having aligned its views with the above UN human rights treaty interpreting bodies.

Although outside the scope of the business and human rights sphere, the CEDAW Committee also implied an extraterritorial reach of the duty to protect in a Concluding observation concerning France. It recommended France to "review its approach to extraterritorial prosecution of acts of gender-based violence against women […] and ensure that such offences, when perpetrated by French nationals or permanent residents, are prosecuted ex officio in the State party, regardless of whether the particular offence is criminalized in the country in which it is committed."[160] Thereby, the Committee communicated its expectation on France to take legislative and adjudicatory measures and, in view of a duty to protect, to prosecute violations of Convention rights even if they have occurred extraterritorially.

Finally, the CEDAW Committee consolidated an extraterritorial duty to protect in its General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. It emphasized therein that states have an obligation to ensure the full implementation of the Convention rights "both within and outside their territories",[161] i.e., confirmed that states have an extraterritorial duty to protect the human rights of women and girls.[162] The CEDAW Committee reaffirmed that states discharge such an obligation successfully only if they "regulate the activities of non-State actors within their jurisdiction, including when they operate extraterritorially"[163] and asserted regulatory measures to be the measure of choice also in regards to extraterritorial activities of corporations.[164] Please note that the CEDAW Committee also joined the Statement on Human Rights and Climate Change,[165] analysed above.

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[159] CEDAW-Com, 'Concluding observations on the combined fourth and fifth periodic reports of Switzerland' (18 November 2016) UN Doc. CEDAW/C/CHE/CO/4-5**,** para. 41 (c); CEDAW, 'Concluding observations on the combined eighth and ninth periodic reports of Canada' (25 November 2016) UN Doc. CEDAW/C/CAN/CO/8-9, para. 19 (a).
[160] CEDAW-Com, 'Concluding observations on the combined seventh and eighth periodic reports of France' (25 July 2016) UN Doc. CEDAW/C/FRA/CO/7-8, para. 25.
[161] CEDAW-Com, 'General recommendation No. 37 (2018) on gender-related dimensions of disaster risk reduction in a changing climate' (13 March 2018) UN Doc. CEDAW/C/GC/37, para. 43 (emphasis added).
[162] CEDAW-Com, 'General recommendation No. 37', para. 15.
[163] CEDAW-Com, 'General recommendation No. 37', para. 49.
[164] CEDAW-Com, 'General recommendation No. 37', para. 51 (d).
[165] CESCR, CRC, CEDAW-Com, CRPD, CMW, 'Statement on human rights and climate change'.

Committee on the Elimination of Racial Discrimination (CERD)

The CERD is the last of the UN human rights treaty interpreting bodies to have stipulated the emergence of an extraterritorial duty to protect. The CERD has done so exclusively in concluding observations to states' periodic reports. While the below concluding observations demonstrate the CERD's recognition of a home state duty to protect from corporate human rights violations, they are formulated as mere condemnations and recommendations, never as obligations. The CERD's recognition of a home state duty to protect is thus only tacit and not as robust as the recognition thereof by other bodies analysed above.

In its 2007 Concluding observations to the periodic report of Canada, the CERD condemned the "adverse effects of economic activities connected with the exploitation of natural resources in countries *outside* Canada by transnational corporations registered in Canada".[166] The Committee thus encouraged Canada to take appropriate legislative or administrative measures to prevent harmful extraterritorial acts of Canadian corporate nationals and to hold them accountable.[167] The CERD reached an almost identical conclusion one year later in its Concluding observations to the periodic report of the United States.[168] Additionally, it requested the United States to "include in its next periodic report information on the effects of activities of transnational corporations registered in the United States on indigenous peoples *abroad* and on any measures taken in this regard."[169] The CERD thereby indicated that home states of transnational corporations are, in fact, expected to prevent human rights violations extraterritorially.

In 2011, the Committee reaffirmed its position in Concluding observations to the periodic report of the United Kingdom. Similarly to the above, the Committee expressed its concern regarding the adverse extraterritorial effects of corporate conduct of transnational corporations registered in the United Kingdom. It encouraged the taking of legislative and administrative

[166] Committee on the Elimination of Racial Discrimination (CERD), 'Consideration of Reports Submitted by State Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Canada' (25 May 2007) UN Doc. CERD/C/CAN/CO/18, para 17.
[167] CERD, 'Concluding observations, Canada' (2007), para. 17.
[168] CERD, 'Consideration of Reports Submitted by State Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America' (08 May 2008) UN Doc. CERD/C/USA/CO/6, para. 30.
[169] CERD, 'Concluding observations, United States of America', para. 30 (emphasis added).

measures to ensure human rights compliance of transnational corporations.[170] The Committee further condemned the introduction of a new bill which, if passed, "will restrict the rights of foreign claimants seeking redress in the State party's courts against such transnational corporations".[171] The Committee held that the United Kingdom shall instead ensure that "no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State party's courts [even] when such violations are committed *outside* the State party."[172]

In a 2012 Concluding observation to the periodic report of Canada, the Committee commended the improvements made by Canada since 2007. Nevertheless, it emphasized that Canada has yet to adopt "measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples *outside* Canada".[173] Again, it recommended the taking of "appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable."[174]

The CERD's consistent condemnation of the state parties' failure to ensure human rights compliance of corporate nationals abroad clearly demonstrates its conviction in favour of an extraterritorial home state duty to protect. The CERD's repeated reference to legislative measures also signifies that such measures are instrumental in ensuring corporate human rights compliance. The CERD thus joined the movement of UN human rights treaty interpreting bodies in attributing an extraterritorial duty to protect, also by means of regulation. The fact that the Committee has indeed done so is likewise evident from the fact that it co-issued the Joint Statement on Human Rights and Climate Change in 2020, analysed above. [175]

[170] CERD, 'Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, United Kingdom of Great Britain and Northern Ireland' (14 September 2011) UN Doc. CERD/C/GBR/CO/18-20, para. 29.
[171] CERD, 'Concluding observations, United Kingdom of Great Britain and Northern Ireland', para. 29.
[172] CERD, 'Concluding observations, United Kingdom of Great Britain and Northern Ireland', para. 29 (emphasis added).
[173] CERD, 'Consideration of reports submitted by States parties under article 9 of the convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Canada' (4 April 2012) UN Doc. CERD/C/CAN/CO/19-20, para. 14 (emphasis added).
[174] CERD, 'Concluding observations, Canada' (2012) para. 14.
[175] CESCR, CRC, CEDAW-Com, CRPD, CMW, 'Statement on human rights and climate change', paras. 10-12.

1.3.2 Extraterritorial Duty to Protect in the Views of Regional Human Rights Bodies

This subsection clarifies the views on the emergence of an extraterritorial home state duty to protect in regional human rights systems. There are three main regional human rights systems: the European, as organized within the Council of Europe; the Inter-American, as organized within the Organization of American States; and the African, as organized within the Organization of African Unity/the African Union.[176] The scope of extraterritorial human rights obligations within regional human rights systems is clarified in the jurisprudence of regional courts, exercising both a compulsory- and advisory jurisdiction, and in pronouncements of regional human rights commissions. While regional human rights bodies have substantially contributed towards a clarification of extraterritorial human rights jurisdiction in general, as addressed in detail in Chapter 3, their views on the extraterritorial dimension of a duty to protect are limited.

Inter-American System of Human Rights

The most relevant regional contribution is IACtHR's 2017 Advisory Opinion on the Environment and Human Rights.[177] The Advisory Opinion has become a global benchmark for the exercising extraterritorial obligations in international human rights law in general. Interestingly, the Advisory Opinion actually constitutes the first instance in which the IACtHR commented on the extraterritorial application of the ACHR.[178] Before that, only the Inter-American Commission on Human Rights ("IACmHR") addressed extraterritoriality within the Inter-American system. As it had only done so within the context of the duty to respect and not the duty to protect,[179] this section does not analyse the IACmHR's views and focuses on the IACtHR instead.

The IACtHR held in its Advisory Opinion that states are obliged to ensure the "human rights of all persons subject to their jurisdiction, even though such persons are *not* within their

[176] Rhona K. M. Smith, *International Human Rights* (Oxford University Press 2014) p. 88.
[177] Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights* (2017) OC-23/17.
[178] Clara Burbano-Herrera, Yves Haeck, 'Extraterritorial obligations in the inter-American human rights system' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 121.
[179] For a detailed analysis, please refer to Chapter 3.

territory".[180] Because to "ensure" human rights is functionally equivalent with "protecting" them,[181] the IACtHR recognized an extraterritorial duty to protect. As reaffirmed by the IACtHR, the obligation to ensure is "projected beyond the relationship between State agents and the persons subject to the State's jurisdiction, and encompasses the duty to prevent third parties from violating the protected rights in the private sphere".[182]

The Court noted that the exercise of an extraterritorial duty to protect is to be discharged using all appropriate steps,[183] as may be *reasonably* expected.[184] Accordingly, this also includes the adoption of domestic laws.[185] In line with the CCPR, the Court limited the exercise of an extraterritorial duty to protect to the rights to life and integrity.[186]

The Court further emphasized that the attribution of a duty to protect is based on the fact that the source of harm originates within the state's territory.[187] The IACtHR thus endorsed the view of the above UN human rights treaty interpreting bodies that the exercise of an extraterritorial duty to protect is conditional on a state's territorial capacity to influence the non-state actors. Thereby, the IACtHR also recognized that an extraterritorial duty to protect amounts to a home state duty to protect.

While the Court did not establish a home state duty to protect specifically from the extraterritorial conduct of (transnational) corporations incorporated, registered, or domiciled within a home state's territory; the Court did acknowledge a tendency "in the case of companies registered in one State that develop activities outside that State's territory […] towards the regulation of such activities by the State where such companies are registered."[188] Reading this in conjunction with the IACtHR's recognition of an extraterritorial duty to protect, it is non-controversial to assume that the Court has established a home state duty to protect also vis-à-vis such entities. However, the Court has so far attributed an extraterritorial duty to protect only

[180] IACtHR, *Advisory Opinion OC-23/17,* para 104 (c).
[181] E.g., HRC, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009) para. 13.
[182] IACtHR, *Advisory Opinion OC-23/17,* para. 118.
[183] IACtHR, *Advisory Opinion OC-23/17,* para. 118.
[184] IACtHR, *Advisory Opinion OC-23/17,* para. 120.
[185] IACtHR, *Advisory Opinion OC-23/17,* p. 58.
[186] IACtHR, *Advisory Opinion OC-23/17,* paras 102, 118.
[187] IACtHR, *Advisory Opinion OC-23/17,* para. 102.
[188] IACtHR, *Advisory Opinion OC-23/17,* para. 151.

through its advisory jurisdiction and not its contentious one,[189] the significance of which is discussed in a later section.

African System of Human Rights

Pronouncements of an extraterritorial duty to protect within the African human rights system are scarce.[190] The African Court on Human and People's Rights ("ACtHPR") has yet to comment on extraterritoriality in general. The only pronouncement that could be identified as relevant to this dissertation is ACmHPR's General Comment on the right to life from 2015.[191]

According to the General Comment, states have a "positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties",[192] even in *extraterritorial* situations.[193] States should realize their duty to protect by adopting preventive measures,[194] which leaves states substantial room for discretion. The ACmHPR likewise reaffirmed the decisive role of home states in exercising extraterritorial human rights protections, as it noted that states should protect human rights extraterritorially from businesses *domiciled* in their territory or jurisdiction.[195] Similarly to the CCPR and IACtHR above, the ACmHPR limited the exercise of an extraterritorial home state duty to protect to the right to life.[196]

European System of Human Rights

Despite being the most developed regional human rights system,[197] the European human rights system (i.e., the Council of Europe system) is surprisingly lagging regarding pronouncements

[189] Clara Burbano-Herrera, Yves Haeck, 'Extraterritorial obligations in the inter-American human rights system', p. 119.
[190] E.g., Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' [2011] 27 South African Journal on Human Rights 249.
[191] African Commission on Human and Peoples' Rights (ACmHPR), 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: the Right to Life (Article 4)' (12 December 2015).
[192] ACmHPR, 'General Comment No. 3', para. 41.
[193] ACmHPR, 'General Comment No. 3', para. 14.
[194] ACmHPR, 'General Comment No. 3', para. 41.
[195] ACmHPR, 'General Comment No. 3', para. 18.
[196] ACmHPR, 'General Comment No. 3', para. 18.
[197] Rhona K. M. Smith, *International Human Rights*, p. 88.

of an extraterritorial duty to protect. The now-defunct European Commission of Human Rights ("ECmHR") did not address the existence of an extraterritorial duty to protect in its decisions. The ECtHR has likewise mostly been silent on the existence of such a duty.[198] While the Council of Europe does not consist of only the ECtHR,[199] views of other bodies have proved irrelevant.[200]

The first indication of an extraterritorial duty to protect stems from the ECtHR's 2001 judgment in *Cyprus vs. Turkey*. The Court held that the human rights obligations of Turkey, as the occupying power in Northern Cyprus, also extend extraterritorially to the acts of *private* parties violating the rights of Greek and Turkish Cypriots. The Court noted that "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention."[201] The Court also reaffirmed this dictum in its 2006 Admissibility Decision in *Isaak and Others against Turkey*.[202]

In a subsequent judgment in *Isaak and Others against Turkey* from 2008, the Court noted that states have "a positive obligation […] to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual"[203] within their jurisdiction.[204] Elsewhere, the Court clarified that a state may indeed exercise jurisdiction also extraterritorially.[205] While relevant to the emergence of an extraterritorial duty to protect in general, all three decisions relate to a state's occupation of another state's territory and not the business and human rights sphere. Ergo, they do not attribute a home state duty to protect within the meaning of this dissertation. However, such attribution is not impossible, as further detailed in Chapter 3.

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[198] Conall Mallory, 'A second coming of extraterritorial jurisdiction at the European Court of Human Rights' [2021] 82 QIL <http://www.qil-qdi.org/a-second-coming-of-extraterritorial-jurisdiction-at-the-european-court-of-human-rights/> last accessed 01.02.2024, p. 48.
[199] Council of Europe, 'The Council of Europe in Brief, Structure' (Council of Europe 2024) <https://www.coe.int/en/web/about-us/structure> last accessed 14.06.2024.
[200] Daniel Augenstein, Willem van Genugten, Nicola Jägers 'Business and Human Rights Law in the Council of Europe: Noblesse oblige' [2014] EJIL Talk < https://www.ejiltalk.org/business-and-human-rights-law-in-the-council-of-europe-noblesse-oblige/> last accessed 14.02.2024.
[201] ECtHR, *Case of Cyprus v. Turkey* (Judgment) (2001) App. No. 25781/94, para. 81.
[202] ECtHR, *Isaak and others v. Turkey* (Decision as to the Admissibility) (2006) App. No. 44587/98, p. 20.
[203] E.g., ECtHR, *Isaak and Others v.Turkey* (Judgment) (2008) App. No: 44587/98, para. 106.
[204] ECtHR, *Isaak and Others v.Turkey* (2008), para. 106.
[205] E.g., ECtHR, *Case of Al-Skeini and Others v. the United Kingdom* (Grand Chamber Judgment) (2011) App. No. 55721/07, para. 132.

1.3.3 Extraterritorial Duty to Protect in Other Views

United Nations Security Council

A 1972 United Nations Security Council resolution may also be considered an early affirmation of an extraterritorial duty to protect.[206] In the context of South Africa's occupation of Namibia and its use of repressive measures against African workers in Namibia,[207] the Security Council called "upon all States whose nationals and corporations are operating in Namibia […] to use all available means to ensure that such nationals and corporations conform, in their policies of hiring Namibian workers, to the basic provisions of the Universal Declaration of Human Rights".[208] This excerpt indeed conveys the impression that states should protect Namibian workers from human rights violations of their corporate nationals/residents even if they operate abroad, fully in line with an extraterritorial, home state duty to protect.[209] However, because of its limited scope and old age, its relevance may not be overstated.

United Nations Guiding Principles on Business and Human Rights

The non-binding UN Guiding Principles, unanimously adopted by the Human Rights Council ("HRC") in 2011, depart from the above consensus regarding an extraterritorial duty to protect. While they set out the expectation on states to ensure that "all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations",[210] i.e., extraterritorially, they maintain that states are not "generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction."[211]

[206] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' [2013] 117 Journal of Business Ethics 493, p. 505.
[207] United Nations Security Council (UNSC) 'Resolution 310 (1972) / [adopted by the Security Council at its 1638th meeting], of 4 February 1972' (4 February 1972) UN Doc. S/RES/310(1972), para. 4.
[208] UNSC 'Resolution 310 (1972)' para. 5.
[209] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' p. 506.
[210] HRC, 'Guiding Principles on Business and Human Rights', Principle 2.
[211] HRC, 'Guiding Principles on Business and Human Rights', Commentary to Principle 2.

The conclusion reached is not surprising, considering the legal context in which the UN Guiding Principles were adopted. As demonstrated in the above sections, few views supported the emergence of an extraterritorial duty to protect prior to 2011. While we can only speculate which approach the UN Guiding Principles would have endorsed if adopted today, they did not reject a future consolidation of an extraterritorial duty to protect. Moreover, they have explicitly recognized the states' *right* to exercise extraterritorial protections through regulation,[212] addressed in detail in Chapter 2.

Maastricht Principles on Extraterritorial Obligations of States

A final perspective on the extraterritorial duty to protect stems from the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights ("Maastricht Principles").[213] The Maastricht Principles were adopted in September 2011 by 40 international law experts, including members of international and regional human rights treaty bodies and Special Rapporteurs of the HRC,[214] as organized under the ETO Consortium. The Maastricht Principles have become the pre-eminent authority on an extraterritorial duty to protect and feature prominently in academic literature.[215]

The Maastricht Principles were issued only three months after the UN Guiding Principles. Despite having been adopted almost simultaneously, both instruments reached different conclusions about the state of law at that time. Allegedly on the basis of *standing* international law,[216] the Maastricht Principles found all states to have the obligation to protect human rights, "including civil, cultural, economic, political and social rights, both within their territories and *extraterritorially*."[217] In line therewith, the Maastricht Principles emphasized that states must take "necessary measures to ensure that non-State actors [including] private individuals and organisations, and *transnational corporations* and other business enterprises, do not nullify or

[212] HRC, 'Guiding Principles on Business and Human Rights', Commentary to Principle 2.
[213] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2013) <https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf> last accessed 17.02.2024.
[214] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', p. 3.
[215] E.g., Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022); Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35.
[216] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', pp. 3-4 (emphasis added).
[217] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 3 (emphasis added).

impair the enjoyment of economic, social and cultural rights." [218] Accordingly, such necessary measures comprise administrative, legislative, investigative, adjudicatory, and other measures.[219]

Similarly to the IACtHR, the Maastricht Principles emphasized that states must only take measures when the harm or threat of harm originates or occurs within the state's territory. Accordingly, this criterion is satisfied when a non-state actor has the nationality of the state concerned. In business scenarios, this includes corporations, the parent/controlling company of which is registered, domiciled within the state's territory, or has its centre of activity/main place of business/ substantial business activities therein. The Maastricht Principles also stipulated the necessity of "a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory".[220]

1.3.4 Consolidation of an Extraterritorial Duty to Protect in Human Rights Jurisprudence

It follows from the above that human rights bodies have reached a consensus on the concept of an extraterritorial duty to protect in international human rights law**,** particularly in the context of business and human rights**.** Except for the UN Guiding Principles, there is agreement regarding the existence of such a duty. There is agreement also in regards to the defining characteristics of such a duty, as summarized below.

According to the above human rights bodies, states should exercise a duty to protect from extraterritorial human rights violations of all non-state actors[221], including (transnational)[222] corporations.[223] For a duty to protect to arise in the business and human rights sphere,

[218] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 24 (emphasis added).
[219] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 24.
[220] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 25.
[221] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations' para. 24; CESCR, 'General Comment No. 14', para. 39; ACmHPR, 'General Comment No. 3' para. 41; CCPR, 'General comment no. 31', para. 8.
[222] CERD, 'Concluding observations, Canada' (2007), para. 17; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 24.
[223] CEDAW-Com, 'General recommendation No. 28', para. 36.; UNSC, 'Resolution 310 (1972)' para. 5.

corporations must be states' nationals,[224] i.e., be incorporated,[225] domiciled,[226] or registered[227] in the territory of the state exercising extraterritorial protections. Alternatively, they should have their centre of activity,[228] main offices,[229] main place of business,[230] or substantial business activities in the territory of the state concerned.[231] Some human rights bodies even attributed an extraterritorial duty to protect vis-à-vis a corporation's subsidiaries,[232] a somewhat controversial postulation from the perspective of public international law, as addressed in Chapter 2.

The above human rights bodies found an extraterritorial duty to protect based on the home state's territorial *capacity* to address the human rights violations in question. Thereby, they equated an extraterritorial duty to protect with a home state duty to protect. The analysis of a state's territorial capacity is a question of jurisdiction addressed in detail in Chapters 2 and 3.

The scope of an extraterritorial duty to protect is similar to a territorial duty to protect, as defined at the beginning of this Chapter. Accordingly, home states should prevent,[233] punish, prohibit,[234] investigate, or redress[235] extraterritorial human rights violations by corporations, i.e., exercise due diligence.[236] An extraterritorial home state duty to protect shall be realized by

[224] CEDAW-Com, 'General recommendation No. 28', para. 36.; UNSC, 'Resolution 310 (1972)' para. 5.
[225] CESCR, 'General comment No. 24', para. 26.
[226] CESCR, 'General comment No. 23', para. 70; CESCR, 'General comment No. 24', para. 26; CRC, 'General comment No. 16', para. 43; HRC, 'Guiding Principles on Business and Human Rights', Principle 2; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 25.
[227] CERD, 'Concluding observations, United Kingdom of Great Britain and Northern Ireland', para. 29; IACtHR, *Advisory Opinion OC-23/17,* para. 151.
[228] CRC, 'General comment No. 16', para. 43; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 25.
[229] CESCR, 'Statement on the obligations of States parties regarding the corporate sector', para. 5;
[230] CESCR, 'General comment No. 24' para. 26; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 25.
[231] CRC, 'General comment No. 16', para. 43.
[232] CESCR, 'General comment No. 24', para. 33; CRC, 'Concluding observations on the combined fifth and sixth periodic reports of Australia' (1 November 2019) UN Doc. CRC/C/AUS/CO/5-6, para 17 (a) (emphasis added).
[233] ACmHPR, 'General Comment No. 3', para. 41; ECtHR, *Isaak and Others v.Turkey* (Judgment) (2008) App. No: 44587/98, para. 106; CESCR, 'General comment No. 14', para. 39.; CESCR, 'General comment No. 15', para. 33; CESCR, 'General comment No. 24', para. 26; CCPR, 'General comment No. 31', para. 8; CEDAW-Com, 'General recommendation No. 28', para. 37.
[234] CEDAW-Com, 'General recommendation No. 28', para. 37; CCPR, 'General comment No. 31', para. 8.
[235] CCPR, 'General comment No. 31', para. 8.
[236] CCPR, 'General comment No. 31', para. 8.

all appropriate measures,[237] including political,[238] administrative,[239]and legislative measures.[240] Some bodies even stipulated that an extraterritorial duty to protect amounts to an extraterritorial obligation to regulate.[241]

According to the above jurisprudence, the extraterritorial duty to protect arises with regard to economic, social, and cultural rights[242] (including the right to health,[243] the right to water,[244] the right to just and favourable conditions of work,[245] the rights to land, environment, and an adequate standard of living[246]), and to civil and political rights,[247] including the rights to life[248] and integrity.[249] Human rights bodies also attributed an extraterritorial duty to protect with regard to children's rights,[250] the human rights of women and girls,[251] and indigenous people.[252]

Human rights bodies have limited the extraterritorial exercise of a duty to protect to instances in which a state may *reasonably* influence a corporation,[253] meaning that a reasonable link between the home state and the corporate conduct concerned must be established.[254] Other bodies required the exercise of extraterritorial protections only vis-à-vis direct and reasonably

[237] CESCR, 'General comment No. 23', para. 70; CESCR, 'General comment No. 24', para. 26; CCPR, 'General comment No. 36', para. 22; CEDAW-Com, 'General recommendation No. 28', para. 36.; IACtHR, *Advisory Opinion OC-23/17,* para. 118.
[238] CESCR, 'General comment No. 14', para. 39.; CESCR, 'General comment No. 15', para. 33.
[239] CERD, 'Concluding observations, Canada' (2007), para. 17; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 24.
[240] CESCR, 'General comment No. 23', para. 70; CEDAW-Com, 'Concluding observations, Switzerland' para. 41 (c); CERD, 'Concluding observations, Canada' (2007) para. 17; CERD, 'Concluding observations, United Kingdom of Great Britain and Northern Ireland', para. 29; IACtHR, *Advisory Opinion OC-23/17,* p. 58; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 24.
[241] CESCR, 'General comment No. 25', para. 84; CEDAW-Com, 'Concluding observations, Canada', para. 19 (a); CEDAW-Com, 'General recommendation No. 37', paras. 49, 51 (d).
[242] CESCR, 'Statement on the obligations of States parties regarding the corporate sector', para. 5; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 3.
[243] CESCR, 'General comment No. 14'; CERD, 'Concluding observations, United Kingdom of Great Britain and Northern Ireland', para. 29.
[244] CESCR, 'General comment No. 15'.
[245] CESCR, 'General comment No. 23'.
[246] CERD, 'Concluding observations, United Kingdom of Great Britain and Northern Ireland', para. 29.
[247] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 3.
[248] CCPR, 'General comment No. 36'; ACmHPR, 'General Comment No. 3'; IACtHR, *Advisory Opinion OC-23/17,* paras. 102, 118.
[249] IACtHR, *Advisory Opinion OC-23/17,* paras. 102, 118.
[250] CRC, 'General comment No. 16'.
[251] CEDAW-Com, 'General recommendation No. 28'.
[252] CERD, 'Concluding observations, Canada', para. 17.
[253] CESCR, 'General comment No. 14', para. 39; CESCR 'General comment No. 24' para. 33.
[254] CRC, 'General comment No. 16', para. 43; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 25.

foreseeable impacts on human rights[255] and reasonably foreseeable violations.[256] While the requirement of reasonableness has remained mostly undefined, the IACtHR clarified that it is met whenever harmful conduct originates in a state's territory.[257]

Having summarized the defining characteristics of an extraterritorial home state duty to protect above, it is now pertinent to briefly consider the language used by human rights bodies. While the language does not affect the overall normative significance of the bodies' outputs, it clearly indicates the bodies' understanding of the mandatory nature of an extraterritorial duty to protect. However, sometimes the same human rights bodies have used both a recommendatory and mandatory language.

Beginning with the recommendatory language, the CESCR, the CCPR, the CEDAW Committee, the CRC, and the CERD have all relied thereupon.[258] They "recommended"[259] and "encouraged"[260] states to exercise extraterritorial protections. However, as they have done so primarily in older documents, reflecting a *status quo ante*,[261] and in the context of concluding observations to the state´s periodic reports, their choice of language is hardly surprising. Because a recommendatory nature is characteristic of these views, it is unlikely meant to indicate an intrinsically recommendatory nature of an extraterritorial duty to protect.

In fact, the more recent and authoritative views, including general comments and general recommendations of UN human rights treaty interpreting bodies and the IACtHR's Advisory Opinion, indisputably convey the impression of *bindingness*. This also specifically includes bodies that have previously used recommendatory language,[262] thus demonstrating the

[255] CCPR, 'General comment No. 36', para. 22; CESCR, 'General comment No. 24', para. 32.
[256] CESCR, 'General comment No. 24', para. 32.
[257] IACtHR, *Advisory Opinion OC-23/17,* para. 102; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', para. 25.
[258] E.g., CESCR, 'General Comment No. 15', para. 33; CESCR, 'General Comment No. 19', para. 54; CESCR, 'Statement on the obligations of States parties regarding the corporate sector', para. 5; CCPR, 'Concluding observations, Canada', para. 6 (a); CRC, 'Concluding observations, Australia', para. 17 (a); CEDAW-Com, 'General recommendation No. 37', para. 49; CEDAW-Com, 'Concluding observations, Switzerland', para. 41 (c); CEDAW-Com, 'Concluding observations, Canada', para 19 (a); CERD, 'Concluding observations, Canada' (2012), para 14.
[259] CRC, 'Concluding observations, Australia', para. 17 (a); CEDAW-Com, 'Concluding observations, Canada', para. 19 (a); CERD, 'Concluding observations, Canada' (2012), para. 14.
[260] CERD, 'Concluding observations, Canada', (2007) para. 17; CERD, 'Concluding observations, United States of America', para. 30; CERD, 'Concluding observations, United Kingdom of Great Britain and Northern Ireland', para. 29.
[261] E.g., CESCR in 1999.
[262] Including the CESCR, CCPR, CRC, CEDAW-Com, as analysed above.

overriding character of these views. These bodies repeatedly referred to states' "obligations"[263] and "duties"[264] to protect human rights. Furthermore, they emphasized that states "must",[265] "have to",[266] or are "required"[267] to protect human rights extraterritorially. Some bodies even affirmed the emergence of a human rights "responsibility" for any resulting violations of such a duty.[268]

1.4 Home State Duty to Protect as a Mandatory Duty?

The above convergence of human rights bodies not only suggests the emergence of a new legal consensus but also underscores the significant shift in the understanding of the extraterritorial duty to protect from human rights violations of corporations incorporated, registered, or domiciled in a home state's territory by means of regulation. The growing recognition of this extraterritorial duty to protect is also demonstrated in recent state practice. Several states have adopted legislation to prevent and redress extraterritorial human rights violations of corporations incorporated, registered, or domiciled within their territories.[269] This raises the question of whether such exercise of extraterritorial protections is mandatory or merely recommended.

[263] CESCR, 'General comment No. 23', para. 70; CESCR, 'General comment No. 25', para. 84; CCPR, 'General comment no. 31', para. 8; CCPR, 'Decision concerning communication No. 2285/2013', para. 6.5; CCPR, 'General comment No. 36', para. 63; CRC, 'General comment No. 16', paras. 39, 43; CEDAW-Com, 'General recommendation No. 28', para. 36; CEDAW-Com, 'General recommendation No. 37', para. 43; IACtHR, *Advisory Opinion OC-23/17,* para. 104 (c).
[264] ACmHPR, 'General Comment No. 3', para. 41.
[265] CRC, 'General comment No. 16', para. 42.
[266] CESCR, 'General comment No. 14', para. 39.
[267] CESCR, 'General comment No. 24', paras. 32, 33; CEDAW-Com, 'General recommendation No. 37', para. 49.
[268] CESCR, 'General comment No. 24', para. 32.
[269] E.g., Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021, BGBl. I S. 2959 (Germany); Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), LOV-2021-06-18-99 (Norway), available in English at <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> last accessed 17.03.2024; LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (France).

1.4.1 A Mandatory Duty in Scholarly Views

Most business and human rights scholars seem convinced that an extraterritorial home state duty to protect is an existing *obligation* under international human rights law. One of the leading proponents of an extraterritorial home state duty to protect is Olivier de Schutter, the UN Special Rapporteur on extreme poverty and human rights and one of the business and human rights experts behind the Maastricht Principles. De Schutter began advocating in favour of a home state duty to protect already in 2006. He stated that because of host states' inability and unwillingness to punish corporate human rights violations within their territories, it would be desirable for home states to ensure extraterritorial human rights protections.[270] However, at that point in time, de Schutter concluded that an extraterritorial home state duty to protect is not yet anchored in existing international law.[271] He reaffirmed this view in 2010.[272]

Interestingly, de Schutter's views had changed by the time the Maastricht Principles were adopted in 2011. As one of the authors of the Maastricht Principles, he must have necessarily concluded that an extraterritorial duty to protect had now emerged from existing international human rights law.[273] De Schutter has held on to this conviction since.

For example, in 2015, de Schutter commented on the UN Guiding Principles on Business and Human Rights and found that "[t]here is one area where the Guiding Principles set the bar clearly below the current state of international human rights law: the extraterritorial human rights obligations of states, including, in particular, the duty of states to control the corporations they are in a position to influence, wherever such corporations operate."[274] While such a change of opinion is adequate given the changing legal landscape, it remains highly disputed whether the legal landscape has indeed changed. As was demonstrated above, human rights

[270] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' [2006] Catholic University of Louvain, available at <https://cridho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf> last accessed 06.12.2023, p. 2.
[271] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', p. 11.
[272] Olivier de Schutter, 'Sovereignty-Plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations' [2010] CRIDHO WP n°2010/5, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448107> last accessed 20.02.2023, p. 19.
[273] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations'.
[274] Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' [2015] 1 Business and Human Rights Journal 41, p. 45.

bodies have implemented the most substantial changes after the adoption of the Maastricht Principles and the publication of de Schutter's paper.

However, de Schutter is not the only scholar who assumes that existing international human rights law obliges states to exercise a duty to protect extraterritorially. This view is also taken by Daniel Augenstein,[275] David Kinley,[276] Tara van Ho,[277] and Khulekani Moyo.[278] Other, albeit more subtle recognitions, were given by Elena Pribytkova,[279] Antal Berkes,[280] Markus Krajewski,[281] and Takele Soboka Bulto.[282] For instance, Markus Krajewski stated that "there is a strong case to be made for the existence of a state duty to protect against human rights violations in the context of transnational business activities."[283] Takele Soboka Bulto noted that there is no reason to conclude that a duty to protect does not arise extraterritorially.[284]

While the views favouring an extraterritorial duty to protect are dominant,[285] other prominent human rights scholars challenge the existence thereof. One of the most vigorous opponents is Claire Methven O'Brien. In 2018, Methven O'Brien concluded that "at present, there cannot be said to exist any positive legal basis for such a duty" and that "the position articulated by

[275] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35, p. 37; Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations' [2013] Sydney Law School Research Paper No. 12/71, p. 22. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149921> last accessed 19.02.2024.
[276] Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations'.
[277] Tara Van Ho, 'Obligations of international assistance and cooperation in the context of investment law' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 328.
[278] Khulekani Moyo, 'Corruption, human rights and extraterritorial obligations' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), pp. 313, 323.
[279] Elena Pribytkova, 'Extraterritorial obligations in the United Nations system: UN treaty bodies' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) p. 103.
[280] Antal Berkes, 'Cross-border Pollution" in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 443-444.
[281] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities' p. 38.
[282] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' p. 275.
[283] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities' p. 38.
[284] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' p. 275.
[285] Tara Van Ho, 'Obligations of international assistance and cooperation in the context of investment law', p. 328.

the UNGPs, that states may be entitled, but are not obliged as a matter of human rights law, or indeed public international law, generally to regulate their companies' extraterritorial activities or human rights impacts, remains a correct one."[286]

This view is shared also by Samantha Besson,[287] Fons Coomans,[288] and Nadia Bernaz.[289] However, compared to O'Brien and Besson, Coomans and Bernaz are more contained in their opposition to the existence of such a duty. They acknowledge that exercising an extraterritorial duty to protect is increasingly recommended. However, they conclude that the law in the area is still developing and an explicit extraterritorial obligation to protect is likely not yet established as a matter of international human rights law.[290]

The lack of consensus is also evident when looking at the literature concerning the states' reception of an extraterritorial duty to protect. While a detailed analysis of such reception is outside the scope of this dissertation, several of the sources analysed above refer thereto. The majority view is that states do not uniformly support and sometimes even categorically oppose the notion of an extraterritorial duty to protect.[291] However, other scholars argue that there are instances in state practice in which states accept an extraterritorial duty to protect,[292] further adding to the complexity of the issue.

[286] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' [2018] 3 Business and Human Rights Journal 47, p. 72.
[287] Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' [2020] 9 ESIL Reflections <https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/> last accessed 20.02.2024.
[288] Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' [2011] 11 Human Rights Law Review 1, p. 31.
[289] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' [2013] 117 Journal of Business Ethics 493, p. 507.
[290] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?', p. 507; Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', p. 31.
[291] Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' [2014] 25 The European Journal of International Law 1071, p. 1087; Antal Berkes, 'Cross-border Pollution', p. 438; Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' [2014] 90 International Law Studies 20, p. 62.
[292] Monika Heupel, 'How Do States Perceive Extraterritorial Human Rights Obligations? Insights from the Universal Periodic Review' [2018] 40 Human Rights Quarterly 521, pp. 545-546; Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?', p. 506.

1.4.2 Normative Significance of Human Rights Jurisprudence

Despite a lack of scholarly consensus on the existence of a mandatory extraterritorial home state duty to protect, human rights bodies have contributed to the emergence of a trend in favour of such a duty. However, the emergence of such a trend, does not necessitate the emergence of a legal duty. While human rights jurisprudence constitutes an authoritative legal interpretation, its normative significance must be considered in detail.

Problematically, business and human rights scholars frequently disregard normative significance in their examinations of the bindingness of a home state duty to protect.[293] As a result, their findings are inaccurate and sometimes even invalid. In view thereof, the normative significance of the above human rights jurisprudence is considered below.

It is generally accepted that outputs of UN human rights treaty bodies, advisory opinions of regional human rights courts, and decisions of regional human rights commissions, as relied on above, are *not* legally binding.[294] There is no enforcement mechanism attached to either and state's implementation is voluntary.[295] Moreover, these views do not create either intra or inter-systemic binding precedents.[296]

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[293] E.g., Antal Berkes, 'Cross-border Pollution'; Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations'.

[294] Rosanne Van Alebeek, André Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law' in Helen Keller, Geir Ulfstein (eds), *UN human rights treaty bodies: law and legitimacy* (Cambridge University Press 2012), p. 407; Leonardo S. Borlini, Luigi Crema, 'The Legal Status of Decisions by Human Rights Treaty Bodies: Authoritative Interpretations or mission *éducatrice*?' [2020] Bocconi Legal Studies Research Paper No. 3483515 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483515> last accessed 22.02.2024; European Commission for Democracy Through Law (Venice Commission), 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (8 December 2014) CDL-AD(2014)036, para. 76; Cecilia M. Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion' [2018] 15 Brazilian Journal of International Law 255, p. 256; Lucyline Nkatha Murungi, Jacqui Gallinetti, 'The Role of Sub-Regional Courts in the African Human Rights System' [2010] 7 Sur International Journal on Human Rights 119, p. 128; HRC, 'Regional arrangements for the promotion and protection of human rights, Report of the Human Rights Council Advisory Committee' (10.07.2018) UN Doc. A/HRC/39/58.

[295] Helen Keller, Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Helen Keller, Geir Ulfstein (eds), *UN human rights treaty bodies: law and legitimacy* (Cambridge University Press 2012) p. 138; Venice Commission, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' paras. 76 – 78; Cecilia M. Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion', p. 256.

[296] Gian Maria Farnelli, Federico Ferri, Mauro Gatti, Susanna Vilanni, 'Introduction: Judicial Precedent in International and European Law' [2022] 2 The Italian Review of International and Comparative Law 263. p. 263.

As far as UN treaty body decisions are concerned, states may decide whether and how to implement them. They are not prohibited from dismissing the views if, after careful consideration, they believe them not to reflect the actual legal position in the case concerned.[297] For example, France repeatedly chose not to give effect to CCPR's views in 2011 and 2013.[298]

The advisory jurisdiction of the IACtHR is also meant to encourage rather than compel state compliance.[299] Because the Court's advisory jurisdiction is not subject to the requirement of additional consent, as is the case with its compulsory jurisdiction, the IACtHR lacks the mandate to attribute legal requirements.[300] In view thereof, the assertion that a mandatory extraterritorial duty to protect arises out of these views may only be regarded as incorrect.

Nevertheless, the relevance of the above views cannot be underestimated. Despite their non-binding status, they are highly authoritative statements of human rights obligations.[301] They are norm-filling,[302] have a substantial normative value,[303] and constitute "important contribution[s] to the conceptual evolution of the international law of human rights".[304]

Human rights bodies are significant global norm-setters,[305] providing major international and regional monitoring and accountability mechanisms.[306] As their capacity to adopt views is mandated through legally binding treaties, state parties may not simply choose to ignore their

[297] Venice Commission, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' para. 78.
[298] Nikolaos Sitaropulos, 'States are Bound to Consider the UN Human Rights Committee's Views in Good Faith' (Oxford Human Righst Hub 2015) < https://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/> las accessed 22.02.2024; Venice Commission, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of, para. 78.
[299] Cecilia M. Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion', p. 256.
[300] Julie Calidonio Schmid, 'Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory', [2006] 16 Duke Journal of Comparative and International Law 415, p. 421.
[301] Helen Keller, Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' p. 132; Cecilia M. Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion', p. 263.
[302] Kasey McCall-Smith, 'Interpreting International Human Rights Standards – Treaty Body General Comments in Domestic Courts' [2015] University of Edinburg School of Law Research Paper Series No. 3, pp. 1-2.
[303] James Crawford, *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press 2019) p. 615; Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' [2019] 9 Melbourne Journal of International Law 221, p. 229.
[304] Thomas Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court' [1985] 79 The American Journal of International Law, p. 18.
[305] Elena Pribytkova, 'Extraterritorial obligations in the United Nations system: UN treaty bodies', p. 103.
[306] Elena Pribytkova, 'Extraterritorial obligations in the United Nations system: UN treaty bodies', p. 103.

views. On the contrary, they must consider them in good faith.[307] As a result, their views often bring about internal legislative and administrative changes.[308] However, due to the lack of enforcement measures, the decision to implement these views in practice is ultimately the states' own.

The jurisprudence of UN human rights treaty bodies is sometimes viewed as a form of developing law, which is increasingly being "cited by domestic courts and regional human rights organs". [309] By being incorporated into the corpus of case law, the jurisprudence gradually moves towards a less 'soft' form of law.[310] The Spanish Constitutional Court even went as far as to declare in 2018 that some decisions of the UN human rights treaty bodies are indeed legally binding for the Spanish State.[311] Nevertheless, this is, without doubt, a minority opinion that does not yet reflect broader state practice.[312]

Finally, despite the absence of a formal precedent, human rights bodies tend to coordinate their approaches in practice.[313] Their views expand and clarify the understanding of human rights obligations and influence state practice.[314] Thus, any obligations arising therefrom may be consolidated in further outputs, including binding court judgments and state practice. Eventually, the outputs of human rights treaty bodies may contribute to the emergence of customary international legal norms.[315] However, until they have crystalized into customary international law, they may only be perceived as soft law or *lex ferenda*.[316]

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[307] Venice Commission, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts'; Kasey McCall-Smith, 'Interpreting International Human Rights Standards – Treaty Body General Comments in Domestic Courts', p. 4; Magnus Killander, 'Interpreting Regional Human Rights Treaties' [2010] 7 Sur International Journal on Human Rights 145, p. 163.
[308] James Crawford, *Brownlie's Principles of Public International Law*, p. 615.
[309] Kasey McCall-Smith, 'Interpreting International Human Rights Standards – Treaty Body General Comments in Domestic Courts', p. 8.
[310] Kasey McCall-Smith, 'Interpreting International Human Rights Standards – Treaty Body General Comments in Domestic Courts', p. 8.
[311] Koldo Casla, 'Supreme Court of Spain: UN Treaty Body individual decisions are legally binding' [2018] EJIL:Talk! < https://www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/> last accessed 22.02.2024.
[312] Leonardo S. Borlini, Luigi Crema, 'The Legal Status of Decisions by Human Rights Treaty Bodies: Authoritative Interpretations or mission *éducatrice*?'.
[313] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System', p. 264.
[314] Kasey McCall-Smith, 'Interpreting International Human Rights Standards – Treaty Body General Comments in Domestic Courts', p. 2.
[315] Helen Keller, Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy', p. 129.
[316] Helen Keller, Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy', p. 145.

At this point, it is also relevant to briefly address the normative significance of other business and human rights instruments introduced above. This includes the UN Guiding Principles on Business and Human Rights and the Maastricht Principles on Extraterritorial Obligations. The UN Guiding Principles are a self-proclaimed soft law;[317] their non-bindingness is thus undisputed.[318]

The Maastricht Principles are likewise non-binding. Because they were devised by international human rights law experts and practitioners, they constitute an international expert opinion.[319] Sometimes, the Maastricht Principles are viewed as soft law.[320] Problematically, the Principles try to persuade that they do not constitute new elements of law but, based on extensive research, "clarify extraterritorial obligations of States on the basis of *standing* international law."[321] However, as was clearly established by this dissertation, a mandatory extraterritorial duty to protect does not exist now and certainly did not exist in 2011 when the Maastricht Principles were adopted. The Principles thus merely "offer a progressive interpretation of the diverse jurisprudence in this nascent area of international law".[322]

1.5 Conclusion

This Chapter introduced the duty to protect in international human rights law as a means of improving the human rights conduct of (transnational) corporations. Because international human rights law does not attribute human rights obligations directly to corporations, it is states that must protect individuals by ensuring corporate human rights compliance in their territory and jurisdiction. Thus, a duty to protect is a focal point of this dissertation.

[317] HRC, 'Guiding Principles on Business and Human Rights', p. 1.
[318] Chiara Macchi, Claire Bright, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Martina Buscemi, Nicole Lazzerini, Laura Magi, Deborah Russo (eds.) *Legal Sources in Business and Human Rights* (Koninlijke Brill, 2020), p. 218.
[319] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', p. 3.
[320] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay', p. 36.
[321] ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations', pp. 3-4 (emphasis added).
[322] Rod Michelmore, 'International tax transparency and Least Developed Countries' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 301; Antal Berkes, 'Cross-border Pollution', pp. 443-444.

The duty to protect is a core obligation in international human rights law. It is recognized in human rights treaties and consolidated in human rights jurisprudence. It requires states to prevent, punish, prohibit, investigate, and redress human rights violations of all non-state actors, including corporations. A significant aspect of the duty to protect is the duty to exercise due diligence. Ergo, states may not be held responsible for human rights violations of corporations *per se*. They are only responsible for their own failure to address such violations.

States realize their duty to protect by adopting appropriate regulatory measures, including political, administrative, and legislative measures. This is why a duty to protect is sometimes argued to be a duty to regulate. States must exercise a duty to protect vis-à-vis all human rights, regardless of their categorization as civil, political, economic, social, or cultural. This is relevant to this dissertation, as corporations can affect the enjoyment of all human rights regardless of their categorization.

A duty to protect is predominantly territorial. This means that within the business and human rights sphere, it is primarily *host states*, as the states in which the human rights violations have occurred, that are responsible for ensuring human rights protections. However, when host states are unable or unwilling to do so, the question of a *home state* duty to protect arises. A home state duty to protect is *extraterritorial*, as it seeks to protect non-resident non-national victims of human rights violations from the extraterritorial conduct of corporations in host states.

The extraterritorial dimension of a duty to protect has been recognized in the jurisprudence of human rights bodies. The IACtHR and the UN human rights treaty interpreting bodies, including the CESCR, CCPR, CRC, CEDAW Committee, and CERD, have been the most influential in establishing an extraterritorial duty to protect. In fact, most of these bodies already framed an extraterritorial duty to protect as a home state duty to protect from business-related human rights violations. The ACmHPR has likewise recognized an extraterritorial duty to protect, albeit outside the context of business and human rights. Pronouncements of the UNSC and the ECtHR have been more tacit and indicated merely a potential for a future attribution of such a duty. Other relevant views, including the UN Guiding Principles on Business and Human Rights and the Maastricht Principles on Extraterritorial Obligations of States, have established a soft law duty.

Human rights bodies based the extraterritorial exercise of a duty to protect on a state's *capacity* to influence the non-state actor in question through regulation. In regards to the business and human rights sphere, they found such capacity to exist when corporations are incorporated, domiciled, or registered within the state's territory. Some bodies even noted that the capacity to exercise a duty to protect also arises with regard to subsidiaries.

To avoid an excessive reach of a state's protections, human rights bodies further limited the exercise of a duty to protect based on *reasonableness*. Accordingly, an extraterritorial duty to protect arises only with regard to reasonably foreseeable violations, which a state has the capacity to reasonably influence, based on a reasonable link between the home state and the corporate perpetrator of human rights violations. Despite the frequent reference to reasonableness, the criterion remained undefined. However, it has been argued that, at least in the business and human rights sphere, home state protections are reasonable if exercised vis-à-vis corporations incorporated, registered, or domiciled within the home state's territory.

The extraterritorial home state duty to protect was mostly recognized with regard to all human rights. The CCPR, the ACmHPR, and the IACtHR have restricted the exercise of a duty to protect to the rights to life and integrity. However, there is no reason of principle why this limitation should persist.

The majority of human rights bodies and instruments (with the notable exception of the UN Guiding Principles) thus attempted to attribute a *mandatory* extraterritorial duty to protect by means of home state regulation. This is reflected in their use of mandatory language as well as their claims to have based the attribution thereof on existing international human rights law. This was received in academic literature as evidence of a mandatory extraterritorial duty to protect.

Contrary to popular belief, this Chapter concludes that a mandatory extraterritorial home state duty to protect does not yet arise. Following a detailed analysis of the normative significance of the views arguing in favour of such a duty, this Chapter found all of them *non-binding*. Because they are not binding, they may not create new legal obligations. As a mandatory, extraterritorial duty to protect is not provided for in binding sources of international human rights law, an exercise of extraterritorial protection is presently only *recommended*. Despite the substantial development in human rights jurisprudence, the 2011 position adopted by the UN

Guiding Principles remains the correct one: "[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction."[323]

Nevertheless, there is an indisputable trend in favour of a home state duty to protect from extraterritorial human rights violations of corporations incorporated, registered, or domiciled within the home state's territory. This trend is increasingly manifested also in the growing recognition of states that domestic legislation in the business and human rights sphere should be adopted to ensure corporate respect for human rights.[324] It is thus possible (and perhaps even likely) that an extraterritorial, home state duty to protect will eventually solidify into a legal requirement through state practice, binding judgments of (regional) human rights courts, and treaty law. Because the exercise of an extraterritorial duty to protect depends on a state's jurisdictional competence, the scope thereof is determined in the subsequent Chapters.

[323] HRC, 'Guiding Principles on Business and Human Rights', Commentary to Principle 2.
[324] Daniel Augenstein, 'Home-state regulation of corporations' p. 285.

2. Chapter: Permissibility of Extraterritorial Human Rights Protections in Public International Law

2.1 Introduction

A home state duty to protect from extraterritorial human rights violations of (transnational) corporations located within the home state's territory has been ascertained by this dissertation as a key mechanism for the prevention and redress of business-related human rights violations in host states. Because a home state duty to protect is a human rights duty, it is regulated in international human rights law. Chapter 1 determined that, according to international human rights law, states are not yet obliged to exercise such protections by means of a mandatory duty to protect in international human rights law, but are strongly recommended to do so. Chapter 1 also established that a recommended duty to protect should be realized by means of home state *regulation*.

Public international law does not generally attribute a duty to exercise human rights protections, as demonstrated below. However, it does regulate the scope and permissibility of (extraterritorial) regulation through which a human rights duty to protect is realized. In accordance therewith, this Chapter examines whether, in absence of a mandatory duty, states have the *right* to exercise human rights protections by means of regulation, as proposed by human rights bodies in Chapter 1, and as seen in state practice.

The right to regulate falls within the scope of *jurisdiction* in public international law, the primary concern of this second Chapter. Problematically, the term "jurisdiction" is also used in the specific context of international human rights law to describe a different concept. As a result, both concepts are frequently conflated, which leads to confusion in an already complex field of study. This is the case especially in the business and human rights sphere, where both concepts are relied on in parallel. To avoid further confusion, this Chapter begins with a detailed analysis of jurisdiction in public international law. The meaning of jurisdiction in international human rights law is addressed in Chapter 3.

Because this Chapter concerns the adoption of home state regulation to prevent corporate human rights violations in *host states*, the question of the extraterritoriality of such regulation

is fundamental. In line therewith, this Chapter examines whether home state regulation within the meaning of this dissertation is, in fact, extraterritorial from the perspective of public international law.

The extraterritoriality of home state regulation in public international law is not a black-and-white issue. Public international law may classify a regulation as either directly or indirectly extraterritorial. Depending on this classification, different jurisdictional principles apply. These principles are relevant also in the context of this dissertation, as they determine the permissibility of home state regulation in the business and human rights sphere.

In its analysis of permissive principles, this Chapter begins with the territoriality principle applicable with regard to indirect extraterritorial regulation. It continues with an examination of the principles of extraterritorial jurisdiction. These principles are subdivided into permissive principles of criminal law jurisdiction and civil law jurisdiction. In the subsection on criminal law jurisdiction, the universality principle, the protective principle, and the nationality principle are introduced. In the subsection on civil law jurisdiction, the effects principle and a civil law equivalent to the nationality principle are presented. Finally, the underlying condition of reasonableness is considered with regard to all permissive principles.

2.2 Jurisdiction in Public International Law

As stated in the introduction, home state regulation, through which a recommended home state duty to protect is realized, is a question of jurisdiction in public international law. It refers to a state's competence or authority, based on- and limited by public international law, to regulate the conduct of both legal and natural persons by means of a state's domestic law. Such regulation includes legislative, executive, and judicial government activities.[325] In line with these government activities, jurisdiction takes the form of either prescriptive,[326] adjudicatory,[327] or enforcement jurisdiction.[328]

[325] James Crawford, *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press 2019) p. 440.
[326] Prescriptive jurisdiction may also be referred to as legislative jurisdiction.
[327] Adjudicatory jurisdiction may also be referred to as judicial jurisdiction.
[328] James Crawford, *Brownlie's Principles of Public International Law*, p. 440.

Prescriptive jurisdiction denotes a state's capacity to prescribe legal rules. Ergo, this type of jurisdiction is particularly relevant in view of home state regulation. Adjudicatory jurisdiction refers to a state's capacity to adjudicate disputes. Finally, enforcement jurisdiction reflects a state's authority to ensure compliance with its laws.[329]

Because jurisdiction is an emanation of state sovereignty, states are generally free to choose how to shape their domestic orders. The exercise of jurisdiction only becomes of interest to public international law once a state begins to promote its interests abroad, for example, by adopting extraterritorial laws.[330] The public international law of jurisdiction then sets out limits on the domestic legal order so that a state's exercise of jurisdiction does not infringe on the sovereignty of other states.[331] The concept of jurisdiction is thus closely linked to the principle of non-intervention[332] and determines the permissibility and lawfulness of a state's conduct.[333]

The exercise of jurisdiction under public international law is *voluntary*. Public international law does not generally impose a duty on states to exercise jurisdiction.[334] The only exception is a state's obligation to exercise jurisdiction vis-à-vis international crimes if a state is unwilling to extradite the alleged offender under the *aut dedere aut judicare* principle. Because this dissertation does not concern international crimes and the obligation applies only to the acts of natural, not legal persons,[335] a state's obligation to exercise jurisdiction under public international law is not further considered.

The exercise of jurisdiction is primarily *territorial*. Ergo, a state has the capacity to legislate, adjudicate, and enforce with regard to the acts of persons within its national territory, that is, a geographical area over which it has sovereignty or title.[336] In practice, however, states do not

[329] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' [2010] Corporate Social Initiative Working Paper No. 59 <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf> last accessed 01.02.2024, p. 13; Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' [2018] 3 Business and Human Rights Journal 47, p. 52.
[330] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edition, Oxford University Press 2015) p. 5.
[331] Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011), p. 29.
[332] Cedric Ryngaert, *Jurisdiction in International Law*, p. 6.
[333] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 27.
[334] Cedric Ryngaert, *Jurisdiction in International Law*, p. 22.
[335] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' [2006] Catholic University of Louvain <https://cridho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf> last accessed 01.02.2024, p. 12.
[336] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 8.

always limit their exercise of jurisdiction to their territories. They exercise jurisdiction also with respect to persons, property, or events beyond their territories, i.e., *extraterritorially*.[337]

The term "extraterritorial" often has a negative connotation and is used to condemn the long arm of domestic law. However, when the exercise of extraterritorial jurisdiction conforms to accepted jurisdictional principles, it is not controversial.[338] This was asserted by the Permanent Court of International Justice (PCIJ) already in 1927. The PCIJ held in the *Lotus* judgment that jurisdiction may "be exercised by a State outside its territory […] by virtue of a permissive rule derived from international custom or from a convention."[339]

2.2.1 (Extra-)Territoriality of Home State Regulation

Extraterritorial jurisdiction in public international law is subject to permissive jurisdictional principles. Only in conformity therewith may a state exercise jurisdiction without infringing upon another state's sovereignty. In the context of this dissertation, this raises the question of whether a home state's exercise of human rights protections by means of regulation is indeed extraterritorial and subject to the stringent limitations. While it was indicated in Chapter 1 that such protections are considered extraterritorial in international human rights law (for reasons clarified in Chapter 3), public international law regulates this matter differently.

The extraterritoriality of home state regulation in public international law is ambiguous. On the one hand, home states adopt regulation with regard to corporate perpetrators of human rights violations located within their territories. They do so on the basis of territorial jurisdiction, the permissibility of which is indisputable. On the other hand, home states adopt such regulation to prevent and redress human rights violations abroad, affecting foreign nationals and foreign states' interests. Ergo, home state regulation indisputably has a degree of extraterritoriality.[340]

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[337] Menno T. Kaminga, 'Extraterritoriality' [2020] Max Planck Encyclopaedia of International <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1040?prd=MPIL> last accessed 01.01.2024, para. 1.
[338] Cedric Ryngaert, *Jurisdiction in International Law*, pp. 7-8.
[339] *S.S. 'Lotus' Case (France v Turkey)* (Judgment) [1927] PCIJ Series A No 10, para. 45.
[340] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35, p. 50, footnote 89.

Extraterritoriality is not a black-and-white issue.[341] It is a question of degree and, depending on the degree, it may be either indirectly extraterritorial or directly extraterritorial.[342] This is conditional on the type of subjects it regulates and the obligations it imposes.[343]

If a regulation regulates conduct within a state's territory and produces extraterritorial effects, it is *indirectly* extraterritorial. If a regulation regulates vis-à-vis corporate conduct and entities abroad, it is *directly* extraterritorial.[344] Direct extraterritoriality is a more traditional understanding of extraterritoriality. In academia, indirect extraterritoriality is also referred to as a territorial extension of domestic law[345] or regulation with extraterritorial implications.[346] While the term "indirect extraterritoriality" is new in this dissertation, the concept is not.[347] In the sphere of business and human rights, it was introduced by then Special Representative to the UN Secretary-General on Business and Human Rights, John Ruggie.[348]

Because both types of extraterritoriality can affect a foreign state's interests, both are regulated by public international law. The exercise of indirect extraterritorial jurisdiction is subject to fewer legal constraints and is generally considered less controversial. Direct extraterritorial

[341] Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 'Exploring Extraterritoriality in Business and Human Rights, Summary Note of Expert Meeting' (Expert Meeting, Harvard Kennedy School, Cambridge MA, USA, 14 September 2010) <https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf> last accessed 17.03.2024, p. 2; Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 5.
[342] Human Rights Council (HRC), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc. A/HRC/17/31, Commentary to Principle 2.
[343] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' pp. 14-15.
[344] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 14.
[345] Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' [2014] 62 American Journal of International Law 87, p. 90.
[346] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 5.
[347] E.g., Cedric Ryngaert, *Jurisdiction in International Law*; Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas'; John G. Ruggie, 'UN SRSG for Business & Human Rights, Keynote Presentation' (EU Presidency Conference on the 'Protect, Respect and Remedy' Framework, Stockholm, 10-11 November 2009) <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-presentation-Stockholm-10-Nov-2009.pdf> last accessed 17.03.2024, p. 3; Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35; Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' [2013] 117 Journal of Business Ethics 493.
[348] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 5.

jurisdiction must conform to strict permissive principles (as analysed later) and is much more likely to trigger international criticism.[349]

While the distinction between direct and indirect extraterritorial jurisdiction is helpful and even necessary, it is likewise problematic. Firstly, it remains unclear how the distinction between a conduct within a state's territory and a conduct abroad should be made when the said conduct spans across territorial borders. This is frequently the case in the business and human rights sphere, where domestic legislations impose measures to be implemented throughout the entire worldwide supply chain.[350]

Secondly, even if a regulation is not directly extraterritorial and merely produces extraterritorial effects, it may impact another state's sovereignty. This is particularly true in the business and human rights sphere, where the effects of domestic legislation (i.e., the protection of human rights in host states) are the intended purpose of such legislation and not an accidental consequence. As a result, indirect extraterritorial jurisdiction is also regulated in public international law, as demonstrated below.

2.2.2 Home State Regulation and Permissive Principles of Jurisdiction

It was stipulated above that if a state exercises jurisdiction with an extraterritorial element (both direct and indirect), such exercise is subject to the permissive principles under public international law. Based on these permissive principles, public international law establishes the necessary *nexus* between the regulating state and the regulated situation or entity. If such a nexus is absent and a state exercises extraterritorial jurisdiction, it oversteps its legal competence under public international law.[351]

The below addresses how a nexus may be construed of and examines its availability in the context of a recommended home state duty to protect in the business and human rights sphere.

[349] Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 'Exploring Extraterritoriality in Business and Human Rights, Summary Note of Expert Meeting', p. 2; Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 13.
[350] E.g., Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021, BGBl. I S. 2959 (Germany).
[351] Cedric Ryngaert, *Jurisdiction in International Law*, p. 19.

The permissive principles on which a jurisdictional nexus is based differ depending on which type of extraterritorial jurisdiction is considered: direct or indirect extraterritorial jurisdiction, prescriptive, adjudicatory, or enforcement jurisdiction.

The exercise of extraterritorial *enforcement* jurisdiction requires physical access to a foreign state's territory. Permissibility is thus linked to having a foreign state's consent to the exercise of jurisdiction. Any unilateral, extraterritorial enforcement is impermissible, as it manifestly violates the principles of sovereignty and territorial integrity.[352] Extraterritorial enforcement jurisdiction is not considered further in this dissertation.

Contrary to enforcement jurisdiction, prescriptive- and adjudicative jurisdictions are less strictly regulated. This is because a state exercising either does not directly operate in a foreign state's territory. Any extraterritorial conduct derived from prescriptive/adjudicative jurisdiction is anchored in a state's territorial capacity to adjudicate and prescribe.[353] As a result, "all the states do it all the time"[354] and often without the foreign state's consent.[355]

Despite a wider tolerance with regard to the extraterritorial exercise of prescriptive/adjudicative jurisdiction, the permissibility of such exercise is still limited. The exercise of both types of jurisdiction may affect a foreign state's domestic interests and potentially infringe upon its sovereignty. To avoid this risk, relevant permissive principles must be followed closely.[356] The below addresses the following permissive principles: the territoriality principle, the active personality principle, the universality principle, the protective principle, the nationality principle (and its civil law equivalent), and the effects principle.

Please note that in line with accepted doctrine, adjudicative jurisdiction is subsumed into prescriptive jurisdiction in this dissertation.[357] The latter always implies the former. As noted by De Schutter, "it would hardly be conceivable for a State to seek to influence situations outside national territory by the adoption of extraterritorial legislation, while at the same time

[352] James Crawford, *Brownlie's Principles of Public International Law*, p. 462.
[353] Menno T. Kaminga, 'Extraterritoriality', para. 23.
[354] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 25.
[355] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 24.
[356] James Crawford, *Brownlie's Principles of Public International Law*, p. 440.
[357] Satya T. Mouland, 'Rethinking Adjudicative Jurisdiction in International Law' [2019] 29 Washington International Law Journal 173, p. 176; Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 23.

denying to its courts the power to accept jurisdiction over cases relating to such situations, to which such legislation is applicable."[358] Because this dissertation concerns a recommended duty to protect, which is realized mainly through regulation, *prescriptive* jurisdiction is likewise the most significant. The permissive principles of both adjudicative and prescriptive jurisdiction are also identical, so that the subsumption does not lead to inaccurate findings anyway.

2.2.2.1 Home State Regulation under the Territoriality Principle

It follows from the above that the question of permissibility of home state regulation in public international law must be answered in consideration of permissive jurisdictional principles. This section addresses the first and most basic permissive principle: the *territoriality* principle.[359] While this principle is most frequently applied in purely territorial contexts, it also finds application with regard to indirectly extraterritorial home state regulation.

In the case of indirect extraterritorial home state regulation, a state exercises jurisdiction vis-à-vis a corporation located in its territory. Thus, home states regulate based on a territorial nexus and their territorial competence to do so. Even if such regulation produces extraterritorial effects, the taking of jurisdiction is territorial, falling within the territoriality principle.[360]

The two most common examples of home state regulation in the business and human rights sphere are market-based due diligence legislation and parent-based due diligence legislation.[361] Both are considered to be indirectly extraterritorial.[362] While this dissertation is mainly concerned with matters pertaining to parent-based legislation, domestic laws may actually combine the elements of both.[363] Ergo, both types are briefly addressed below.

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[358] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 11.
[359] James Crawford, *Brownlie's Principles of Public International Law*, p. 440.
[360] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 14.
[361] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' p. 43.
[362] HRC, 'Guiding Principles on Business and Human Rights' Principle 2, Commentary; John G. Ruggie, 'UN SRSG for Business & Human Rights, Keynote Presentation' p. 4; Cedric Ryngaert, *Jurisdiction in International Law,* p. 94.
[363] Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), LOV-2021-06-18-99 (Norway), available in English at

Market-based due diligence legislation restricts foreign companies' access to a state's market based on their conformity to specific regulatory standards regarding their extraterritorial operations.[364] This practice is indirectly extraterritorial because it ultimately concerns the terms on which a foreign company operates within the regulating state, despite being informed by a conduct happening abroad and producing extraterritorial effects.[365] This approach is epitomized, for example, in the UK Modern Slavery Act 2015, which imposes transparency requirements with regard to modern slavery on businesses wanting to operate within the UK territory.[366]

Contrary to market-based due diligence legislation, parent-based due diligence legislation usually imposes obligations on the regulating state's corporate nationals.[367] It requires (parent) companies to exercise due diligence and adopt specific measures concerning corporate activities throughout the entire transnational group and its supply chain.[368] These measures may include group reporting obligations,[369] import/export controls, monitoring and prevention of risks associated with a company's supply chain, and the implementation of other measures vis-à-vis the management of also foreign subsidiaries and suppliers.[370] This type of jurisdiction is said to be indirectly extraterritorial as it is extraterritorial only "in terms of its implications, not in the taking of jurisdiction."[371] An example of parent-based due diligence legislation is the German Supply Chain Due Diligence Act.[372]

<https://lovdata.no/dokument/NLE/lov/2021-06-18-99> last accessed 17.03.2024; arguably also: Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021, BGBl. I S. 2959 (Germany).

[364] Cedric Ryngaert, *Jurisdiction in International,* p. 94.

[365] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 14.

[366] Modern Slavery Act 2015 (c. 30) (United Kingdom).

[367] Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' [2015] 1 Business and Human Rights Journal 41, p. 47.

[368] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 16.

[369] Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 'Exploring Extraterritoriality in Business and Human Rights, Summary Note of Expert Meeting' p. 2.

[370] E.g., Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021, BGBl. I S. 2959 (Germany); Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), LOV-2021-06-18-99 (Norway), available in English at <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> last accessed 17.03.2024; LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (France).

[371] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 14.

[372] Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021, BGBl. I S. 2959 (Germany).

In the case of a parent-based due diligence legislation, the territorial nexus is determined by the location of a parent company. This is a strong territorial nexus. In the case of a market-based due diligence regulation, the territorial nexus is established based on access to the domestic market. Such territorial nexus is weak because other states, especially home states of the companies operating on the domestic market of the state exercising jurisdiction, have an undeniably stronger nexus to regulate those companies with regard to their extraterritorial impacts.

Problematically, the scope of a territorial nexus under the territorial principles is currently limitless[373] and several states may claim jurisdiction. In a globalized world, the lack of such limitations leads to the possibility of relying on *any* territorial nexus and, therefore, a virtually universal exercise of jurisdiction.[374] Because such a universal exercise of jurisdiction is exempt from most jurisdictional constraints under public international law, states have broad room for action.

Despite being based on the territoriality principle, indirect extraterritorial jurisdiction is controversial. It allows the regulating state to export its standards and values[375] and "de facto impose its own laws […] on foreign States, especially if the latter are dependent on access to the former's markets for the sale of their products."[376] Imposing high regulatory standards through indirect extraterritorial jurisdiction may be unfair, especially to developing countries, who may have more difficulties implementing them.[377] Arguably, even the exercise of indirect extraterritorial jurisdiction may thus encroach on a foreign state's sovereignty and supplant its regulation.

For these reasons, public international law began to regulate the exercise of jurisdiction even under the territoriality principle. Accordingly, it only passes muster if it is temporary and exercised until an acceptable foreign or global solution is implemented.[378] The exercise of

[373] Cedric Ryngaert, *Jurisdiction in International Law*, pp. 49-50; Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 13.
[374] Cedric Ryngaert, *Jurisdiction in International Law*, p. 96.
[375] Cedric Ryngaert, *Jurisdiction in International Law*, p. 94.
[376] Cedric Ryngaert, *Jurisdiction in International Law*, p. 98.
[377] Cedric Ryngaert, *Jurisdiction in International Law*, p. 97.
[378] Cedric Ryngaert, *Jurisdiction in International Law*, pp. 94 – 96.

jurisdiction should also always be based on an internationally agreed-upon framework,[379] to ensure that a state only exercises jurisdiction in order to protect globally recognized values.[380]

It is evident that home state regulation in the business and human rights sphere conforms to these criteria. It is being adopted due to the lack of host state regulation and a binding international instrument. The adoption of home state regulation is also based on an international framework – the UN Guiding Principles on Business and Human Rights – which, despite being non-binding, was adopted unanimously by states.[381] Finally, such regulation is adopted to strengthen the protection of human rights, the principal value of the international community.[382]

2.2.2.2 Home State Regulation and Permissive Principles of Direct Extraterritorial Jurisdiction

As stated above, home state regulation may be both indirectly and directly extraterritorial. To the extent to which a regulation is directly extraterritorial, it must conform to the permissive principles of direct extraterritorial jurisdiction. The above determination of permissibility under the territorial principle is not sufficient.

In public international law, the permissive principles of criminal and civil law jurisdiction differ. Permissive principles in criminal law are well-developed, whereas permissive principles in civil law are minimally developed. This is likely a result of the public/private divide in international law. Despite the distinction, business and human rights scholars frequently rely on only criminal law principles when addressing the permissibility of extraterritorial home state regulation.[383] They argue that the principles of both may be asserted in parallel, as public

[379] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 12, Cedric Ryngaert, *Jurisdiction in International Law*, p. 99; HRC 'Guiding Principles on Business and Human Rights' Commentary to Principle 2.
[380] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 12; Cedric Ryngaert, *Jurisdiction in International Law*, p. 99.
[381] UN Working Group on Business and Human Rights, 'The UN Guiding Principles on Business and Human Rights, an Introduction' (OHCHR) <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf > last accessed 26.02.2024, p. 2.
[382] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 12; Cedric Ryngaert, *Jurisdiction in International Law*, p. 99.
[383] E.g., Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations'.

international law does not rely on the domestic characterization of jurisdiction as criminal or civil.[384] However, as this dissertation aims to be accurate, it makes this distinction and discusses the consequences thereof below.

Permissive Principles of Extraterritorial Criminal Jurisdiction

With the exception of the universality principle, a state may only exercise extraterritorial criminal jurisdiction in public international law if there is a connection between the subject matter of jurisdiction and the state exercising jurisdiction.[385] Such a connection is epitomized in two permissive principles of jurisdiction: the 'nationality principle' and the 'protective principle'. While the 'universality principle' is also relevant in the context of extraterritorial jurisdiction, it does not require the existence of a special nexus.[386] Each principle and its applicability in the business and human rights sphere are addressed below.

Universality Principle

Beginning with the universality principle, a state may exercise jurisdiction thereunder if a conduct threatens the international community as a whole.[387] Such conduct involves most serious international crimes,[388] including piracy, slavery, torture, war crimes, crimes against peace, crimes against humanity, and genocide.[389] When these crimes are committed, a state does not require a special territorial nexus to the crime in question to exercise jurisdiction.[390]

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[384] James Crawford, *Brownlie's Principles of Public International Law,* p. 455; Lucas Roorda, Cedric Ryngaert, 'Public International Law Constraints on the Exercises of Adjudicatory Jurisdiction in Civil Matters' in Forlati S, Franzina P, (eds.), *Universal Civil Jurisdiction: Which Way Forward?* (Koninklijke Brill NV 2021), p. 82.
[385] James Crawford, *Brownlie's Principles of Public International Law*, p. 440.
[386] Menno T. Kaminga, 'Extraterritoriality' para. 15; James Crawford, *Brownlie's Principles of Public International Law*, pp. 440 – 455; Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' p. 52.
[387] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' p. 52.
[388] Princeton University Program in Law and Public Affairs, 'The Princeton Principles on Universal Jurisdiction' (University of Minnesota Human Rights Library 2001) <http://hrlibrary.umn.edu/instree/princeton.html> last accessed 17.03.2024; Principle 1(2).
[389] Princeton University Program in Law and Public Affairs, 'The Princeton Principles on Universal Jurisdiction' Principle 2(1).
[390] Cedric Ryngaert, *Jurisdiction in International Law*, p. 120.

Thus, in theory, the exercise of universal jurisdiction is based solely "on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[391] However, in practice, exercising universal jurisdiction without a nexus is considered controversial.[392] For example, the exercise of universal jurisdiction by Spanish and Belgian authorities has given rise to considerable international tensions for its perceived violation of state sovereignty.[393]

While an interesting field of study, the universality principle is not applicable in the context of this dissertation for three reasons. Firstly, it is argued that universal jurisdiction arises only with regard to the conduct of individuals and not that of corporations.[394] While the ability of corporations to aid, abet, and commit serious international crimes is increasingly debated,[395] it is not yet sufficiently established in international law.[396] Secondly, the most common business-related human rights violations do not amount to international crimes.[397] Finally, because the exercise of universal jurisdiction is not tied to a state's territory, attributing an extraterritorial duty to protect specifically to home states is not necessary.

Protective Principle

The second permissive principle of extraterritorial jurisdiction in public international law is the protective principle. Contrary to the universality principle above, this principle requires a nexus between the conduct concerned and the state exercising jurisdiction. Under the permissive principle, a state may exercise jurisdiction in respect of persons, property, and events abroad

[391] Princeton University Program in Law and Public Affairs, 'The Princeton Principles on Universal Jurisdiction' Principle 1(1).
[392] Cedric Ryngaert, *Jurisdiction in International Law*, p. 120.
[393] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 142.
[394] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 12.
[395] International Bar Association (IBA), 'IBA War Crimes Committee shines a light on corporate liability cases' (IBA 2022) < https://www.ibanet.org/IBA-War-Crimes-Committee-shines-a-light-on-corporate-liability-cases> last accessed 04.03.2024.
[396] Nadia Bernaz, 'Corporate Criminal Liability under International Law, The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon' [2015] 13 Journal of International Criminal Justice 313, p. 330.
[397] Shift, Mazars LLP, 'The UN Guiding Principles Reporting Framework and its Implementing and Assurance Guidance' (Shift Project Ltd., Mazars LLP 2015) < https://www.ungpreporting.org/resources/how-businesses-impact-human-rights/> last accessed 26.02.2024.

only when its internal or external security and other vital interests are threatened.[398] Common examples include currency forging, coup d'état, or terrorist acts.[399] Nevertheless, the list of protected interests is not closed. According to James Crawford, the exercise of exorbitant jurisdiction under the protective principles is a matter of "knowing it when one sees it."[400]

Despite the list of protective interests not being closed, business-related human rights violations abroad do not qualify. Such human rights violations affect non-resident non-nationals and, therefore, do not constitute a home state's vital interest within the meaning of the protective principle nor a threat to a home state's internal/external security. Ergo, to claim the permissibility of extraterritorial home state regulation based on the protective principle is unacceptable.

Nationality Principle

The nationality principle shows the greatest promise within the context of this dissertation. The nationality principle is subdivided into two subprinciples: the active personality principle and the passive personality principle. Under the active personality principle, a state is entitled to exercise jurisdiction over its nationals even if they are located abroad and the conduct has been committed outside that state's territory.[401] A national may be a natural person, a ship, an aircraft, or a company.[402] Nationality is used as a mark of allegiance. Sometimes, such allegiance is also extended to residence.[403]

The passive personality principle refers to a state's exercise of jurisdiction in situations in which the extraterritorial conduct of foreigners injured a state's nationals abroad. The passive personality principle is controversial.[404] According to Cedric Ryngaert, it is "the most aggressive basis for extraterritorial jurisdiction".[405] The passive personality principle is

[398] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' p. 52; James Crawford, *Brownlie's Principles of Public International Law*, pp. 446.
[399] Menno T. Kaminga, 'Extraterritoriality' para. 13.
[400] James Crawford, *Brownlie's Principles of Public International Law*, p. 446.
[401] Cedric Ryngaert, *Jurisdiction in International Law* p. 104.
[402] Menno T. Kaminga, 'Extraterritoriality' para. 11.
[403] James Crawford, *Brownlie's Principles of Public International Law*, p. 443.
[404] James Crawford, *Brownlie's Principles of Public International Law*, pp. 444 – 445; Menno T. Kaminga, 'Extraterritoriality', para. 12.
[405] Cedric Ryngaert, *Jurisdiction in International Law*, p. 110.

regarded with suspicion mainly because its invocation may circumvent the rules of diplomatic protection, which constitute the usual means through which a state protects its nationals abroad.[406]

The significance of the passive personality principle is negligible within the business and human rights sphere. While it is conceivable for the home state's nationals to be harmed by the conduct of foreign corporations abroad, this dissertation focuses on the human rights impacts on local communities.[407] Moreover, even if a home state's nationals were injured, the possibility of relying on the passive personality principle is weakened by its controversial nature.

In contrast to the passive personality principle, the active personality principle is non-controversial. It is actually the firmest basis for justifying extraterritorial prescriptive jurisdiction.[408] According to this principle, a state may exercise jurisdiction with regard to the extraterritorial conduct of its nationals, including corporate nationals.[409] Ergo, it is specifically relevant to the business and human rights sphere and this dissertation.

For the active personality principle to be successfully invoked, the perpetrator's nationality must be established as that of the state exercising jurisdiction. While the rules on the nationality of natural persons, ships, and aircraft are clear enough, the determination of corporate nationality is ambiguous. This is especially true with regard to transnational corporations.[410]

The Issue of Corporate Nationality

Because a home state may exercise extraterritorial jurisdiction under the nationality principle only if the corporate perpetrator of human rights violations is its national, the issue of corporate

[406] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 24.
[407] Please note, that all of the emblematic examples of human rights violations presented in the Introduction to this dissertation affected local communities.
[408] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 2.
[409] Cedric Ryngaert, *Jurisdiction in International Law* p. 104; Menno T. Kaminga, 'Extraterritoriality', para. 11.
[410] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 2.

nationality becomes fundamental. Problematically, there is no single test for corporate nationality in public international law.[411] The choice of defining a corporation as one's national is left to states' discretion, enabling them to shape the mode of determination of corporate nationality and, with it, also the limits of their exercise of extraterritorial jurisdiction.[412]

While factors determining corporate nationality differ within domestic legal systems, some similarities may be identified. The traditionally accepted grounds of corporate nationality include the place of incorporation, the place of registration of a corporation's main office, and its principal place of business.[413] The places of incorporation and registration[414] as the basis of corporate nationality are the least ambiguous[415] and are sometimes even considered a norm of customary international law.[416]

This has been confirmed by the International Court of Justice ("ICJ") in the *Barcelona Traction* case. Accordingly, based "on an analogy with the rules governing the nationality of individuals", a corporate entity is allocated to those states "under the laws of which it is incorporated and in whose territory it has its registered office." [417] The Court found that this has "been confirmed by long practice and by numerous international instruments."[418]

It is sometimes suggested that corporate nationality may also be derived from the nationality of the persons who own or control the company.[419] In this scenario, a state would be allowed to exercise extraterritorial jurisdiction vis-à-vis the behaviour of foreign subsidiaries if they are controlled or owned by the state's nationals. While the emergence of this practice is

[411] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 22.
[412] James Crawford, *Brownlie's Principles of Public International Law*, p. 512; Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 31; Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' p. 46.
[413] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 32; and, e.g., Treaty on the Functioning of the European Union (adopted 25 March 1957, entered into force 01 January 1958) OJ C 326 (TFEU), Art. 54.
[414] Incorporation is the fact of creation as a legal person within a domestic legal system.
[415] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 34.
[416] James Crawford, *Brownlie's Principles of Public International Law*, p. 513.
[417] *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (second phase-merits) [1970] ICJ Rep 1970, para. 70.
[418] *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, para. 70.
[419] James Crawford, *Brownlie's Principles of Public International Law*, p. 512.

increasingly evidenced in international investment law,[420] it is not generally accepted.[421] In fact, the ICJ has declared this interpretation of corporate nationality unacceptable.[422]

Relevantly, the human rights jurisprudence analysed in Chapter 1 has reached the same conclusion. According to the majority view, home states may only exercise extraterritorial protections vis-à-vis its corporate nationals, i.e., corporations incorporated, registered, and domiciled within the home state's territories.[423] While some bodies have also recognized a home state duty to protect with regard to the extraterritorial conduct of subsidiaries, this is a minority opinion.[424] Thus, the majority view of human rights bodies conforms to the public international law on jurisdiction.

The Challenge of Corporate Nationality in the Business and Human Rights Sphere

While the determination of corporate nationality is fundamental to the business and human rights sphere in general and this dissertation in particular, it is problematic in practice, especially when transnational corporations are concerned. Under the above definition,

[420] For a more detailed analysis, please refer to: Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 33.
[421] Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights', pp. 46-47.
[422] *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, para. 184.
[423] Committee on Economic, Social and Cultural Rights (CESCR), 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (2017) UN Doc. E/C.12/GC/24, para. 26; CESCR, 'General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (2016) UN Doc. E/C.12/GC/23, para. 70; CESCR, 'Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights' (12 July 2011) UN Doc. E/C.12/2011/1, para. 5; Committee on the Rights of the Child (CRC), 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights' (2013) UN Doc. CRC/C/GC/16, para. 43; HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc. A/HRC/17/31, Principle 2; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2013) <https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf> last accessed 17.02.2024, para. 25; Committee on the Elimination of Racial Discrimination (CERD), 'Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, United Kingdom of Great Britain and Northern Ireland' (14 September 2011) UN Doc. CERD/C/GBR/CO/18-20, para. 29; Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights* (Advisory Opinion) (2017) OC-23/17*,* para. 151; Committee on the Elimination of Discrimination against Women (CEDAW-Com), 'General recommendation No. 28' (2010) UN Doc. CEDAW/C/GC/28, para. 36; United Nations Security Council (UNSC) 'Resolution 310 (1972) / [adopted by the Security Council at its 1638th meeting], of 4 February 1972' (4 February 1972) UN Doc. S/RES/310(1972), para. 5.
[424] CESCR, 'General comment No. 24', para. 33; CRC, 'Concluding observations on the combined fifth and sixth periodic reports of Australia' (1 November 2019) UN Doc. CRC/C/AUS/CO/5-6, para 17 (a).

corporations are to be treated as a composition of separate entities. Depending on their place of incorporation, registration, or their main place of business, these entities are either national or foreign.[425]

However, because the active personality principle is only applicable vis-à-vis a state's corporate nationals, the exercise of extraterritorial jurisdiction is only permissible with regard to these entities. Foreign entities within the same corporate structure fall outside the permissive scope of extraterritorial jurisdiction despite being *de facto* controlled by the home state's corporate nationals.[426] Problematically, it is usually those foreign entities that cause human rights violations in host states' territories. The above definition of corporate nationality and the resulting lack of home state guarantees thus actively encourage reckless investment and socially irresponsible business decisions.[427]

For example, the Anglo-Dutch oil conglomerate Shell has caused serious human rights violations in Nigeria.[428] Because the parent company does not operate in Nigeria directly but through locally owned subsidiaries,[429] human rights violations are attributed to the subsidiaries and not the parent company.[430] According to the above definition of nationality, these entities fall outside the scope of the active personality principle of extraterritorial jurisdiction, and the home state cannot regulate them, leaving a gap in human rights protections.[431]

In the business and human rights sphere, the issue of nationality may be mitigated by the adoption of parent-based due diligence legislation. This practice is actually already reflected in state practice. Parent-based due diligence legislation imposes obligations on controlling parents (as home state's corporate nationals) to effectively monitor the behaviour of their subsidiaries,

[425] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', p. 31.
[426] Sara L. Seck, 'Conceptualizing the Home State Duty to Protect Human Rights' [2009] <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729930> last accessed 17.03.2024, p. 6.
[427] Radu Mares, 'Liability within corporate groups: Parent company's accountability for subsidiary human rights abuses' in Surya Deva, David Birchall (eds.) *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020), p. 448.
[428] Amnesty International, 'Investigate Shell for complicity in murder, rape and torture' (Amnesty International 2017) < https://www.amnesty.org/en/latest/press-release/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/> last accessed 17.03.2024.
[429] Shell Nigeria, 'Our Business in Nigeria' (Shell 2024) < https://www.shell.com.ng/#> last accessed 17.03.2024.
[430] Sara L. Seck, 'Conceptualizing the Home State Duty to Protect Human Rights', p. 6.
[431] Radu Mares, 'Liability within corporate groups: Parent company's accountability for subsidiary human rights abuses', p. 448.

other affiliates, and business partners.[432] As demonstrated previously, parent-based due diligence legislation is usually considered indirectly extraterritorial and, therefore, outside the scope of the strict limitations of direct extraterritorial jurisdiction in public international law. However, such regulation must still conform to the above criteria of indirect extraterritoriality.

Permissive Principles of Extraterritorial Civil Jurisdiction

Civil or commercial jurisdiction is usually considered to be a matter of private (international) law.[433] Thus, scholars frequently avoid mentioning it in matters pertaining to extraterritorial jurisdiction in public international law.[434] However, in the context of this dissertation, reference to extraterritorial civil jurisdiction and its permissive principles under public international law must be made.

Home state regulation in the business and human rights sphere exists at the intersection between the public and the private. On the one hand, the regulation of corporations is subject to domestic civil laws and private international law. On the other hand, business and human rights regulation falls within the scope of international human rights law and, more broadly, of public international law. This is because such regulation concerns corporations' involvement in extraterritorial human rights abuse. As business and human rights regulation may raise sovereignty issues, public international law imposes limits thereupon.[435]

Because civil jurisdiction usually falls outside the scope of public international law, only a few principles were devised vis-à-vis the permissibility of extraterritorial civil jurisdiction. The most clearly formulated permissive principle is the *effects* principle, resembling the protective

[432] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', p. 44; Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021, BGBl. I S. 2959 (Germany); Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), LOV-2021-06-18-99 (Norway), available in English at <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> last accessed 17.03.2024; LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (France).
[433] Lucas Roorda, Cedric Ryngaert, 'Public International Law Constraints on the Exercises of Adjudicatory Jurisdiction in Civil Matters', p. 74.
[434] E.g., Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' p. 52; Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations'.
[435] Lucas Roorda, Cedric Ryngaert, 'Public International Law Constraints on the Exercises of Adjudicatory Jurisdiction in Civil Matters', p. 86.

principle introduced above. According to the effects principle, a state may exercise jurisdiction whenever foreign conduct produces substantial effects within the state's territory.[436] However, the effects principle is not limited to effects amounting to threats to a state's security or vital interests within the meaning of the protective principle but encompasses harmful effects in general.[437] While the effects principle is relied on in state practice, usually by the United States of America and the European Union,[438] it is highly controversial.[439] Any reliance thereupon regularly provokes criticism by other states.[440]

Regardless of its controversial nature, the effects principle is inapplicable within the context of this dissertation. Home state regulation in the business and human rights sphere does not have effects within the regulating state's territory. Such regulation is being adopted to protect non-resident non-nationals from extraterritorial human rights violations. The exercise of prescriptive jurisdiction is thus meant to address effects *outside* the home state's territory.

A second permissive principle available in the sphere of civil or commercial law is a civil law equivalent to the active personality principle.[441] It is relied on in state practice, for example, by the US, when it subjects the worldwide income of its (corporate) nationals to domestic taxation.[442] Why such an exercise of jurisdiction is directly extraterritorial instead of indirectly extraterritorial has not been addressed in academia and remains unclear.

Under this principle, it is acceptable for home states to exercise (direct) extraterritorial civil jurisdiction vis-à-vis the conduct of their corporate nationals. As home state regulation in the business and human rights sphere usually addresses the conduct of the home state's corporate national, the active personality principle finds applicability. However, the exercise of jurisdiction may prove difficult given the ambiguous determination of corporate nationality, as addressed above.

[436] Menno T. Kaminga, 'Extraterritoriality', para. 15.
[437] Olivier de Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' p. 23; Danielle Ireland – Piper, 'Extraterritorial criminal jurisdiction: Does the long arm of the law undermine the rule of law?' [2012] 13 Melbourne Journal of International Law 122, p. 131.
[438] James Crawford, *Brownlie's Principles of Public International Law*, p. 447.
[439] Menno T. Kaminga, 'Extraterritoriality', para. 15.
[440] James Crawford, *Brownlie's Principles of Public International Law*, p. 447.
[441] Cedric Ryngaert, *Jurisdiction in International Law*, pp. 107-108.
[442] Cedric Ryngaert, *Jurisdiction in International Law,* p. 107.

The lack of clearly defined permissive principles in the sphere of civil/commercial law is problematic, as the resulting permissibility of directly extraterritorial business and human rights regulation is uncertain. However, because public international law is ultimately "blind to the domestic characterization of an exercise of State authority as penal, regulatory, or private",[443] the lack of specificity in the civil/commercial sphere is not concerning as jurisdictional principals of criminal law are applicable in parallel. This aligns with Crawford's stipulation that there is "no great difference between the problems created by assertion of civil and criminal [extraterritorial] jurisdiction".[444] It would also explain why many prominent scholars avoid any reference to the jurisdictional distinction between civil and criminal law.

2.2.3 Reasonable Exercise of Jurisdiction

The exercise of extraterritorial jurisdiction, both direct and indirect, is argued to be subject to the qualifying concept of *reasonableness*.[445] This is especially true with regard to jurisdictional justifications based on permissive principles that are not universally accepted. According to this concept, assertions of jurisdiction are merely *prima facie* valid and must survive a subsequent reasonableness analysis to be considered appropriate and lawful under public international law.[446]

Because several states may claim extraterritorial jurisdiction, an additional analysis based on reasonableness is helpful to identify the state with a stronger link, i.e., the state with the best case for exercising jurisdiction.[447] While in the context of business and human rights, host states should have a regulatory primacy, such regulatory primacy is arguably relinquished in favour of home states when host states are unwilling or unable to adopt protective measures.

The legal status of reasonableness is debatable at present. While it has been authoritatively argued that states have an "obligation not only to exercise prescriptive jurisdiction pursuant to accepted permissive principles, but also conform to reasonableness under public international

[443] Lucas Roorda, Cedric Ryngaert, 'Public International Law Constraints on the Exercises of Adjudicatory Jurisdiction in Civil Matters' p. 82.
[444] James Crawford, *Brownlie's Principles of Public International Law,* p. 455.
[445] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' pp. 10, 20.
[446] Cedric Ryngaert, *Jurisdiction in International Law,* p. 146.
[447] Cedric Ryngaert, *Jurisdiction in International Law*, p. 145.

law",[448] this has also been authoritatively refuted.[449] Within the specific context of home state regulation in the business and human rights sphere, the criterion of reasonableness is indispensable, [450] as also demonstrated in Chapter 1.

According to the human rights bodies and instruments analysed in Chapter 1, extraterritorial protection of human rights by means of home state regulation must always be *reasonable*. Pursuant to the CESCR, such protections must be exercised with regard to *reasonably* foreseeable human rights violations[451] and only when the state's capacity to influence the corporate perpetrator of human rights violations is reasonable.[452] Pursuant to the CCPR, the exercise of human rights protections must have a reasonably foreseeable impact.[453] The CRC and the Maastricht Principles on Extraterritorial Obligations specified that a reasonable link between the state exercising protections and the harmful conduct is necessary.[454] Finally, the IACtHR emphasized that extraterritorial jurisdiction should be exercised as may be reasonably expected.[455]

While reasonableness plays a prominent role in public international law in general and the business and human rights sphere in particular, its exact meaning remains unspecified.[456] Even the human rights jurisprudence cited in Chapter 1 has failed to define reasonableness despite heavily relying on the concept. As a result, "almost any jurisdictional assertion could be defended or opposed by invoking […] reasonableness factors."[457] Such factors can be merely "mundane concerns of political and economic loss or expansion of power", rather than legal grounds determining jurisdictional reasonableness.[458]

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[448] American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States,* (American Law Institute 1987) <http://www.kentlaw.edu/perritt/conflicts/rest403.html> last accessed 18.03.2024, para. 403, Commentary; Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 20.
[449] E.g., Cedric Ryngaert, *Jurisdiction in International Law,* p. 180.
[450] HRC, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22.04.2009) UN Doc. A/HRC/11/13, para. 15.
[451] CESCR, 'General comment No. 24', para. 32.
[452] CESCR, 'General comment No. 14', para. 39; CESCR, 'General comment No. 24', para. 33.
[453] Human Rights Committee (CCPR), 'General comment no. 36, Article 6 (Right to Life)' (2019) UN Doc. CCPR/C/GC/35, para. 22.
[454] CRC, 'General comment No. 16', para. 43; ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', para. 25.
[455] IACtHR, *Advisory Opinion OC-23/17,* para. 120.
[456] Olivier de Schutter, *International Human Rights Law*, p. 857; Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 21.
[457] Cedric Ryngaert, *Jurisdiction in International Law,* p. 185.
[458] Cedric Ryngaert, *Jurisdiction in International Law,* p. 185.

Jennifer Zerk has provided some guidance on reasonableness in her extensive study of extraterritorial jurisdiction. Accordingly, the exercise of jurisdiction is reasonable if it is authorised under a multilateral regime and if there is an international consensus that the regulated activity is wrong.[459] In Zerk's view, the determination of reasonableness may also be inferred from state's reactions to the exercise of jurisdiction of other states.[460]

Parent-based legislation in the business and human rights sphere, as relevant to this dissertation, arguably conforms to Zerk's criteria. Such legislation is adopted in view of the UN Guiding Principles on Business and Human Rights – a universally accepted framework. It aims to prevent business-related human rights violations, which are internationally condemned. Finally, the necessity thereof is increasingly accepted by the international community, as evidenced in the growing adoption of domestic laws in the business and human rights sphere.

2.3 Conclusion

This Chapter addressed the extent to which home state regulation, as a means of realizing a recommended extraterritorial duty to protect, is permissible under public international law. Permissibility of home state regulation was assessed through the prism of prescriptive jurisdiction. At the outset, it was established that jurisdiction is linked to a state's sovereign *right* to prescribe, adjudicate, and enforce. Public international law does not interfere with a domestic exercise of jurisdiction unless international crimes are committed and the duty to exercise jurisdiction under the *aut dedere aut judicare* principle arises. Because such a duty only arises with regard to the acts of natural- and not legal persons, this dissertation focused on the exercise of a right to adopt home state regulation.

This Chapter determined that the exercise of jurisdiction in public international law may also be extraterritorial. Because such an exercise of jurisdiction may potentially encroach on another state's sovereignty, it is subject to limitations in public international law. To establish whether

[459] House of Commons, 'Foreign Affairs – First Joint Report' (2003) <https://publications.parliament.uk/pa/cm200203/cmselect/cmfaff/620/62002.htm> last accessed 18.03.2024, para. 38; Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' pp. 213-214.
[460] Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' p. 141.

such limitations apply also in the context of home state regulation in the business and human rights sphere, the extraterritoriality thereof had to be determined first.

Extraterritoriality of home state regulation is a contentious issue. Because home state regulation is adopted based on a state's territorial capacity, it is often argued not to be subject to extraterritorial jurisdiction despite producing extraterritorial effects. This Chapter found that the extraterritoriality of home state regulation is a question of *degree*. Home state regulation regulating conduct within the home state's territory, yet producing effects abroad, was established to be *indirectly* extraterritorial. Home state regulation regulating conduct outside the state's territory was determined as *directly* extraterritorial. As home state regulation may be both directly and indirectly extraterritorial, the permissive principles of both types of jurisdictions were found relevant.

The exercise of indirect extraterritorial jurisdiction is anchored in the territoriality principle. In the context of home state regulation, a state regulates vis-à-vis a corporation located within its territory, i.e., on the basis of a territorial nexus. This also applies to the two most frequently adopted types of regulations in the business and human rights sphere: the parent-based due diligence legislation and the market-based due diligence legislation. The former regulates with regard to a parent located within the state's territory, and the latter with regard to a company operating within the state's domestic market.

As indirect extraterritorial jurisdiction is based on a territorial nexus, it is subject to fewer legal constraints than direct extraterritorial jurisdiction. The exercise should be reasonable, temporary, and based on an internationally recognized framework. It has been argued above that these criteria are met in the business and human rights sphere.

However, due to the lack of a clear definition of a territorial nexus, indirect extraterritorial jurisdiction is an ambiguous concept. In a globalized world, virtually all states may claim to have a territorial nexus, resulting in an almost universal jurisdiction. Furthermore, the distinction between direct and indirect extraterritorial jurisdiction is difficult, especially when a territorial link is required with regard to both types of jurisdiction. This is also an issue with respect to home state regulation in practice, as it is unclear where an indirectly extraterritorial regulation ends and a directly extraterritorial regulation begins.

Because home state regulation may also be directly extraterritorial, the permissive principles of direct extraterritorial jurisdiction were likewise analysed. It has been argued that out of the six main permissive principles of jurisdiction, including the active personality principle, the passive personality principle, the universality principle, the protective principle, and the effects principle, only the active personality principle and its civil jurisdiction equivalent are applicable with regard to home state regulation in the business and human rights sphere. Incidentally, both are considered to be the least controversial. Other permissive principles were found inconsequential. While an initial distinction was made between the permissive principles of civil law jurisdiction and criminal law jurisdiction, it was established that public international law is ultimately blind to such domestic law distinction and that it may be disregarded in practice.

It was determined that the active personality principle and its civil jurisdiction equivalent permit the adoption of extraterritorial home state regulation vis-à-vis the conduct of a home state's corporate nationals. Problematically, corporate nationality was found to lack a universal definition in public international law. However, this Chapter determined that corporate nationality is widely recognized when a corporation is incorporated, registered, or domiciled within the home state's territory, in line with the findings of Chapter 1.

This Chapter thus found that the exercise of extraterritorial jurisdiction by means of home state regulation is generally *acceptable* in public international law if the permissive principles under the territoriality principle (indirect extraterritorial jurisdiction) or the active personality principle (direct extraterritorial jurisdiction) are satisfied. For both types of jurisdiction, it was determined that, if corporations are incorporated, registered, or domiciled in a home state's territory, the permissive jurisdictional principles are satisfied. While under the territoriality principle, the place of incorporation/registration/domicile is evidence of a territorial nexus, it is a legal requirement under the active personality principle. Relevantly, these findings correspond with the findings of Chapter 1.

Despite the lack of a mandatory home state duty to protect, this Chapter demonstrated that the exercise of human rights protection by means of home state regulation under a recommended duty to protect is permissible. This is significant, as it may further expedite a future consolidation of a *mandatory* home state duty to protect by means of regulation. How such a duty may be attributed based on human rights jurisdiction is analysed in the following Chapter.

3. Chapter: Jurisdiction in International Human Rights Law

3.1 Introduction

Throughout this dissertation, an extraterritorial duty to protect by means of home state regulation is presented as a potential solution to the inefficient human rights protections from business-related violations in host states. While Chapter 1 found that such a duty is not yet mandatory, it demonstrated a trend in favour of attributing a *recommended* extraterritorial home state duty to protect. It also noted that a recommended duty is likely to become mandatory with time. These findings align with Chapter 2, where it was determined that a home state duty to protect by means of regulation is generally *permissible* if exercised vis-à-vis corporations incorporated, registered, or domiciled within the home state's territory.

The means of attributing an extraterritorial home state duty to protect still needs to be addressed. Problematically, human rights bodies frequently fail to do so, causing ambiguities as to the duty's foundation, overall existence, and the resulting permissibility. In view thereof, this Chapter aims to clarify the foundation of the duty to protect and determine whether a future attribution of a mandatory duty is foreseen in existing international human rights law.

This Chapter finds the question of attribution to be answered through the prism of *jurisdiction* in international human rights law. Because a duty to protect in the business and human rights sphere affects non-resident non-nationals in home states, it pertains to the exercise of *extraterritorial* jurisdiction. As indicated in Chapter 2, the concept of jurisdiction in international human rights law differs from that in public international law, necessitating a detailed examination.

The point of departure in discussing extraterritorial jurisdiction and the attribution of human rights duties is the jurisdiction clauses of universal and regional human rights treaties. An analysis of jurisdiction clauses is fundamental to this dissertation, as these clauses provide the only text-based indication as to the emergence of extraterritorial duties in general. Even if treaty texts do not explicitly mention an extraterritorial duty to protect, they imply the emergence of extraterritorial jurisdiction, through which such a duty is attributed.

This dissertation then defines human rights jurisdiction based on the interpretations of human rights courts, bodies, and scholarly articles. Relevantly, it also addresses what extraterritorial human rights jurisdiction is not. A definition by negation helps further to delimit the defining characteristics of human rights jurisdiction. It also helps to avert the frequent conflation of human rights jurisdiction with public international law jurisdiction and state responsibility for internationally wrongful acts.

This Chapter demonstrates that, similarly to public international law, international human rights law jurisdiction cannot be claimed towards everyone. A *nexus* must be established between the state exercising jurisdiction and the human rights violation in question. Such a nexus is reflected in three jurisdictional models: the spatial, personal, and cause-and-effect models. The scope of each model is introduced based on relevant human rights jurisprudence. While the spatial- and personal models are almost universally recognized, the case law of the European Court of Human Rights is the most pertinent.

However, the *cause-and-effect model* is the jurisdictional model showing the biggest promise in attributing a duty to protect from business-related human rights violations by means of home state regulation. This newest and most controversial jurisdictional model has emerged primarily in the jurisprudence of UN human rights treaty interpreting bodies and the Inter-American Court of Human Rights ("IACtHR"). Despite its relevance in the business and human rights sphere, it is frequently disregarded in the business and human rights scholarship. Because of this research gap, this Chapter aims to provide one of the most detailed analyses of this jurisdictional model. Subsequently, it determines whether a future mandatory extraterritorial home state duty to protect may be attributed based on the cause-and-effect model also in the business and human rights sphere.

3.2 Extraterritorial Jurisdiction in Human Rights Treaties

The point of departure for attributing human rights obligations in general and a home state duty to protect in the business and human rights sphere in particular, are so-called jurisdiction clauses in regional and universal human rights treaties. While they do not define the term jurisdiction, they determine the scope of application of human rights treaties, i.e., establish

when the threshold for jurisdiction is met in the first place.[461] Even if human rights jurisdiction clauses say nothing explicit about their extraterritorial application, it is demonstrated below that they generally do *not* establish territory as the threshold criterion of their applicability.

The majority of human rights treaties contain a jurisdiction clause.[462] While this is not always the case,[463] the threshold criterion of jurisdiction also applies to treaties without a jurisdiction clause.[464] Interestingly, it is mainly treaties *with* a jurisdiction clause that cause controversies in international human rights law and require a detailed interpretation. As stated by the British Supreme Court Justice Lord Dyson, it is remarkable how a "small number of apparently simple words have proved to be […] troublesome".[465] Both treaty categories and their implications on the emergence of a home state duty to protect from extraterritorial business-related human rights violations are analysed below.

3.2.1 Treaties with a Jurisdiction Clause

This section addresses jurisdiction clauses, their interpretation, and implications of the following human rights treaties: the International Covenant on Civil and Political Rights

[461] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35, p. 48.
[462] E.g., International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 2.1; United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Art. 2.1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Art. 2.1; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Art. 1; The American Convention on Human Rights "Pact of San Jose, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) No. 17955 (ACHR), Art. 1.1; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICMW) Art. 7; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPED) Art. 9.
[463] E.g., International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1996, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1248 UNTS 13 (CEDAW).
[464] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' [2011] 27 South African Journal on Human Rights 249. pp. 257 – 259; Lea Raible, 'Between facts and principles: jurisdiction in international human rights law' [2022] 13 Jurisprudence 52, p. 55; Marko Milanović, *Extraterritorial Application of Human Rights Treaties,* p. 19.
[465] Lord Dyson, 'The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But Is It a Sound One?' (Essex University, 30 January 2014) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf> last accessed 16. 04. 2024.

("ICCPR"); the United Nations Convention on the Rights of the Child ("UNCRC"); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"); the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"); the American Convention on Human Rights ("ACHR"); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("ICRMW"); the International Convention for the Protection of All Persons from Enforced Disappearance ("ICPED"), and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). While this section does not provide an exhaustive account of all human rights treaties containing a jurisdiction clause, it introduces jurisdiction clauses of the most relevant core human rights treaties.

The jurisdiction clause of the ECHR states that "High Contracting Parties shall secure to everyone within their *jurisdiction* the rights and freedoms defined in Section I of [the] Convention."[466] The jurisdiction clauses of the ACHR, the UNCRC, and the ICERD are almost identical in meaning, as they have all been modelled on the prototype clause from the ECHR.[467] The ACHR states that "[t]he States Parties to [the] Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their *jurisdiction* the free and full exercise of those rights and freedoms".[468] The UNCRC establishes that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their *jurisdiction*".[469] Finally, the ICERD affirms that "States Parties shall assure to everyone within their *jurisdiction* effective protection".[470]

Because the above jurisdiction clauses refer to "jurisdiction" instead of "territory", they enable an extraterritorial application, as confirmed in human rights jurisprudence. The European Court of Human Rights ("ECtHR") has repeatedly emphasized that "[t]he concept of 'jurisdiction' under Article 1 of the Convention […] is *not restricted* to the national territory of the

[466] ECHR, Art. 1 (emphasis added).
[467] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 11.
[468] ACHR, Art. 1 (1) (emphasis added).
[469] CRC, Art. 2 (1) (emphasis added).
[470] ICERD, Art. 6 (emphasis added).

Contracting States."[471] Relevantly, the Court recognized that jurisdiction may also exist beyond the European *espace juridique*.[472]

The IACtHR likewise affirmed that "'jurisdiction' referred to in Article 1(1) of the American Convention is *not limited* to the national territory of a State but contemplates circumstances in which the extraterritorial conduct of a State constitutes an exercise of its jurisdiction."[473] Similarly to the European system, jurisdiction in the Inter-American system may be amplified beyond the American continent.[474] Finally, the Committee on the Rights of the Child ("CRC") also reaffirmed the permissibility of extraterritorial jurisdiction when it noted that the UNCRC "does not limit a state's jurisdiction to "territory".[475]

The CAT and ICPED also include a jurisdiction clause. Compared to the abovementioned treaties, they do not contain just one but multiple jurisdiction clauses.[476] Nevertheless, the implications of their jurisdiction clauses remain the same. Both treaties establish that a state must take measures to ensure the protected rights from violations committed in "*any* territory under its *jurisdiction*".[477] Both treaties thus manifest the overriding character of jurisdiction over territory.[478]

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[471] European Court of Human Rights (ECtHR), *Case of Loizidou v. Turkey Judgment* (Grand Chamber Judgment) (1996) App. No. 15318/89, paras. 52-57; ECtHR, *Case of Cyprus v. Turkey* (Judgment) (2001) App. No. 25781/94, para 76; ECtHR, *Case of Al-Skeini and Others v. the United Kingdom*, para. 131; also confirmed by the European Commission of Human Rights (ECmHR) 'Cyprus v. Turkey, Decision of 26 May 1975 on the admissibility of the applications' (26 May 1975) App. Nos 6780/74 and 6950/75, p. 136, para. 8 (emphasis added).

[472] ECtHR, *Mansur PAD and Others against Turkey* (Decision as to the Admissibility) (2007) App. No. 60167/00, para. 53; ECtHR, *Case of Al-Skeini and Others v. the United Kingdom*, para. 142; ECtHR, *Case of Issa and Others v. Turkey* (Judgment) (2004) App. No. 31821/96, para. 74; Yves Haeck, Clara Burbano-Herrera, Hannah Ghulam Farag, 'Extraterritorial obligations in the European human rights system' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) p. 132.

[473] Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights* (Advisory Opinion) (2017) OC-23/17 para. 78; also, Inter-American Commission on Human Rights (IACmHR) 'Petition Victor Saldaño Argentina' (11 March 1999) Report No. 38/99, para. 17 (emphasis added).

[474] Clara Burbano-Herrera, Yves Haeck, 'Extraterritorial obligations in the inter-American human rights system' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) pp. 118, 123.

[475] Committee on the Rights of the Child (CRC) 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights' (2013) UN Doc. CRC/C/GC/16, para. 39.

[476] CAT, Arts. 2, 5; ICPED, Arts. 9, 11.

[477] CAT, Art. 2 (1); ICPED Art. 9 (emphasis added).

[478] E.g., Committee Against Torture (CAT-Com) 'Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories' (10 December 2004) UN Doc. CAT/C/CR/33/3, para. 4 (b).

The jurisdiction clause of the ICMW is exceptional, as it is manifestly *disjunctive*. The ICMW states that "States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory *or* subject to their jurisdiction the rights provided for in the present Convention[.]"[479] As the drafters of the ICMW have opted for the word "or", the availability of extraterritorial jurisdiction thereunder is undisputed.[480]

Finally, the ICCPR also contains a jurisdiction clause. The jurisdiction clause of the ICCPR resembles the jurisdiction clause of the ICMW above, with one notable difference. Pursuant to the ICCPR's jurisdiction clause, "[e]ach 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[.]"[481] Because of the use of the term "and" instead of "or", the jurisdiction clause of the ICCPR introduces a seemingly conjunctive territorial requirement, which appears to suggest that human rights obligations under the ICCPR arise only vis-à-vis right holders that are both in a state's territory and jurisdiction.[482] Problematically, this would disable the emergence of extraterritorial jurisdiction.

However, this understanding was expressly rejected by the Human Rights Committee ("CCPR"), tasked with interpreting the ICCPR. The CCPR repeatedly noted that human rights obligations under Article 2 (1) of the ICCPR apply to anyone located within a state's jurisdiction, even when located outside the state's territory.[483] It emphasized that any other interpretation would be unconscionable as it would "permit a State party to perpetrate [human

[479] ICMW, Art. 7 (emphasis added).
[480] CRC, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (2017) UN Doc. CMW/C/GC/3-CRC/C/GC/22, para. 12; CESCR, CRC, CEDAW, CRPD, CMW, 'Statement on human rights and climate change: joint statement / by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities' (14 May 2020) UN Doc. HRI/2019/1, para. 1.
[481] ICCPR, Art. 2 (1) (emphasis added).
[482] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, pp. 223-226.
[483] CCPR, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 10; CCPR 'General comment no. 36, Article 6 (Right to Life)' (2019) UN Doc. CCPR/C/GC/35, para. 63.

rights violations] on the territory of another State, which violations it could not perpetrate on its own territory."[484]

The International Court of Justice ("ICJ") also rejected the conjunctive interpretation of the ICCPR's jurisdiction clause. After analysing the ICCPR's *travaux préparatoires,* the Court observed that the Covenant indeed attributes human rights jurisdiction (i.e., obligations) extraterritorially.[485] From a historic perspective, a conjunctive interpretation of the ICCPR's jurisdiction clause would likewise be controversial, as a state's colonies would be left outside the scope of its jurisdiction.[486]

3.2.2 Treaties without a Jurisdiction Clause

Despite the common practice of including a jurisdiction clause, several human rights treaties do not contain it. This includes, most notably, the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), and the African Charter on Human and Peoples' Rights ("ACHPR"). As there is nothing to import the territoriality of states' human rights obligations from, human rights treaties without a jurisdiction clause are likewise argued to attribute extraterritorial obligations.[487]

This has been confirmed in human rights jurisprudence. The Committee on Economic, Social and Cultural Rights ("CESCR") affirmed that "extraterritorial obligations of States under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory".[488] The ICJ supported the Committee's interpretation and

[484] United Nations Human Rights Committee (CCPR) 'Delia Saldias de Lopez v. Uruguay, Communication No. 52/1979' (29 July 1981) UN Doc. CCPR/C/OP/1, para. 12.3.
[485] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 2004, para. 109.
[486] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' [2018] 3 Business and Human Rights Journal 47, p. 54.
[487] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' pp. 257 - 259.
[488] United Nations Committee on Economic, Social and Cultural Rights (CESCR) 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (2017) UN Doc. E/C.12/GC/24, para. 27.

ascertained ICESCR's applicability to right-holders outside a state's territory.[489] Similarly, the CEDAW Committee noted that "obligations of States parties apply without discrimination both to citizens and non-citizens […] within their territory or effective control, even if *not* situated within the *territory*".[490]

Due to the absence of a jurisdiction clause, it is sometimes assumed that the above human rights treaties are not limited to territory or jurisdiction.[491] Because jurisdiction is a *conditio sine qua non* for human rights obligations to arise in the first place, such an assumption is incorrect.[492] The necessity of jurisdiction for treaty obligations to arise has been affirmed by both the CESCR and the CEDAW Committee. The CESCR repeatedly ascertained that states must "ensure compliance, *under their jurisdiction*, with internationally recognized human rights norms and standards".[493] The CEDAW likewise noted that "the State party that ratified or acceded to the Convention remains responsible for ensuring full implementation throughout the territories under its jurisdiction."[494] The exact meaning of jurisdiction in international human rights law is addressed in due course.

3.2.3 Extraterritoriality of Home State-Regulation in International Human Rights Law

As noted above, jurisdiction clauses are the main point of reference in attributing extraterritorial human rights obligations through the prism of extraterritorial jurisdiction. While each jurisdiction clause is different, their implications remain the same: human rights treaties

[489] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), para. 112.
[490] Committee on the Elimination of Discrimination against Women (CEDAW-Com) 'General recommendation No. 28' (2010) UN Doc. CEDAW/C/GC/28, para. 12 (emphasis added).
[491] Ibrahim Kanalan, 'Extraterritorial State Obligations Beyond the Concept of Jurisdiction' [2018] 19 German Law Journal 43, p. 48; Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' [2011] 11 Human Rights Law Review 1, p. 7.
[492] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal', p. 65.
[493] CESCR, 'General comment No. 24', para. 1 (emphasis added); similar conclusion reached also in: CESCR, '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)' (11 August 2000) UN Doc. E/C.12/2000/4, para. 51; CESCR, 'General Comment No. 19: The right to social security (Art. 9 of the Covenant)' (2008) UN Doc. E/C.12/GC/19, para. 51; CESCR, 'General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (2016) UN Doc. E/C.12/GC/23, para. 55.
[494] CEDAW-Com, 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (19 October 2010) UN Doc. CEDAW/C/2010/47/GC.2, para. 39.

are not limited to a state's territory but also apply extraterritorially. This raises the question of *when* exactly a situation is subject to extraterritorial jurisdiction as opposed to territorial jurisdiction and whether home state regulation, within the meaning of this dissertation, should indeed be considered extraterritorial in *international human rights law*. The extraterritoriality of home state regulation in public international law has been addressed in the previous Chapter.

To answer this question, it is necessary to refer again to the above jurisdiction clauses. Jurisdiction clauses impose obligations on states vis-à-vis "everyone",[495] all "persons"[496] and "individuals".[497] Because states owe human rights obligations towards these individuals, their location becomes the determinant factor of extraterritoriality.[498] Whether a human rights injury originated inside or outside a state's territory is irrelevant.[499]

Thus, the rules of extraterritorial jurisdiction in international human rights law apply when the individual concerned is not physically located within a state's territory at the moment of the alleged violation of his or her human rights.[500] In the standard case of a home state regulation in the business and human rights sphere, the individual whom the state puts under its legislative protection is permanently located outside the home state's territory. Hence, to the extent to which this individual is under a state's jurisdiction, the rules of *extraterritorial* jurisdiction apply.

Despite the underlying applicability of the rules on extraterritorial jurisdiction, international human rights law still distinguishes between acts performed *outside* the state's territory (corresponding with direct extraterritoriality in public international law) and acts performed *within* a state's territory *producing effects abroad* (corresponding with indirect extraterritoriality).[501] This distinction is significant, as it affects the applicable jurisdictional principles, as analysed below. Because home state regulation is an act performed within a home

[495] ECHR, Art. 1; ICERD, Art. 6.
[496] ACHR, Art. 1 (1).
[497] ICCPR, Art. 2 (1)
[498] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 33; Lea Raible, 'Between facts and principles: jurisdiction in international human rights law' p. 53.
[499] Lea Raible, 'Between facts and principles: jurisdiction in international human rights law' p. 55; Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' p. 50, footnote 89.
[500] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 8.
[501] E.g., ECtHR, *Banković and Others v. Belgium and Others*, para. 54; ECtHR, *Case of Al-Skeini and Others v. the United Kingdom,* para. 131; IACtHR, *Advisory Opinion OC-23/17,* para. 81; IACmHR 'Petition Victor Saldaño Argentina' para. 17.

state's territory producing effects in a host state, the corresponding rules are of consequence to this dissertation.

3.3 The Meaning of Jurisdiction in International Human Rights Law

As demonstrated above, the concept of extraterritorial jurisdiction is deeply rooted in international human rights law. It has also been determined that home state regulation may only become a human rights obligation if it satisfies the principles of extraterritorial jurisdiction in international human rights law. However, the meaning and the consequences of jurisdiction in international human rights law are yet to be addressed in detail.

The previous analysis of human rights jurisdiction clauses already implied the meaning of jurisdiction. Nonetheless, it also demonstrated that human rights treaty texts do not actually define it. Thus, in defining jurisdiction, this dissertation must, once again, rely on the jurisprudence of human rights treaty interpreting bodies.

As stipulated in human rights treaties, jurisdiction is a threshold criterion that must be satisfied for treaty obligations, including the duty to protect from business-related human rights violations, to arise.[502] The existence of such a threshold is crucial. Without it, the "universality of human rights would imply that any state would owe human rights duties to any human rights holder, regardless of any specific political-legal nexus between them."[503]

Human rights jurisdiction is an "all or nothing" condition. If a jurisdictional link cannot be established, a state does not have human rights obligations towards an individual,[504] i.e., an individual cannot claim human rights protections.[505] This also means that a state cannot be held

[502] ECtHR, *Case of Al-Skeini and Others v. the United Kingdom,* para. 130; Lea Raible, 'Between facts and principles: jurisdiction in international human rights law' p. 55.
[503] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' [2020] 21 German Law Journal 385, p. 396.
[504] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 20.
[505] Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights' [2021] 82 QIL 53 <http://www.qil-qdi.org/extraterritorial-jurisdiction-a-dialogue-between-international-human-rights-bodies-forthcoming/> last accessed 01.02.2024, p. 54; Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 53.

accountable under international human rights law and that human rights bodies lack the competence to interpret a treaty and adjudicate vis-à-vis a state's conduct.[506]

According to human rights jurisprudence, the term "jurisdiction" is synonymous with the terms "control", "authority", and "power", as demonstrated below. The ECtHR repeatedly emphasized that a state party must exercise "effective control" for extraterritorial human rights obligations to arise.[507] The IACtHR,[508] the Inter-American Commission on Human Rights ("IACmHR"),[509] the African Commission on Human and Peoples' Rights ("ACmHPR"),[510] the CCPR, [511] the ICESCR,[512] the CAT Committee,[513] and the ICJ[514] also relied on the effective control test to establish jurisdiction. Please note that in this context, the meaning of "effective control" differs from "effective control" in public international law.[515]

Human rights jurisprudence stipulated that the meaning of jurisdiction is not limited to effective control, but comprises control in general.[516] The European Commission on Human Rights ("ECmHR"),[517] the ECtHR,[518] the IACtHR,[519] the IACmHR,[520] and the ACmHPR also linked

[506] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' p. 53.
[507] ECtHR, *Case of Loizidou v. Turkey (Preliminary Objections)* (Judgment) (1995) App. No. 15318/89, para. 62; ECtHR, *Case of Loizidou v. Turkey Judgment* (Grand Chamber Judgment) (1996) App. No. 15318/89, para. 52; ECtHR, *Banković and Others v. Belgium and Others,* para. 71.
[508] IACtHR, *Advisory Opinion OC-23/17,* para. 79.
[509] IACmHR, 'Petition Victor Saldaño Argentina' para. 19.
[510] ACmHPR 'Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti' para. 134.
[511] CCPR, 'General Comment No. 31', para. 10.
[512] CESCR, 'Consideration of Reports Submitted by States Parties under Article 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights' (26 June 2003) UN Doc. E/C.12/1/Add.90, para. 31.
[513] CAT-Com, 'Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland' para. 4 (b).
[514] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), para. 112.
[515] Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' [2007] 18 European Journal of International Law 649, p. 650; In public international law, the effective control test is used to attribute private conduct to a state for the purpose of state responsibility for internationally wrongful acts.
[516] ECtHR, *Case of Issa and Others v. Turkey* (Judgment) (2004) App. No. 31821/96, paras. 70-71; ACmHPR, 'Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti', para. 134; IACmHR, 'Case 10.951 Coard et al. United States' (29 September 1999) Report No. 109/99, para. 37; CESCR, 'General Comment No. 23', para. 55.
[517] ECmHR, 'Cyprus v. Turkey, Decision of 26 May 1975 on the admissibility of the applications', p. 136, para. 8.
[518] ECtHR, *Case of Issa and Others v. Turkey,* para. 71.
[519] IACtHR, *Advisory Opinion OC-23/17,* paras. 80 – 81.
[520] IACmHR, 'Petition Victor Saldaño Argentina', para. 19.

the exercise of jurisdiction to the exercise of authority.[521] Finally, the CCPR affirmed jurisdiction to be equivalent to "power".[522]

As demonstrated in reference to different models of extraterritorial jurisdiction below, a state's assertion of *de facto* power,[523] i.e., actual or physical power over a right-holder, is decisive.[524] It is irrelevant whether such power is exercised legally under public international law.[525] Thus, the determination of a home state's exercise of extraterritorial human rights law jurisdiction vis-à-vis a victim of corporate human rights violations depends on the victim being subject to home state's control as well as its location in the host state's territory.

3.3.1 What Human Rights Jurisdiction is Not

When defining jurisdiction in international human rights law, it is imperative to address what this term does not refer to. This further helps to delimit the scope of human rights jurisdiction and clarify persistent misconceptions. The below will address three concepts most frequently confounded with international human rights law jurisdiction: a court's jurisdiction, public international jurisdiction, and state responsibility for internationally wrongful acts.

Firstly, human rights law jurisdiction does not equal the jurisdiction of a court or quasi-judicial body. This jurisdiction denotes the body's competence to receive and consider complaints vis-à-vis a state party. While this competence is conditional on a state having human rights jurisdiction in the first place, this is not the case *vice versa*. A state may well have human rights jurisdiction without a human rights body having the capacity to adjudicate. This is the case when a state does not ratify the subsequent treaty granting such competence.[526]

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[521] ACmHPR, 'Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti', para. 134.
[522] CCPR, 'General Comment No. 31', para. 10.
[523] CAT-Com, 'Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland' para. 4 (b)**;** ECtHR, *Medvedyev and Others v. France* (Grand Chamber Judgment) (2010) App. No. 3394/03, para. 67.
[524] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 41; Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights', p. 54.
[525] E.g., ECtHR, *Case of Loizidou v. Turkey (Preliminary Objections),* para. 62; ECtHR, *Case of Loizidou v. Turkey Judgment*, para. 52.
[526] E.g., Optional Protocol to the International Covenant on Civil and Political Rights (adopted 17 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 1; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83, Art. 2; Optional Protocol to the Convention against Torture and other Cruel,

Secondly, human rights law jurisdiction is not public international law jurisdiction within the meaning of Chapter 2, despite both being variations of state jurisdiction.[527] In international human rights law, jurisdiction refers to a state's exercise of *de facto* control based on which human rights obligations are attributed. In public international law, jurisdiction denotes a state's sovereign prerogative to exercise *de jure* authority, i.e., to prescribe and enforce domestic laws within a specific territory.[528] While *de jure* and *de facto* authority or control may coincide, this is not always true. A state frequently exercises human rights jurisdiction over a right-holder in a foreign state's territory without being able to lawfully extend the application of its laws to this individual.

Two examples from state practice further substantiate the distinction between *de jure* and *de facto* authority/control. The first example draws on the ECtHR's jurisprudence regarding Turkey's occupation of Cyprus. Throughout the occupation, Turkey did not exercise *de jure* authority in Cyprus by means of its prescriptive/enforcement jurisdiction. However, it exercised *de facto* control (i.e., actual power and force) by means of which it severely affected the lives of the inhabitants in the occupied territory. As a result, the ECtHR found Turkey responsible for several human rights violations committed in Cyprus,[529] including those by private parties.[530]

The second example concerns the US naval base Guantanamo Bay in Cuba. It is Cuba that has *de jure* authority in Guantanamo Bay. However, it is undoubtedly the United States that exercises *de facto* control. Ergo, United States also has an obligation to ensure the human rights of persons detained there.[531]

Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237, Art. 4 (1); ACHR, Arts. 61-62.

[527] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 26; Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations' [2013] Sydney Law School Research Paper No. 12/71 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149921> last accessed 19.02.2024, p. 10; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' p. 398; Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights' p. 54.

[528] Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations' p. 11; Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, pp. 8, 32.

[529] ECtHR, *Case of Cyprus v. Turkey*, pp. 94-100; Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, pp. 27 – 30.

[530] ECtHR, *Case of Cyprus v. Turkey*, para. 81.

[531] IACmHR, 'Precautionary Measure 259/02 – Persons detained by the United States in Guantanamo Bay, Precautionary Measures 259/02' (12 March 2002) No. 259/02; Richard J. Wilson, 'United States Detainees at

The distinction between human rights jurisdiction and public international jurisdiction is not merely academic. If both types of jurisdictions were the same, a state could circumvent its international human rights law obligations by exceeding its jurisdictional competences under public international law.[532] This would incentivize states to act outside their legal boundaries, an absurdity that human rights treaty drafters could have not possibly intended.[533]

Finally, human rights law jurisdiction is not synonymous with state responsibility. As reiterated by the ECtHR, "the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law."[534] While human rights bodies generally refer to "responsibility" in their jurisprudence,[535] they mean responsibility under human rights treaties, not state responsibility for internationally wrongful acts.[536] Responsibility under human rights treaties arises based on the state's control of human rights holders through its state's agents or control over the territory in which they are located. Contrary thereto, state responsibility arises based on a state's control over the perpetrators of human rights violations.[537]

In practice, the difference between both types of responsibility is well manifested in ECtHR's *Banković* and *Al-Skeini* cases. As noted by Marko Milanović in regards to *Banković*, "even though the bombing was most certainly attributable to someone, the Court still could not

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Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole"' [2003] 10 Human Rights Brief 2, p. 4.

[532] Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations' p. 10; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' p. 398.

[533] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 30; Daniel Augenstein, 'Home-state regulation of corporations' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 285.; Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' [2013] 7 Law and Ethics of Human Rights 47, p. 56.

[534] ECtHR, *Case of Jaloud v. the Netherlands* (Grand Chamber Judgment) (2014) App. No. 47708/08, para. 154.

[535] E.g., ECtHR, *Case of Cyprus v. Turkey*, para. 81., ECtHR, *Case of Loizidou v. Turkey (Preliminary Objections),* para. 62; ECtHR, *Case of Loizidou v. Turkey Judgment,* para. 52; CESCR 'General comment No. 24' para. 32; CRC, 'General comment No. 16', para. 10.

[536] E.g., ECtHR, *Case of Cyprus v. Turkey*, para. 81., ECtHR, *Case of Loizidou v. Turkey (Preliminary Objections),* para. 62; ECtHR, *Case of Loizidou v. Turkey Judgment,* para. 52; CESCR 'General comment No. 24' para. 32; CRC, 'General comment No. 16', para. 10.

[537] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 51; The confusion likely stems from the fact that the ECtHR referred to "effective control over an area" (ECtHR, *Case of Loizidou v. Turkey (Preliminary Objections)*) and to "effective overall control over an area" (ECtHR, *Case of Loizidou v. Turkey Judgment*), which was later picked up by the International Tribunal on Former Yugoslavia in its *Tadić* case in the context of attribution and state responsibility.

establish that the NATO states exercised effective overall control over Serbia, and therefore had obligations under the ECHR to the people of Serbia."[538] As regards to *Al-Skeini*, Milanović highlighted that "while it was beyond doubt that the killings in Al-Skeini were attributable to the UK, this still did not mean that the UK had jurisdiction over the victims, or over the area of Basra."[539]

The distinction between human rights law jurisdiction and state responsibility for internationally wrongful acts is highly relevant within the context of a home state duty to protect from business-related human rights violations. If both concepts were the same, the acts of transnational corporations abroad would have to be attributed to the state exercising jurisdiction. Because there is no basis on which to claim attribution of these acts to home states, responsibility could not be claimed.[540] However, as the corporate conduct in question does not have to be attributed to the state, its human rights responsibility may arise based on a state's obligation to protect, provided the state exercises control over the individuals concerned.[541]

3.4 Principal Models of Extraterritorial Jurisdiction

Similarly to public international law, the extraterritorial exercise of jurisdiction in international human rights law cannot be claimed towards everyone and requires a sufficient "nexus" between the acts or omissions of a state and the alleged human rights violations.[542] As was demonstrated above, such a connection is met in international human rights law when an individual is under a state's control or authority. This section addresses the meaning of control for the purpose of attributing human rights obligations in general and the business and human rights sphere in particular.

[538] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 50.
[539] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 50.
[540] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' p. 63.
[541] Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations' p. 14; Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' [2013] 117 Journal of Business Ethics 493, p. 503.
[542] CCPR, 'Concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour' in 'Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013' (7 December 2017) UN Doc. CCPR/C/120/D/2285/2013, para. 6.

Three permissive models have taken shape in human rights jurisprudence: the spatial, personal, and cause-and-effect models.[543] As demonstrated below, the amount of case law on the spatial- and personal models is extensive. In contrast, the understanding of the cause-and-effect model is yet to be fully clarified. This subsection begins with a general analysis of the spatial- and personal models, as the two principal models of extraterritorial jurisdiction in international human rights law,[544] and their (in-)applicability within the specific context of this dissertation.

3.4.1 Spatial Model of Extraterritorial Jurisdiction

The spatial model of extraterritorial jurisdiction was introduced by the ECtHR in its 1995 judgment, *Loizidou v. Turkey*. The Court established extraterritorial jurisdiction based on a state's effective control over a *geographical* area beyond the state's territory. Accordingly, "the responsibility of a Contracting Party may […] arise when as a consequence of a military action – whether lawful or unlawful – it exercises effective *control* of an area outside its national territory."[545] The Court specified that "[t]he obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[546]

In a subsequent judgment, *Banković and Others v. Belgium and Others*, the ECtHR expanded the meaning of effective control. The Court held that a state exercises effective control when "as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, [it] exercises all or some of the public powers normally to be exercised by that Government".[547] In *Issa v. Turkey*, the ECtHR specified that in order to establish effective control within the meaning of the spatial model, "[i]t is *not* necessary to determine whether a Contracting Party actually exercises detailed control over the policies and

[543] Wouter Vandenhole, 'Introduction' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 4; Anne Oloo, Wouter Vandenhole, 'Enforcement of extraterritorial human rights obligations in the African human rights system' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 141.
[544] ECtHR, *Case of Al-Skeini and Others v. the United Kingdom,* paras. 134-138*;* ACmHPR, 'Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti', para. 134.
[545] ECtHR, *Case of Loizidou v. Turkey (Preliminary Objections)*, para. 62 (emphasis added).
[546] ECtHR, *Case of Loizidou v. Turkey (Preliminary Objections)*, para. 62.
[547] ECtHR, *Banković and Others v. Belgium and Others,* para. 71 .

actions of the authorities in the area situated outside its national territory, since even *overall control* of the area may engage the responsibility of the Contracting Party concerned."[548]

Other human rights bodies have also consolidated the above understanding of effective control. In an explicit reference to the ECtHR, the IACtHR stated that "the exercise of jurisdiction outside the territory of a State requires that a State Party to that Convention exercises effective control over an area outside its territory" as a matter of international human rights law.[549] The ACmHPR affirmed that "circumstances may obtain in which a state assumes obligations beyond its territorial jurisdiction such as when a state assumes effective control of part of territory of another state (spatial model of jurisdiction)".[550] This view has also been confirmed by the CAT Committee. Accordingly, "Convention protections extend to all territories under the jurisdiction of a State party", including "all areas under the de facto effective control of the State party's authorities."[551]

The CCPR, the CESCR, and the ICJ applied the effective control test under the spatial model of extraterritorial jurisdiction within the specific context of the Israeli–Palestinian conflict. The CCPR declared that the ICCPR "must be held applicable to the occupied [Palestinian] territories and those areas […] where Israel exercises effective control'.[552] The CESCR held that Israel's "obligations under the Covenant, apply to all territories and populations under its effective control", including Palestine.[553]

The ICJ also noted that "the State party's obligations under the [ICESCR] apply to all territories and populations under its effective control."[554] The Court affirmed the spatial model of jurisdiction in its *Congo v. Uganda* Judgment. It declared that "international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction

[548] ECtHR, *Case of Issa and Others v. Turkey*, para. 70 (emphasis added).
[549] IACtHR, *Advisory Opinion OC-23/17*, para. 79.
[550] ACmHPR, 'Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti', para. 134.
[551] CAT-Com, 'Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland', para. 4 (b).
[552] CCPR, 'Consideration of Reports Submitted by states Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee, Israel' (18 August 1998) UN Doc. CCPR/C/79/Add.93, para. 10.
[553] CESCR, 'Consideration of Reports Submitted by States Parties under Article 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Israel' (4 December 1998) UN Doc. E/C.12/1/Add.27, para. 8.
[554] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), para. 112.

outside its own territory', particularly in occupied territories."[555] While having relied on *occupation* as the basis for extraterritorial jurisdiction, the ICJ did not explicitly limit the exercise of jurisdiction thereto, implying that jurisdiction may be conceived in broader terms than that.[556]

The above demonstrates that a state is attributed extraterritorial human rights obligations when a right-holder is located within a geographical area under its (effective) *de facto* control. In practice, such control arises as a consequence of military actions, most frequently in times of occupation. While nearly all cases established an extraterritorial duty to respect, they did not explicitly limit the scope of human rights obligations thereto. The ECtHR even implied the possibility of attributing an extraterritorial duty to protect under the spatial model.[557]

Because of the consistent recognition and interpretation of the spatial model, this model is considered the least controversial. It is said to best reconcile the "normative demands of universality and the factual demands of effectiveness, as extraterritorial application would happen when it is realistically possible, in the circumstances of state control over *territory*."[558] Sometimes, it is also argued that the spatial model of jurisdiction best corresponds with the text of those treaties linking jurisdiction with territory,[559] as addressed previously.

Despite its wide recognition, the spatial model of extraterritorial jurisdiction is also susceptible to criticism. Firstly, the geographical area over which a state must exercise effective control for the spatial model to apply lacks a clear definition. Secondly, the model's limitation to control over territory, makes its application too rigid.[560] This rigidity allows states to avoid human rights accountability under the spatial model in extraterritorial situations over which they still have absolute, factual control. To prevent this gap in human rights protections, human rights treaty bodies also rely on a second model of extraterritorial jurisdiction, the personal model, as addressed below. It is generally accepted that the personal and spatial models are not mutually

[555] *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (Judgment) [2005] ICJ Rep 2005, para. 216.
[556] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p.128
[557] ECtHR, *Case of Cyprus v. Turkey*, para. 81; ECtHR, *Isaak and others v. Turkey* (Decision as to the Admissibility) (2006) App. No. 44587/98, p. 20.
[558] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p.128 (emphasis added).
[559] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p.128.
[560] Marko Milanović, 'Foreign Surveillance and Human Rights, Part 3: Models of Extraterritorial Application' [2013] EJIL:Talk! < https://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-3-models-of-extraterritorial-application/> last accessed 17.04.2024.

exclusive and that elements of both models may be used to establish extraterritorial jurisdiction.[561]

3.4.2 Personal Model of Extraterritorial Jurisdiction

The personal model of extraterritorial jurisdiction is based on a state's exercise of authority and control over a *right-holder* outside a state's territory.[562] Contrary to the spatial model of jurisdiction, the right-holder is at the centre of this model, not any geographical area within which the right-holder is located. As demonstrated below, the necessary level of control under the personal model is met whenever a *state agent* has the right-holder under his or her control, regardless of whether the state agent is located within a territory under the state's control.

The personal model of extraterritorial jurisdiction was first devised in the 1975 *Cyprus v. Turkey* decision of the now-defunct ECmHR.[563] Accordingly, "authorised agents of a State, including diplomatic and consular agents and armed forces, not only remain under [a State's] jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property."[564] The ECtHR later consolidated the Commission's view despite its initially restrictive understanding of the personal model of jurisdiction in *Banković*.[565] In *Issa and Others v. Turkey*, the ECtHR held that "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents" whether operating lawfully or

[561] ECtHR, *Case of Jaloud v. the Netherlands* (Grand Chamber Judgment) (2014) App. No. 47708/08, paras. 139-153.
[562] ECtHR, *Case of Al-Skeini and Others v. the United Kingdom.* Para 137; ECtHR, *Case of Öcalan v. Turkey* (Grand Chamber Judgment) (2005) App. No. 46221/99, para. 91; IACmHR 'Case 11.589 Armando Alejandre Jr., Carlos Costa, Mario de la Peña, and Pablo Morales, Cuba' (29 September 1999) Report No. 86/99, para. 23; ACmHPR 'Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti' para. 134; Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' p. 56.
[563] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 181.
[564] ECmHR, 'Cyprus v. Turkey, Decision of 26 May 1975 on the admissibility of the applications' (26 May 1975) App. Nos 6780/74 and 6950/75, p. 136, para. 8.
[565] Conall Mallory, 'A second coming of extraterritorial jurisdiction at the European Court of Human Rights' [2021] 82 QIL <http://www.qil-qdi.org/a-second-coming-of-extraterritorial-jurisdiction-at-the-european-court-of-human-rights/> last accessed 01.02.2024.

unlawfully.[566] The Court reaffirmed this personal notion of jurisdiction also in *Pad and Others v. Turkey.*[567]

Inspired by the developments in Europe, the IACmHR held in *Saldaño v. Argentina* that "a state party to the American Convention may be responsible […] for the acts and omissions of its *agents* which produce effects or are undertaken outside that state's territory."[568] The CCPR likewise established personal extraterritorial jurisdiction for the acts of state agents. It observed in *Lopez Burgos v. Uruguay* that a state party may be "held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of the State or in opposition to it."[569] The CCPR argued that any other jurisdictional approach would be "unconscionable" as it would "permit a State party to perpetrate violations of the Covenant on the territory of another States, which violations it could not perpetrate on its own territory."[570]

Referring to the above views of the CCPR and the ECtHR, the ACmHPR also endorsed the personal model of jurisdiction. It noted that "circumstances may obtain in which a state assumes obligations beyond its territorial jurisdiction such as […] where the state exercised control or authority over an individual (personal model of jurisdiction)".[571] Despite not having elaborated on the exact meaning of the personal model any further, considering its explicit reliance on the CCPR and the ECtHR, this dissertation interprets the ACmHPR's view to signify state agent control.

While it is evident from the above that a state agent must exercise control over a right-holder for human rights obligations to be attributed to states under the personal model, the exact scope of such control is unclear. Several examples of state agent control are available. The ECtHR has been most prolific in exemplifying when the criterion of state agent control is satisfied in practice. Accordingly, a state agent exercises control when it has a right-holder in physical

[566] ECtHR, *Case of Issa and Others v. Turkey,* para. 71.
[567] ECtHR, *Mansur PAD and Others against Turkey* (Decision as to the Admissibility) (2007) App. No. 60167/00, paras. 53-54.
[568] IACmHR, 'Petition Victor Saldaño Argentina', para. 17.
[569] CCPR, 'Delia Saldias de Lopez v. Uruguay', paras. 12.1-12.3.
[570] CCPR, 'Delia Saldias de Lopez v. Uruguay', paras. 12.1-12.3.
[571] ACmHPR, 'Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti', para. 134.

custody, such as in cases of arrest and detention.[572] This has also been reaffirmed by the CAT Committee in its General Comment No. 2.[573] The ECtHR further established state-agent control when a right-holder has been killed by a state agent and thereby brought within that state's jurisdiction.[574] State agent control was likewise recognised in connection to state agents' acts in a neutral UN buffer zone.[575]

The above examples have provided limited clarification on the emergence of state agent control. In any case, state agent control under the 'personal' model seems to be associated with military situations. This is in line with the interpretation of the IACtHR, which, leaning on the jurisprudence of the ECtHR, declared that state agent "control", "power" or "authority" within the meaning of the personal model of extraterritorial jurisdiction mainly involves "military actions or actions by State security forces".[576] Please note that while most examples of state agent control relate to the violation of a duty to respect, the ECtHR suggested that a duty to protect human rights holders from private individuals may also arise under the personal model.[577]

Nevertheless, as the above instances are merely non-exhaustive examples of state agent control, an exact definition is unavailable.[578] While problematic from the perspective of legal certainty, an open-ended list supports a more inclusive understanding of extraterritorial jurisdiction in general. Thus, further expansion of extraterritorial human rights protections is conceivable.

3.4.3 (In-)Applicability of the Spatial- and Personal Models in the Business and Human Rights Sphere

The previous section addressed the criteria for the emergence of state control under the spatial and personal models for human rights obligations to be successfully attributed to states. The

[572] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' p. 400; Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 187.
[573] CAT-Com, 'General Comment No. 2 Implementation of article 2 by State parties' (24 January 2008) UN Doc. CAT/C/GC/2, para. 16.
[574] ECtHR, *Mansur PAD and Others against Turkey*, paras. 53-54.
[575] ECtHR, *Isaak and others v. Turkey* (Decision as to the Admissibility) (2006) App. No. 44587/98, p. 21.
[576] IACtHR, *Advisory Opinion OC-23/17,* para. 80.
[577] ECtHR, *Isaak and others v. Turkey*, pp. 20 – 21.
[578] E.g., Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, pp. 187 – 200.

applicability of both models in the business and human rights sphere and the context of this dissertation is examined below. Considering the limitations of both models, their inapplicability in the business and human rights sphere is apparent.

To reiterate, extraterritorial jurisdiction under the spatial model arises whenever a state exercises *de facto* control over foreign territory, such as in the case of occupation. Contrary thereto, a state exercises jurisdiction under the personal model whenever its state agents exercise control over foreign nationals in a foreign territory *outside* the state's control. Control under the personal model arises primarily when a victim is detained or otherwise deprived of liberty.

As authoritatively stated by the IACtHR, the recognized situations of control under both models include primarily *military* state actions.[579] In these situations, control is premised on the physical presence of State agents on foreign soil.[580] Both models are thus applicable only with regard to acts committed directly in a foreign state's territory and not to acts producing effects in the foreign state. Because home state regulation from business-related human rights violations is a *peaceful* act performed within a home state's territory and producing effects in the territory of a host state, it does not constitute an exercise of authority/control under the spatial and personal models of jurisdiction.[581] Thus, an extraterritorial duty to protect by means of home state regulation may not be attributed under these permissive models.

Regardless of the inapplicability of both models in the context of this dissertation, the above analysis suggests that the definition of control is not limited to either model and that the examples thereunder are non-exhaustive.[582] As is best seen in ECtHR's jurisprudence, the definition of control is a constantly developing notion. As demonstrated in due course, control is actually increasingly interpreted in human rights jurisprudence to include previously out-of-scope situations, falling within a third model of extraterritorial jurisdiction: the cause-and-effect model. This model is applicable to the business and human rights sphere and other

[579] IACtHR, *Advisory Opinion OC-23/17,* paras. 79-80.
[580] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay', p. 49.
[581] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal', p. 61.
[582] Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights', p. 55.

situations involving transnational harm originating within (home) states' territories, such as in cases of environmental harm, drone attacks, or mass surveillance.[583]

3.5 Cause-and-Effect Model in Business and Human Rights

The cause-and-effect model is the third and final jurisdictional model identified and employed in human rights jurisprudence and academia.[584] This model was developed specifically to attribute jurisdiction to acts performed within a state's territory producing effects abroad, which, despite having been previously recognized as extraterritorial, [585] still lacked a jurisdictional basis. The spatial and personal models were previously found inapplicable to such acts. Because a home state duty to protect by means of regulation is an act with extraterritorial effect, the cause-and-effect model of jurisdiction is relevant.

Cause-and-effect jurisdiction has many names in human rights jurisprudence and academia. It is referred to as functional jurisdiction,[586] capacity-impact model,[587] functional-impact model,[588] or control over rights doctrine.[589] This dissertation refers to the model as a cause-and-effect model, [590] because this term best reflects its defining characteristics.

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[583] Yves Haeck, Clara Burbano-Herrera, Hannah Ghulam Farag, 'Extraterritorial obligations in the European human rights system' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), pp. 136-137.
[584] Anne Oloo, Wouter Vandenhole, 'Enforcement of extraterritorial human rights obligations in the African human rights system', p. 141; Wouter Vandenhole, 'Introduction', p. 4.
[585] ECtHR, *Banković and Others v. Belgium and Others*, para. 54; ECtHR, *Case of Al-Skeini and Others v. the United Kingdom,* para. 131; IACtHR, *Advisory Opinion OC-23/17,* para. 81; IACmHR 'Petition Victor Saldaño Argentina' para. 17.
[586] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law'; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"'; Wouter Vandenhole, 'Introduction', p. 4; Yves Haeck, Clara Burbano-Herrera, Hannah Ghulam Farag, 'Extraterritorial obligations in the European human rights system', p. 136.
[587] Alice Ollino, 'The 'capacity-impact' model of jurisdiction and its implications for States' positive human rights obligations' [2021] 82 QIL <http://www.qil-qdi.org/the-capacity-impact-model-of-jurisdiction-and-its-implications-for-states-positive-human-rights-obligations/> last accessed 01.02.2024, p. 81.
[588] Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights', p. 53.
[589] Başak Çali, 'Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn' [2020] EJIL:Talk! <https://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/> last accessed 01.02.2024.
[590] The term 'cause-and-effect jurisdiction' is also used in: ECtHR, *Banković and Others v. Belgium and Others,* para. 75; ECtHR, *Medvedyev and Others v. France,* para. 64; Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 187; Emma Luce Scali, 'Extraterritorial human rights obligations and sovereign debt' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds.), *The Routledge*

It was emphasized above that human rights jurisdiction is a relational concept between a state and a victim of human rights violations. It arises only when a state exercises *control* over the victim. In the context of the spatial and personal models, control over a victim is conceived through control over territory or state agents, which has proved limiting in the context of globalization.

The cause-and-effect model differs from the spatial and personal ones in that it does *not* require direct physical control over a right-holder.[591] Control over the victim may be exercised *indirectly* through control over domestic conduct,[592] control over conduct originating or taking place in whole or in part in a state's territory,[593] control over situations,[594] control over the enjoyment of rights,[595] or control over the source of harm.[596] Control under the cause-and-effect model thus constitutes *contactless* control.[597]

All of the above stipulates a state's at least partly territorial control over the *cause* of harm. Such control may be claimed with regard to both a state's actions producing effects abroad as well as actions of third parties. [598] Because territorial control over the cause of harm also stipulates control over the extraterritorial effects of such harm, i.e., stipulates the ability to influence human rights violations of non-resident non-nationals,[599] this jurisdictional model

Handbook on Extraterritorial Human Rights Obligations (Routledge 2022), p. 247; Anne Oloo, Wouter Vandenhole, 'Enforcement of extraterritorial human rights obligations in the African human rights system' p. 141.

[591] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"', p. 388.

[592] Antal Berkes, 'Cross-border Pollution' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 440.

[593] Emma Luce Scali, 'Extraterritorial human rights obligations and sovereign debt', p. 247.

[594] CESCR, 'General comment No. 24', para. 10; Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' [2018] 29 European Journal of International Law 581, p. 590.

[595] CCPR, 'General comment no. 36', para. 63; Başak Çali, 'Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn'; Kristof Gombeer, Stefaan Smis, 'The establishment of ETOs in the context of externalised migration control' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 177.

[596] IACtHR, *Advisory Opinion OC-23/17,* para. 104 (h); Alice Ollino, 'The 'capacity-impact' model of jurisdiction and its implications for States' positive human rights obligations' p. 88.

[597] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"', p. 401.

[598] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law', p. 62; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"', p. 414.

[599] Emma Luce Scali, 'Extraterritorial human rights obligations and sovereign debt', pp. 248 – 249, Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"', p. 414.

conforms to the general relational concept of human rights jurisdiction. The reliance on "cause" and "effect" for attributing jurisdiction also clarifies the choice of name for this jurisdictional model.

It is likewise characteristic of the cause-and-effect model that it combines *de facto* and *de jure* elements of power. For a state to be able to influence the cause of harm, it must exercise public powers. The existence of a jurisdictional link thus depends on "control over (general) policy areas or (individual) tactical operations performed or producing effects abroad".[600] This is manifested in the business and human rights sphere, in which a home state must adopt regulatory measures to comply with its extraterritorial duty to protect.[601] The state's capacity to influence the cause of harm is also contingent on its *de jure* relationship with the corporate perpetrator of human rights violations. It is the place of incorporation, registration, or domicile of the corporate perpetrator that enables a state to prescribe its course of conduct, as demonstrated in Chapter 2.

Finally, control over the cause of harm and its effects also stipulates the necessity of a causal relationship.[602] A human rights violation must have been a reasonably foreseeable consequence of a conduct under the state's control.[603] Furthermore, the state's lack of exercise of due diligence vis-à-vis such conduct must have actually contributed to the human rights violation in question.[604]

[600] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"', p. 403.
[601] Human Rights Council (HRC), 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22.04.2009) UN Doc. A/HRC/11/13, para. 14; CESCR, 'General comment No. 24', para. 31; Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection* (e-Book, 2nd edition Oxford University Press 2019) p. 88.
[602] Anne Oloo, Wouter Vandenhole, 'Enforcement of extraterritorial human rights obligations in the African human rights system', p. 141.
[603] IACtHR, *Advisory Opinion OC-23/17,* para. 74; CESCR, 'General comment No. 24', para. 32; CCPR, 'General comment No. 36', para. 22.
[604] Emma Luce Scali, 'Extraterritorial human rights obligations and sovereign debt', p. 247.

3.5.1 Cause-and-Effect Jurisdiction in Human Rights Jurisprudence

The cause-and-effect model of jurisdiction is in an early stage of development.[605] So far, it has been affirmed by the CESCR, the IACtHR, and the CCPR, as analysed below. Relevantly, the cause-and-effect jurisdiction has already been affirmed in the context of a home state duty to protect. While many more human rights bodies have established an extraterritorial duty to protect, as demonstrated in Chapter 1,[606] most have failed to clarify the applicable jurisdictional basis.

The CESCR endorsed a cause-and-effect jurisdiction in its 2017 General Comment No. 24. It expanded the qualifying criterion of control beyond the scope of effective territorial control under the spatial model and state agent authority under the personal model. It established extraterritorial jurisdiction based on a state's control of extraterritorial situations and has done so specifically in a business and human rights context.[607]

The CESCR specified that a state party exercises *control* when an extraterritorial situation involves the activities of businesses incorporated within the state's territory or having their statutory seat, central administration, or principal place of business therein.[608] In these cases, a state is able to "take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of [these] business entities" because it exercises control over them.[609] In line with the cause-and-effect model of jurisdiction, the CESCR thus established jurisdiction based on the state's capacity to *influence* the corporate perpetrators through its territorial exercise of public powers. The state's *de facto* control over a foreign victim of human rights violations is thus established based on the *de jure* relationship between a state and the corporate perpetrator of human rights violations. Despite having broadened the scope of jurisdiction in general, the CESCR limited the exercise of jurisdiction to the extent to

[605] Kristof Gombeer, Stefaan Smis, 'The establishment of ETOs in the context of externalised migration control' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022).
[606] Please, refer to Chapter 1 for a detailed analysis.
[607] CESCR, 'General comment No. 24', para. 10.
[608] CESCR, 'General comment No. 24', para. 28, 31.
[609] CESCR, 'General comment No. 24', para. 30.

which the state's measures may r*easonably* prevent the occurrence of a human rights violation.[610]

By clarifying that a home state's capacity to influence businesses incorporated, registered, or domiciled within its territory is equivalent to control over the cause of harm for the purpose of attributing jurisdiction, the CESCR established such capacity to be exemplary of cause-and-effect jurisdiction. This is significant, as most views attributing a home state duty to protect analysed in Chapter 1 included such references yet failed to elaborate why.[611]

In 2017, the IACtHR also affirmed the cause-and-effect jurisdiction in its ground-breaking Advisory Opinion OC–23/17. The IACtHR expanded the meaning of extraterritorial jurisdiction beyond the previously accepted grounds of control to include control over the *cause of harm*. Despite having dealt with transboundary environmental harm, the Court's reasoning is argued to apply also to the sphere of business and human rights.[612]

The IACtHR noted that "[w]hen transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory."[613] In this instance, a state of origin (i.e., a home state) exercises jurisdiction because it "exercises effective control over the *activities* that caused the damage and the consequent human rights violation."[614] This is based on the understanding that "it is the State in whose territory or under

[610] CESCR, 'General comment No. 24', para. 32 (citations omitted); CESCR, 'General comment no. 14', para. 51; CESCR, 'General Comment No. 19', para. 51.
[611] As introduced in Chapter 1, these views include: CESCR, 'General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (2016) UN Doc. E/C.12/GC/23, para. 70; CESCR, '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)' (11 August 2000) UN Doc. E/C.12/2000/4, para. 39; CESCR, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (2003) UN Doc. E/C.12/2002/11, para. 31; HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc. A/HRC/17/31, Principle 2; ETO Consortium 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2013) <https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf> last accessed 17.02.2024**,** para. 25; CERD, 'Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, United Kingdom of Great Britain and Northern Ireland' (14 September 2011) UN Doc. CERD/C/GBR/CO/18-20, para. 29.
[612] Clara Burbano-Herrera, Yves Haeck, 'Extraterritorial obligations in the inter-American human rights system', p. 123.
[613] IACtHR, *Advisory Opinion OC-23/17,* para. 104 (h).
[614] IACtHR, *Advisory Opinion OC-23/17,* para. 104 (h) (emphasis added).

whose jurisdiction the activities were carried out that […] is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory."[615] Thus, the IACtHR established extraterritorial jurisdiction based on a state's capacity to influence the cause of a human rights violation and, with it, also the effects of such violation, fully within the meaning of cause-and-effect jurisdiction.

It is conspicuous that in establishing jurisdiction, the Court did not explicitly ascertain whether this includes transboundary harm resulting from the acts of states or also acts of third parties, such as transnational corporations. Because the Court did not explicitly refer to a state's actions but to actions within a state's territory,[616] it is concluded that third-party conduct may also trigger extraterritorial jurisdiction within the meaning of the Advisory Opinion.[617] This is further demonstrated by the fact that the IACtHR included the duty to protect within the scope of extraterritorial jurisdiction, as discussed in Chapter 1. Nevertheless, as also noted in Chapter 1, the Court limited its findings to the rights of life, personal integrity,[618] and a reasonable exercise of jurisdiction.[619]

In 2019, also the CCPR established cause-and-effect jurisdiction in the context of an extraterritorial duty to protect.[620] In its General Comment No. 36 on the right to life, the CCPR recognized that states have an extraterritorial duty to protect vis-à-vis "all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control."[621] The CCPR thus clearly established the qualifying criterion of control to be met when states exercise it over the human rights of persons. This notion of control evidently extends beyond control under the spatial and personal models.

The CCPR noted that states exercise control because "all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction [have] a direct and reasonably foreseeable impact on the right to life of individuals outside their territory".[622]

[615] IACtHR, *Advisory Opinion OC-23/17,* para. 102.
[616] IACtHR, *Advisory Opinion OC-23/17,* para. 104 (h).
[617] Antal Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR' [2018] EJIL:Talk! < https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/> last accessed 17.04.2024.
[618] IACtHR, *Advisory Opinion OC-23/17,* paras. 102, 118.
[619] IACtHR, *Advisory Opinion OC-23/17,* para. 120.
[620] Antal Berkes, 'Cross-border Pollution', p. 440.
[621] CCPR, 'General comment no. 36', para. 63.
[622] CCPR, 'General comment no. 36', para. 22.

Relevantly to this dissertation, the CCPR specified that these activities also include the "activities undertaken by *corporate entities* based in [a states'] territory".[623] Because the CCPR established jurisdiction over the individual's human rights based on a state's capacity to exercise public powers within its territory, it ultimately recognized the cause-and-effect model of jurisdiction, also in the business and human rights sphere.

Equally to the above bodies, the CCPR also limited the exercise of jurisdiction based on reasonableness. Furthermore, it limited the exercise of jurisdiction to the right to life, similarly to the IACtHR. However, the CCPR's limitation on the right to life is likely only a result of the General Comment's focus on the right to life and not a principled limitation.

While only the above human rights bodies have explicitly established a home state duty to protect from corporate human rights violations based on the cause-and-effect jurisdiction, other views have tacitly implied the emergence thereof. For example, the CRC found that states exercise jurisdiction because they have the territorial capacity to influence corporations having their centre of activity, place of registration, or domicile within the state's territory.[624] By linking the permissive criterion of control with a state's territorial capacity to affect corporate conduct and its extraterritorial effects, the Committee established jurisdiction akin to cause-and-effect jurisdiction. The same may be said about the CERD and the CEDAW Committee, both of which indicated that a (recommended) home state duty to protect arises with regard to extraterritorial conduct of home states' corporate nationals or residents,[625] fully within the meaning of this third jurisdictional model.

[623] CCPR, 'General comment no. 36', para. 22 (emphasis added).
[624] CRC 'General comment No. 16' para. 43.
[625] E.g., CERD, 'Consideration of reports submitted by States parties under article 9 of the convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Canada' (4 April 2012) UN Doc. CERD/C/CAN/CO/19-20, para 14; CEDAW – Com, 'Concluding observations on the combined fourth and fifth periodic reports of Switzerland' (18 November 2016) UN Doc. CEDAW/C/CHE/CO/4-5**,** para. 41 (c); CEDAW – Com, 'Concluding observations on the combined eighth and ninth periodic reports of Canada' (25 November 2016) UN Doc. CEDAW/C/CAN/CO/8-9, para. 19 (a).

3.5.2 Key Takeaways for the Business and Human Rights Sphere

The above human rights jurisprudence has proven that attributing an extraterritorial duty to protect by means of home state regulation in the business and human rights sphere is indeed possible. Human rights bodies departed from the spatial and personal models and expanded a state's exercise of jurisdiction to acts performed within a state's territory producing effects abroad, i.e., transnational harm. The criterion of control remained essential, and "control-free" jurisdiction has not been recognized.[626]

Human rights bodies defined the criterion of control as control over extraterritorial situations,[627] the human rights of victims,[628] and the cause of harm to human rights.[629] While all notions of control were formulated differently, this dissertation argued them all to be synonymous with control over the *cause of harm*. The jurisdictional nexus between a state and a victim of human rights violations was established based on a state's territorial *capacity* to exercise public powers vis-à-vis a corporate perpetrator of human rights violations and the resulting capacity to influence these human rights violations outside a state's territory. [630] The CESCR and the CCPR denoted a state's territorial capacity based on a corporate perpetrator's place of incorporation, registration, or domicile. Thus, a cause-and-effect jurisdiction has materialized also in the specific context of the business and human rights sphere.

As noted in Chapter 1 and reiterated in the section above, human rights bodies have limited the exercise of cause-and-effect jurisdiction to situations in which it is reasonable.[631] They have likewise recognized this jurisdictional model only with regard to economic, social, and cultural

[626] E.g., as argued by Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law'; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"'.
[627] CESCR, 'General comment No. 24', para. 10.
[628] CCPR,'General comment no. 36', para. 63.
[629] IACtHR, *Advisory Opinion OC-23/17,* para. 104 (h).
[630] Daniel Augenstein, David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations', p. 17.
[631] CESCR, 'General comment No. 24', para. 32 (citations omitted); IACtHR, *Advisory Opinion OC-23/17,* para. 120; CCPR, 'General comment no. 36', para. 22.

rights,[632] as well as the rights to life and personal integrity.[633] However, there is no reason of principle why cause-and-effect jurisdiction should be confined solely to these rights.[634]

Despite the above reliance on the cause-and-effect model of jurisdiction, its recognition is still circumstantial. So far, it has been explicitly recognized in single views of only three human rights bodies. Moreover, as addressed in Chapter 1, the relied-on views are not legally binding,[635] aspiring to become mandatory in the future.

Nevertheless, as also emphasized in Chapter 1, the views are authoritative statements[636] contributing to the conceptual evolution of international human rights law.[637] Despite the absence of a binding intra- and inter-systemic precedent, human rights bodies tend to coordinate their approaches in practice[638] to "avoid isolated positions worldwide and construe a more coherent approach to handle new complex cases having transboundary elements that warrant innovative interpretative solutions."[639]

Most importantly, however, the emergence of cause-and-effect jurisdiction simply makes sense. Without it, the exercise of extraterritorial jurisdiction vis-à-vis acts performed within a state's territory producing effects abroad is impossible. It is thus expected that cause-and-effect jurisdiction will be further consolidated in human rights jurisprudence.

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[632] CESCR, 'General comment No. 24'.
[633] IACtHR, *Advisory Opinion OC-23/17,* paras. 102, 118; CCPR, 'General comment no. 36'.
[634] Marko Milanović, 'Surveillance and Cyber Operations' in Marc Gibney, Gamze Erdem Türkelli, Markus Krajewski, Wouter Vandenhole (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), p. 372.
[635] Helen Keller, Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Helen Keller, Geir Ulfstein (eds), *UN human rights treaty bodies: law and legitimacy* (Cambridge University Press 2012) p. 138; Cecilia M. Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion' [2018] 15 Brazilian Journal of International Law 255, p. 256.
[636] Helen Keller, Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' p. 132; Cecilia M. Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion' p. 263.
[637] Thomas Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court' [1985] 79 The American Journal of International Law, p. 18.
[638] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' p. 264.
[639] Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights' p. 69.

3.5.3 The ECtHR and Cause-and-Effect Jurisdiction

Despite the emerging trend in favour of the cause-and-effect model of jurisdiction, the ECtHR's position is ambiguous. In 2001, the ECtHR held in *Banković* that "a 'cause-and-effect' notion of jurisdiction [is] not contemplated by or appropriate to Article 1 of the Convention" because it would be "tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."[640] The ECtHR reaffirmed its rejection of cause-and-effect jurisdiction in its 2010 judgment, *Medvedyev and Others v. France*.[641]

While the ECtHR did not explicitly revoke the rejection of cause-and-effect jurisdiction since, it did vaguely recognize that "acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1".[642] Recalling the above discussion of acts producing effects outside the state's territory and the that fact the spatial- and personal models are inapplicable thereto, only a new jurisdictional nexus could have led to the ECtHR's finding of jurisdiction in this instance. In line with the findings of the previous section, cause-and-effect jurisdiction is the most likely basis for establishing control in cases involving acts producing effects outside the state's territory.[643]

The ECtHR also arguably recognized a cause-and-effect jurisdiction[644] in its two 2021 judgments, the *Big Brother Watch and Others v. United Kingdom*[645] and *Centrum for Rättvisa v. Sweden.*[646] Both cases involved non-resident non-national applicants and concerned the implementation of surveillance measures from within the state's territory, which affected

[640] ECtHR, *Banković and Others v. Belgium and Others,* para. 75.
[641] ECtHR, *Medvedyev and Others v. France*, para. 64.
[642] ECtHR, *Case of Al-Skeini and Others v. the United Kingdom,* para. 131; ECtHR, *Medvedyev and Others v. France*, para. 64.
[643] Antal Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR'.
[644] Başak Çali, 'Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn'.
[645] ECtHR, *Case of Big Brother Watch and Others v. the United Kingdom* (Grand Chamber Judgment) (2021) App. Nos. 58170/13, 62322/14 and 24960/15.
[646] ECtHR, *Case of Centrum för Rättvisa v. Sweden* (Grand Chamber Judgment) (2021) App. No. 35252/08.

persons abroad and sometimes even specifically targeted them.[647] In both judgments, the ECtHR found that the surveillance measures violated the individuals' right to privacy under the ECHR.

By finding a violation of the right to privacy, the Court clearly established that a state owes human rights protections to non-resident non-nationals and, therefore, exercises extraterritorial jurisdiction. Interestingly, mass surveillance does not actually conform to the permissibility criteria under the spatial and personal models. States conducting mass surveillance do not exercise physical control over non-resident non-nationals nor effective overall control over the foreign territory where these persons are located.[648]

Because the ECtHR did not elaborate on why extraterritorial jurisdiction was established in both instances,[649] one may only speculate about the applicable jurisdictional basis. Considering the above developments concerning transnational human rights harm, reliance on cause-and-effect jurisdiction seems logical. Mass surveillance is a transnational operation carried out of the states' territory. The affected individuals were non-resident non-nationals located outside the states' territory. Thus, the only option for the Court to establish control was based on the states' capacity to influence these individuals and their human rights, fully in line with cause-and-effect jurisdiction.[650] While the ECtHR's expansion of jurisdiction has so far only manifested vis-à-vis a duty to respect the right to privacy in the context of mass surveillance, nothing suggests that it is limited thereto.[651]

This interpretation finds support in a ground-breaking judgment of the German Constitutional Court ("GCC"), concerning illegal telecommunications surveillance of non-German nationals outside German territory.[652] In reference to the *Big Brother Watch* and *Centrum for Rättvisa*

[647] ECtHR, *Case of Big Brother Watch and Others v. the United Kingdom,* para. 344; ECtHR, *Case of Centrum för Rättvisa v. Sweden,* para. 258.
[648] Başak Çali, 'Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn'.
[649] ECtHR, *Case of Big Brother Watch and Others v. the United Kingdom*, para. 272.
[650] Başak Çali, 'Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn'.
[651] Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights' p. 55; David Krebs, 'Globale Gefahren und nationale Pflichten: Extraterritoriale Schutzpflichten im Grundgesetz: Das BND-Urteil und die Debatte um ein „Lieferkettengesetz"' [2020] Verfassungsblog <https://verfassungsblog.de/globale-gefahren-und-nationale-pflichten/> last accessed 17.04.2024; Antal Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR'.
[652] Bundesverfassungsgericht, *Judgment of the First Senate of 19 May 2020* (2020) 1 BvR 2835/17 (Germany), available in English at

cases, the GCC found an extraterritorial duty to respect human rights beyond control under the spatial and personal models.[653] Because the judgment ultimately emphasized that "the capacity to interfere with the human rights of persons is the paramount consideration to bring the extraterritorial exercise of German public power within the jurisdiction of the [German] Constitution,"[654] it is argued to have recognized a cause-and-effect jurisdiction based on control over human rights.

However, the GCC concluded that a limitation to defence rights against surveillance and the duty to respect is currently likely.[655] While limiting, this is clearly not a principled rejection of jurisdiction in other cases of transnational harm carried out of a state's territory.[656] The choice of formulation, arguably enables a future attribution of human rights obligations in general, also in the business and human rights sphere.

3.5.4 Overcoming the Criticism of Cause-and-Effect Jurisdiction

The cause-and-effect jurisdiction has been subject to criticism even before it had begun materializing in human rights jurisprudence. For example, the ECtHR feared that establishing a cause-and-effect jurisdiction would be "tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."[657] This concern was shared also by human rights scholars and practitioners. Lord Brown, as quoted by the ECtHR in *Al-Skeini*, has argued that a cause-and-effect understanding of jurisdiction would stretch the concept of jurisdiction to a "breaking point" because it would make the principle of effective control and with it also the concept of jurisdiction *redundant*.[658] Marko Milanović noted that if cause-and-effect jurisdiction were to be adopted, "jurisdiction clauses in human rights treaties would essentially

<https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200519_1bvr283517en.html> last accessed 22.04.2024.
[653] Bundesverfassungsgericht, *Judgment of the First Senate of 19 May 2020,* paras. 87; 89; 97-98.
[654] Başak Çali, 'Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn'.
[655] Bundesverfassungsgericht, *Judgment of the First Senate of 19 May 2020,* para. 88.
[656] David Krebs, 'Globale Gefahren und nationale Pflichten: Extraterritoriale Schutzpflichten im Grundgesetz: Das BND-Urteil und die Debatte um ein „Lieferkettengesetz"'.
[657] ECtHR, *Banković and Others v. Belgium and Others,* para. 75.
[658] ECtHR, *Case of Al-Skeini and Others v. the United Kingdom*, para. 127.

be rendered meaningless" because "[a]ny act capable of violating a person's rights as a substantive matter would also be capable of bringing that person within the state's jurisdiction, and no jurisdiction issue would therefore actually arise."[659] A similar conclusion was reached also by Alice Ollino.[660]

While extreme jurisdictional overreaching is problematic and might result in political resistance,[661] the deficiencies of the cause-and-effect model may be overcome. Human rights treaty bodies have, in fact, introduced jurisdictional limitations that are at least partly capable of preventing an attribution of human rights obligations vis-à-vis anyone adversely affected, wherever in the world. Accordingly, a state only incurs responsibility with regard to acts performed within a state's territory if these acts produce reasonably foreseeable harm abroad. Furthermore, a state must have had a reasonable capacity to influence such activity based on its (at least partly) territorial exercise of public powers. Finally, a state's failed exercise of due diligence must have led to the reasonably foreseeable human rights violation.[662]

In the business and human rights sphere, a territorial limitation was expressed in reference to a company's place of incorporation, registration, or domicile. A home state was not found to have due diligence obligations, as a part of its duty to protect, vis-à-vis a foreign company operating within its territory if it is not incorporated, registered, or domiciled therein. However, if a company is incorporated, registered, or domiciled in the home state and causes human rights harm adversely affecting individuals in a host state, then the individuals are within the home state's jurisdiction.[663]

Ergo, cause-and-effect jurisdiction is not based on the mere capacity to protect or counter human rights violations. For example, "simply having the capacity to counter famine in a remote land to which there is no prior public-power relation does not suffice to entail

[659] Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, p. 208.
[660] Alice Ollino, 'The 'capacity-impact' model of jurisdiction and its implications for States' positive human rights obligations' p. 100.
[661] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' p. 50.
[662] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' p. 414; Antal Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR'; and, e.g., CCPR, 'General comment no. 36', para. 7; CESCR, 'General comment No. 24', para.15; CCPR, 'General comment no. 31', para. 8.
[663] CESCR, 'General comment No. 24', para. 31; CCPR, 'General comment No. 36', para. 22; CRC 'General comment No. 16' para 43.

responsibility."[664] However, to effectively counter the concern of an overly expansive jurisdiction, more guidance on the threshold criteria of cause-and-effect jurisdiction is necessary.[665]

3.6 Conclusion

This Chapter addressed the attribution of an extraterritorial duty to protect by means of home state regulation in the business and human rights sphere through the prism of extraterritorial jurisdiction in international human rights law. The understanding of the concept of extraterritorial human rights jurisdiction was found fundamental, as it is thereby that human rights treaty obligations are attributed to states. Extraterritorial jurisdiction is the *threshold* criterion without which individuals cannot claim human rights protections, states cannot be found responsible for human rights violations, and treaty bodies cannot adjudicate vis-à-vis said violations.

It was determined that the notion of extraterritorial jurisdiction is implied in jurisdiction clauses of human rights treaties. While not all human rights treaties have a jurisdiction clause, the necessity of jurisdiction was established also for those treaties. Despite failing to mention extraterritorial application explicitly, it was demonstrated that they imply it by making human rights obligations contingent on jurisdiction and not territory.

Based on the analysis of jurisdiction clauses, it was also established that the extraterritoriality of jurisdiction is determined based on the extraterritorial location of a *victim*. If a victim of corporate human rights violations is a non-resident non-national located outside the home state's territory, the rules and limitations of an extraterritorial notion of jurisdiction apply, regardless of whether the corporate perpetrator is a home state's national or resident. An extraterritorial duty to protect by means of home state regulation was thus found to be

[664] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' p. 397; similar example in Mariagiulia Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights' p. 76.
[665] Antal Berkes, 'Cross-border Pollution' pp. 443-444.

extraterritorial and subject to the rules of extraterritorial jurisdiction in international human rights law.

It was determined that the acts subject to extraterritorial human rights jurisdiction are further divided into acts performed outside the state's territory and acts performed within the state's territory producing effects abroad. This closely resembles direct and indirect jurisdiction in public international law. Contrary to public international law, however, both types of acts were found to be regulated by extraterritorial human rights jurisdiction. Nevertheless, both are also subject to different jurisdictional principles. Because an extraterritorial duty to protect by means of home state regulation was found to be an act performed within the state's territory producing effects abroad, the principles applied to such acts are relevant.

It was determined that states do not owe human rights obligations to everyone. The exercise of jurisdiction is limited based on a *nexus* between the state exercising jurisdiction and the victim of human rights violations. The existence of such a nexus is reflected in three jurisdictional models: the spatial, personal, and cause-and-effect models. All of these models were developed in human rights jurisprudence.

This Chapter emphasized that for jurisdiction to arise under either model, a state must exercise *de facto* control, authority, or power over an individual. Thus, home states only have an extraterritorial duty to protect non-resident non-nationals if they exercise said control. The precise elements of control are distinct under each model.

Control under the spatial model was defined as *de facto* territorial control over another state's territory, e.g., in the case of occupation. Control under the personal model was defined as a *de facto* state agent control, e.g., in the cases of arrest or detention. Both models were found applicable only with regard to acts performed outside the state's territory and only in military situations. In these situations, a state was found to exercise control due to its physical presence on foreign soil. Ergo, neither model applies to home state regulation in the business and human rights sphere.

In response to such a gap in the system of human rights protections, a third model, the cause-and-effect model, has gathered momentum and popularity in human rights fora. This model, developed explicitly in regards to acts performed within a state's territory producing effects

abroad, is highly relevant also in the business and human rights sphere. Under the cause-and-effect model, a state exercises *contactless* control over a right-holder by controlling the cause of harm located within its territory. Such territorial control over the source of harm is manifested through the state's exercise of public powers, most prominently through domestic regulation. Relevantly, a state may exercise control under the cause-and-effect model vis-à-vis its own actions and those of corporations.

The cause-and-effect model is often criticized for its alleged jurisdictional overreaching. However, this Chapter demonstrated that a cause-and-effect jurisdiction is tolerable if meaningful limitations are accepted. The exercise of jurisdiction is limited by means of a territorial nexus and the criterion of reasonableness, analysed in detail in Chapters 1 and 2.

This Chapter highlighted that the cause-and-effect model of extraterritorial jurisdiction has been expressly affirmed in the jurisprudence of the CESCR, the CCPR, and the IACtHR. These bodies defined control as control over extraterritorial situations, the human rights of victims, and the cause of harm to human rights. While at first glance, all notions of control were formulated differently, this dissertation clarified them all to be a subtheme of the overlying cause-and-effect jurisdiction.

This Chapter found that other human rights bodies also supported the emergence of cause-and-effect jurisdiction, yet only tacitly. For instance, the CRC established an extraterritorial duty to protect from business-related human rights violations based on a state's nexus to the extraterritorial human rights violation on the basis of a corporate perpetrator's place of incorporation, registration, or domicile. The ECtHR established an extraterritorial duty to respect the right to privacy of non-resident non-nationals in the context of mass surveillance based on a state's capacity to interfere with these individuals' rights. It was argued that the same reasoning may, in principle, also be applied in the context of the business and human rights sphere.

Most relevantly to this dissertation, this Chapter demonstrated that cause-and-effect jurisdiction may also be applied vis-à-vis the transnational human rights harm of corporations. Based on this model, human rights treaty bodies have attributed a home state duty to protect non-resident non-nationals from human rights violations of corporations incorporated, registered, or domiciled within their territories. They established *de facto* control over a victim

of human rights violations based on a *de jure* relationship between the state and corporate perpetrator of human rights violations incorporated, registered, or domiciled in the state's territory. This finding is a significant development in international human rights law. It demonstrates a "shift in the interpretation of human rights jurisdiction towards an approach more attuned to the realities of transnational State power wielded through and against global business enterprises."[666]

[666] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35, p. 52.

Conclusion

Globalization has paved the way for corporations to become the new global power players. The economic power of some corporations is said to have exceeded the power of most states.[667] While contributing to an increase in the standard of living and a decrease in poverty worldwide, corporations also cause serious human rights violations.

Despite their capacity to violate human rights, corporations do not have direct obligations in international human rights law. It is host states that have a primary duty to protect individuals from the adverse human rights impacts of corporations operating within their territories. However, host states are typically developing countries and, as such, are often unable or unwilling to exert influence against the more powerful corporations, rendering human rights protections meaningless in practice.

In an attempt to contribute towards a more robust system of human rights protections, this dissertation examined a *home state* duty to protect against extraterritorial human rights violations of corporations located within the home state's territory. It suggested that because home states are mostly developed countries and are home to the more powerful enterprise, i.e., a parent company, they are better equipped to prevent and redress their human rights violations. Attributing an extraterritorial duty to protect to home states could thus realistically compensate for the host state's unwillingness/inability to do so.

This dissertation analysed the emergence of a home state duty to protect through the prism of extraterritorial jurisdiction in public international law and international human rights law. In doing so, it relied on the doctrinal method, that is, interpreted international law as is. Because the business and human rights scholarship is characterized by an excess of normative research (bordering on confirmation bias) and a lack of a doctrinal one, this dissertation has substantially contributed to clarifying existing law. However, in the absence of treaty law, this dissertation had to rely on the jurisprudence of international human rights bodies. This has been identified as one of its main limitations.

[667] Milan Babić, Jan Fichtner, Eelke M. Heemskerk, 'States versus Corporations: Rethinking the Power of Business in International Politics' [2017] 52(4) The International Spectator 20, p. 20.

This dissertation posed three main research questions, each of which it answered individually in Chapters 1 to 3. Chapter 1 analysed an extraterritorial duty to protect in general and the business and human rights sphere in particular and examined its legal bindingness. While compelling evidence in favour of such a duty was found, it was determined that an extraterritorial home state duty to protect is merely recommended. This dissertation thus disproved the majority scholarly view that a mandatory home state duty to protect already exists in international human rights law.

Chapter 2 then inquired into the permissibility of a recommended home state duty to protect. In reference to the public international law of jurisdiction, it found that the exercise of extraterritorial human rights protections is a state's sovereign prerogative, regardless of it not being a mandatory state duty. Home states are thus generally allowed to exercise extraterritorial human rights protections to the extent to which they conform to the relevant public international law limitations.

Finally, Chapter 3 determined that any attribution of a recommended/mandatory home state duty to protect is rooted in the existing framework of extraterritorial human rights jurisdiction. While there are several possibilities for attributing extraterritorial obligations in international human rights law, only the cause-and-effect model of jurisdiction was found viable with regard to a duty to protect in the business and human rights sphere. Despite being new and controversial, this jurisdictional model is gathering momentum in human rights fora. Please refer to the detailed summary of findings below.

Home State Duty to Protect

International human rights law has no horizontal effect. States, as the main subjects of international law, are also the main duty-bearers in international human rights law. They must guarantee human rights protections of individuals from human rights violations by non-state actors, including corporations. They are required to do so under the obligation to protect, referred to as a duty to protect in the business and human rights sphere.

The duty to protect originates in human rights treaty texts. Its meaning, scope, and applicability have been clarified in human rights jurisprudence. In the business and human rights sphere, the scope of a duty to protect has also been interpreted in soft law instruments, including the United Nations Guiding Principles on Business and Human Rights and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

It was determined that the duty to protect arises vis-à-vis *all* internationally recognized human rights: civil, political, social, cultural, and economic. This is relevant for the business and human rights sphere, as (transnational) corporations are likewise capable of violating all kinds of human rights. The duty to protect compels states to take positive measures to prevent and redress human rights violations within their jurisdictions (both territorial and extraterritorial), i.e., exercise a duty of due diligence. Ergo, a state will not be held responsible for a human rights violation of a non-state actor per se but for its failure to take reasonable measures.

A home state duty to protect is realized by means of home state *regulation*. Regulation is so fundamental that the duty to protect is sometimes argued to amount to a duty to regulate. Domestic regulation is also the measure of choice for the effective realization of a duty to protect in the business and human rights sphere in state practice. Several home states, including Germany, Norway, and France, have already adopted domestic legislation to strengthen human rights protections from business-related violations.

The requirement to exercise human rights protections within a state's territory and the permissibility thereof are indisputable. It is the *extraterritorial* duty to protect, especially in a business and human rights context, that is contentious. Because of the controversial nature of such a duty, this dissertation carefully identified and reviewed the available primary sources in both universal and regional human rights systems. While focusing on a duty to protect in the business and human rights sphere, it also referred to sources attributing an obligation to protect from the conduct of non-state actors in general. Thereby, this dissertation filled a substantial research gap, as until this point a scholarly analysis of available primary sources was inadequate.

This dissertation analysed relevant views of UN treaty interpreting bodies (CESCR, CCPR, CRC, CEDAW, CERD), regional human rights bodies (IACtHR, ECtHR, ACmHPR), the UNSC, as well as views adopted in soft law instruments (UN Guiding Principles on Business

and Human Rights, Maastricht Principles on Extraterritorial Obligations of States). Based thereupon, it identified a consensus in favour of an extraterritorial duty to protect.

The above bodies have established an extraterritorial duty to protect human rights in 33 different decisions, including advisory opinions, judgments, general comments/recommendations, concluding observations, resolutions, and soft law instruments. Out of these pronouncements, 25 were reached explicitly in the context of business and human rights. The UN treaty interpreting bodies were the most prolific.

These bodies have recognized an extraterritorial duty to protect from all non-state actors, including transnational corporations. Accordingly, states must adopt all appropriate measures to prevent, punish, prohibit, investigate, or redress extraterritorial human rights violations by non-state actors. Appropriate measures are regulatory measures: political, administrative, and legislative. Such measures must only be adopted when a state has the reasonable capacity to influence the non-state actor in question (i.e., exercises control) and only with regard to direct and reasonably foreseeable impacts on human rights. However, the meaning of reasonableness remained undefined.

In the business and human rights sphere, a duty to protect is limited based on either a *de jure* link or a *de facto* one. A *de jure* link, under which a company is to be either incorporated, registered, or domiciled within a home state's territory, is the most common. As it targets a state's corporate nationals (mostly parent enterprises), this link is closest in conformity with the jurisdictional requirements of public international law summarized below. Such a link is also said to satisfy the above criterion of reasonableness.

Interestingly, several bodies have also attributed a duty to protect vis-à-vis companies having their centre of activity or main place of business in the state's territory. The CESCR even went as far as to attribute an extraterritorial duty to protect from the harmful conduct of foreign subsidiaries. This finding is the most difficult to square off with the limitations of both the public international law of jurisdiction and the international human rights law of jurisdiction, as addressed later.

In the business and human rights sphere, an extraterritorial duty to protect was recognized predominantly in the context of economic, social, and cultural rights. Within this category of

rights, the right to health, the right to water, the right to just and favourable conditions of work, the rights to land, environment, and an adequate standard of living were accentuated. In the civil and political rights category, the duty to protect from business-related violations was limited to the rights to life and integrity. However, as a general obligation to protect in international human rights law was recognized vis-à-vis all human rights, it is questionable whether this limitation will hold in the future.

The above findings are significant as they demonstrate a trend in favour of an extraterritorial duty to protect by means of home state regulation. This trend is frequently interpreted in academia as evidence of a mandatory home state duty to protect. As most academic commentaries fail to consider the normative significance of the sources they rely on, this dissertation found them to inevitably reach erroneous conclusions.

Following a detailed analysis of normative significance, this dissertation demonstrated that the relied-on human rights jurisprudence has a merely advisory, interpretative function. It is not legally binding and, at present, does not create legal obligations. Ergo, it may not attribute a mandatory extraterritorial duty to protect to home states.

However, it would be incorrect to assume its irrelevance. It was ascertained throughout this dissertation that the relied-on jurisprudence is highly authoritative and contributes to the conceptual evolution of international human rights law. While its implementation by states is voluntary, it may not be ignored and must sometimes even be considered in good faith. Moreover, it was demonstrated in reference to domestic business and human rights legislation, that the above human rights jurisprudence already influences state practice in the business and human rights sphere. Despite its non-binding status, it is thus capable of bringing about regulatory changes.

Extraterritorial Jurisdiction

The lack of a mandatory home state duty to protect raises the question of a state's *right* to exercise extraterritorial human rights protections by means of home state regulation, nonetheless. Chapter 2 identified that the permissibility of extraterritorial protections by means

of home state regulation is a question of *jurisdiction* in public international law. However, the term jurisdiction also has a special meaning in international human rights law and, as a result, generates frequent confusion in both human rights jurisprudence and scholarship. Because jurisdiction is a central concept to this dissertation, great care has been taken to untangle the different meanings thereof, as summarized below.

In public international law, jurisdiction refers to a state's sovereign prerogative to exercise *de jure* authority, i.e., to prescribe and enforce domestic laws within a specific territory. A duty to exercise jurisdiction in public international law does not arise unless international crimes have been committed. Because such a duty arises only with regard to crimes committed by private individuals and not corporations and, because this dissertation is not concerned with the commission of international crimes in general, it did not consider the emergence of a duty to exercise jurisdiction in public international law any further.

Contrary thereto, as established in Chapter 3, jurisdiction in international human rights law *does* attribute human rights obligations. It is a threshold criterion for human rights obligations to arise in the first place, for individuals to be able to claim human rights protections, and for treaty bodies to be able to adjudicate vis-à-vis any alleged human rights violations. As was determined in human rights jurisprudence, jurisdiction refers to a state's exercise of *de facto* control, authority, or power over a victim of human rights violations. While jurisdiction in international human rights law is inherently a question of responsibility, it is a human rights kind of responsibility, not responsibility for internationally wrongful acts.

Jurisdiction in public international law and international human rights law is primarily territorial but may also arise extraterritorially. A correct understanding of extraterritoriality of jurisdiction is fundamental to this dissertation, as it affects the type of rules applicable to a duty to protect and home state regulation. The extraterritoriality of home state regulation has, in fact, become a contentious issue in academia. Several commentators from academia argue that because a home state regulation is based on a state's territorial competence to legislate vis-à-vis corporate perpetrators of human rights violations within the state's territory, such regulation is territorial, i.e., not subject to the rules and limitations of extraterritorial jurisdiction in neither public international law nor international human rights law.

However, this dissertation found that a blanket approach to the extraterritoriality of home state regulation is flawed. Extraterritoriality is not a black-and-white issue. The determination of whether a home state regulation is subject to the rules of territorial or extraterritorial jurisdiction depends on several elements, as summarized below.

In international human rights law, the distinction between territoriality and extraterritoriality is based on the location of a *victim* of human rights violations. Territorial jurisdiction applies if a victim is located within the state's territory. Extraterritorial jurisdiction applies if a victim is located outside the state's territory while still subject to the state's control. It is thus irrelevant whether the object of a state's regulation, i.e., the corporate perpetrator of human rights violation, is located within or outside a state's territory. A home state regulation affecting non-resident non-nationals is thus also subject to the conditions of extraterritorial jurisdiction.

The matter is more complicated in public international law. While the determination of (extra)territoriality generally depends on the location or nationality of the object of a state's regulation, even a seemingly territorial exercise of jurisdiction may be subject to the rules of extraterritorial jurisdiction. This depends on whether a territorial regulation produces extraterritorial effects, a phenomenon referred to in this dissertation as indirect extraterritoriality.

Indirect extraterritoriality is a fairly new approach to jurisdiction in public international law, which is meant to tackle jurisdictional grey zones, such as in the context of home state regulation in the business and human rights sphere. Despite being based on a state's territorial capacity to regulate (i.e., a territorial nexus), home state regulation usually produces effects outside the home state's territory, as it impacts the human rights of non-resident non-nationals. These extraterritorial effects are not accidental but are, in fact, the intended consequence (and even the primary goal) of such regulation.

Because the extraterritorial effects of home state regulation can affect a foreign state's interests, an indirectly extraterritorial home state regulation is subject to public international law constraints. It may thus only pass muster if it is based on an internationally agreed-upon framework. Moreover, its adoption is acceptable only temporarily until a global solution is implemented. Because home state regulation in the context of this dissertation aims to fill in the regulative void in the business and human rights sphere and does so based on the

unanimously adopted UN Guiding Principles on Business and Human Rights, it was determined permissible.

This dissertation argued that a home state regulation may also be classified as directly extraterritorially if it regulates corporate conduct abroad. However, states exercising direct extraterritorial jurisdiction generally have less room for action and must conform to strict jurisdictional limitations, summarized in five principles: the active personality principle, the passive personality principle, the protective principle, the effects principle, and the universality principle. Out of these principles, only the active personality principle and its civil law equivalent were found applicable with regard to directly extraterritorial home state regulation in the business and human rights sphere.

According to the active personality principle, a state may only exercise jurisdiction vis-à-vis its corporate nationals. While corporate nationality is not a universally defined concept, it was found to be usually based on a company's place of incorporation, registration, or main place of business. Thus, to the extent to which a home state regulates the conduct of one of its corporate nationals, even a directly extraterritorial regulation is permissible. Home state regulation, as foreseen in human rights jurisprudence cited above thus conforms to public international law, regardless of whether it has been classified as directly or indirectly extraterritorial.

Similarly to public international law, international human rights law distinguishes between acts performed *outside* the state's territory and acts performed *within* a state's territory, producing *effects* abroad. Contrary to public international law, however, both instances are explicitly recognized as subject to extraterritorial jurisdiction in international human rights law. Nevertheless, the distinction is still relevant, as it likewise affects the type of jurisdictional limitations applicable. Because home state regulation is an act performed within a state's territory producing effects abroad, the corresponding principles are crucial to this dissertation.

Chapter 3 demonstrated that a jurisdictional link in international human rights law arises if a victim of human rights violations is under a state's *control*. The different understandings of control have been summed up in three jurisdictional models: the spatial, personal, and cause-and-effect models. The spatial and the personal models are the two principal models of jurisdiction recognized across all human rights systems. The cause-and-effect model is a novel and relatively controversial approach to human rights jurisdiction.

It was determined that control under the spatial model arises when a state exercises control over a foreign state's territory. Control under the personal model arises when a state's agents exercise authority over a victim of human rights violations outside a territory within the state's control. Both models denote a direct, physical control exercised primarily in military situations. In both cases, the relevant acts are performed *outside* the state's territory. Because a home state duty to protect within the meaning of this dissertation denotes the taking of acts within the home state's territory and not outside of it, the spatial- and personal models of jurisdiction are inapplicable.

Cause-and-Effect Jurisdiction

The inapplicability of the personal and spatial models has led business and human rights scholars to mistakenly conclude that an extraterritorial home state duty to protect may not be attributed in the business and human rights sphere. This dissertation argued that these scholars have ignored the emergence of the *cause-and-effect* model of jurisdiction. While this jurisdictional model is still in its infancy, it is on the basis thereof that a duty to protect may be attributed in the business and human rights sphere and other instances involving transnational (human rights) harm originating within a state's territory. A detailed analysis of this jurisdictional model was missing – a research gap that this dissertation now fills.

The cause-and-effect model was explicitly developed in view of acts performed within a state's territory producing effects abroad, including cases of transnational corporate and environmental harm, and mass surveillance. Pursuant to this model, a jurisdictional link arises based on a state's territorial capacity to exercise public powers, i.e., its capacity to prevent and redress human rights violations extraterritorially. Control over a victim of human rights violations is thus indirect and *contactless*, exercised through control over the cause of harm. Relevantly, the source of harm may be a third party, enabling the emergence of an extraterritorial duty to protect.

The cause-and-effect model was consolidated in human rights jurisprudence. The CESCR, the CCPR, and the IACtHR have attributed an extraterritorial duty to protect based on the cause-and-effect model. While these bodies have referred to control over extraterritorial situations,

the human rights of victims, and the cause of harm to human rights, it was determined that all of the above notions of control are actually a subtheme of the overlying cause-and-effect jurisdiction. Most significantly, all bodies have recognized the cause-and-effect jurisdiction also in the context of transnational (human rights) harm of corporations incorporated, domiciled, or registered within a state's territory, as relevant to this dissertation.

It was ascertained that other bodies have recognized the cause-and-effect model tacitly. The CRC has done so in the specific context of business and human rights as it attributed an extraterritorial duty to protect to the home states of (transnational) corporations. This dissertation argued that also the ECtHR relied on cause-and-effect jurisdiction when it recognized an extraterritorial duty to respect the right to privacy of non-resident non-nationals in cases of mass surveillance. While not specifically relevant to the business and human rights sphere, the ECtHR's tacit recognition is the first step in the solidification of this jurisdictional model also in the European human rights system. This is a significant finding, as the ECtHR has been reluctant to recognize a jurisdictional link akin to cause-and-effect jurisdiction in the past.

The above human rights bodies have introduced several limitations to avoid an overly excessive jurisdictional reach for which cause-and-effect jurisdiction is frequently criticized. Accordingly, the exercise of jurisdiction must be limited to reasonably foreseeable human rights violations and a state's reasonable capacity to prevent and redress any such violations. There must also be a territorial nexus between the state exercising jurisdiction and the source of harm. In the business and human rights sphere, such territorial nexus was based on the basis of a company's place of incorporation, registration, or domicile. Thus, it is only those entities vis-à-vis which an extraterritorial home state duty to protect in the business and human rights sphere emerges. Relevantly, these limitations also align with the public international law limitations established in Chapter 2.

While it was asserted that the cause-and-effect model of jurisdiction has been consolidated in human rights jurisprudence, this model of jurisdiction is not yet operating as law and may not attribute a mandatory home state duty to protect in the business and human rights sphere. As noted above, most of the relied-on jurisprudence is not legally binding. Any obligations arising therefrom are merely *recommended*. From a human rights activist's point of view, this conclusion is disappointing, but it constitutes a relevant clarification in legal doctrine.

Moreover, even a recommended duty to protect has contributed to strengthening human rights protections in the business and human rights sphere and will likely continue to do so also in the future. The attribution of a recommended home state duty to protect from extraterritorial human rights violations of home state's corporate nationals by means of domestic regulation also constitutes a significant shift in international human rights law. The fact that such attribution conforms to public international law will likely further accelerate the consolidation of a mandatory home state duty to protect.

Future Outlook

A future consolidation of an extraterritorial duty to protect by means of home state regulation in the business and human rights sphere may be anticipated as follows. The first and most definite solution would be the adoption of an international *treaty* in the business and human rights sphere. A hard law instrument would create greater coherence within the current framework of soft law and could, once and for all, resolve the contentious debate surrounding the attribution of an extraterritorial home state duty to protect.

A human rights treaty would likewise contribute to more legal certainty and create a level playing field.[668] A 'Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' is already in the works, with the latest draft having been adopted in 2023. Despite the draft of the treaty being "negotiation-ready",[669] it is unlikely that negotiations will start any time soon. The draft currently lacks the necessary consensus among states.[670]

[668] David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' [2016] 1 Business and Human Rights Journal 203; Business and Human Rights Resource Centre, 'Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons' (Workshop an Public Debate, Notre Dame Law School, USA, 14 May 2014) < https://media.business-humanrights.org/media/documents/cfebdab67eb10367397b504f1380f820b5533bba.pdf> last accessed 08.05.2024.

[669] Surya Deva, 'BHR Symposium: The Business and Human Rights Treaty in 2020-The Draft is "Negotiation-Ready", but are States Ready?' (Opinio Juris 2020) < http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/> last accessed 15.06.2024.

[670] Human Rights Council, 'Report on the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (26.12.2023) UN Doc. A/HRC/55/59, para. 28.

Second, a mandatory home state duty to protect could be consolidated in the binding case law of regional human rights courts. This would be in line with the already existing practice of expanding extraterritorial jurisdiction in human rights jurisprudence. Despite the absence of an inter-systemic precedent, human bodies tend to coordinate their approaches in practice.[671] It is thus possible that regional human rights courts will depend on the already existing principles of a recommended extraterritorial duty to protect in the business and human rights sphere. However, they will likely be cautious not to broaden extraterritorial jurisdiction too widely, as they have to navigate a complex political landscape.[672]

A third possibility is consolidating a home state duty to protect in domestic law. While not yet a duty, several states already avail themselves of the right to exercise extraterritorial human rights protections. France, Norway, Germany, the United Kingdom, Australia, and California have adopted human rights transparency and due diligence laws. The entry into force of the European Corporate Sustainability Due Diligence Directive will certainly further promote the legislative momentum in the business and human rights sphere.

A more widespread adoption of domestic laws is beneficial as it strengthens universal human rights guarantees. Moreover, if it becomes general state practice exercised in view of *opinio juris*, it even creates customary international law.[673] Yet, the current laws do not satisfy the necessary criteria of customary international law.

While generally beneficial, the extraterritorial imposition of domestic regulatory standards in the business and human rights sphere is also criticized for its perceived violation of state sovereignty. Home state regulation is argued to be "neo-colonialist" because mainly third-world sovereignty is affected.[674] This concern may be mitigated when states adhere to the jurisdictional limitations introduced by this dissertation. However, to what extent this is actually the case in existing state practice is questionable. For example, elements of the German

[671] Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' [2011] 27 South African Journal on Human Rights 249, p. 264.
[672] Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011) pp. 174 – 175.
[673] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) XV UNCIO 335; Čestmír Čepelka, Pavel Šturma, *Mezinárodní právo veřejné* (2nd edition, C. H. Beck 2018) pp. 69-70.
[674] Caroline Omari Lichuma, '(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' [2021] 81 Heidelberg Journal of International law 497, p. 519.

Supply Chain Due Diligence Act regulate the extraterritorial conduct of also foreign companies.[675] If the Act is determined to be directly extraterritorial, its permissibility is doubtful.

Finally, effective human rights protections in the business and human rights sphere may also be secured outside the scope of extraterritorial jurisdiction. If a *direct horizontal effect* of human rights is recognized, transnational corporations become duty-bearers in international human rights law and directly assume responsibility for their extraterritorial human rights violations. Historically, however, this solution has faced strong opposition. For example, John Ruggie, the father of the UN Guiding Principles on Business and Human Rights, noted that "corporations are not democratic public interest institutions and […] making them, in effect, co-equal duty bearers for the broad spectrum of human rights […] may undermine efforts to build indigenous social capacity and to make Governments more responsible to their own citizenry."[676] It is because of this argumentation that all past attempts to attribute human rights duties directly to corporations have been rejected.

Thus, the attribution of an extraterritorial home state duty to protect by means of home state regulation in the business and human rights sphere remains the most viable solution for corporate impunity. While this dissertation found that such a duty is not yet mandatory, there are reasons to be hopeful. The international community recognized the need for a home state duty to protect. This dissertation determined that a home state duty to protect may be realized based on already existing principles in international law. Now, what is left, is to settle on the appropriate means of realizing such a duty. As Abraham Lincoln famously said: “determine that the thing can and shall be done, and then we shall find the way”.[677]

[675] Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021, BGBl. I S. 2959 (Germany), Section 1, para. 1 (1) 1.
[676] Economic and Social Council, Commission on Human Rights, ‘Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (22.02.2006) UN Doc. E/CN.4/2006/97.
[677] Abraham Lincoln, ‘The Perpetuation of Our Political Institutions’ (Young Men’s Lyceum of Springfield, Illinois, USA, 27 January 1838) <https://abrahamlincoln.org/features/speeches-writings/abraham-lincoln-quotes/> last accessed 08. 05. 2024.

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and People's Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT-Com	Committee Against Torture
CCPR	Human Rights Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW-Com	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECmHR	European Commission of Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
HRC	Human Rights Council
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
ILC	International Law Commission
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNCTAD	The United Nations Conference on Trade and Development

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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1248 UNTS 13

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3

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'Home State Duty to Protect in Business and Human Rights Through the Prism of Extraterritorial Jurisdiction'

Abstract

Transnational corporations have become the new global power players. Their economic influence is growing, and so is their capacity to violate human rights. However, corporations do not have direct obligations in international human rights law. It is primarily states where human rights violations have occurred ("host-states") that must ensure corporate human rights compliance within the scope of their duty to protect. In practice, these are often developing states unable or unwilling to exert power against the more powerful corporations, negatively impacting people's universal enjoyment of human rights.

To strengthen human rights protections in the business and human rights sphere, human rights bodies and scholars have begun placing a duty to protect human rights on the *home states* of corporations operating in the territory of host states. The study of a home state duty to protect from extraterritorial human rights violations of corporations is in its infancy. In the absence of a legally binding instrument in the sphere of business and human rights, the existence of such a duty is also highly ambiguous. While most human rights scholars argue that a home state duty to protect may already be attributed as a matter of existing international human rights law, other scholars firmly oppose such views.

To contribute towards the clarification of the human rights *status quo* and strengthening of international human rights law protections in the business and human rights sphere, this dissertation thus examines the home state duty to protect in the business and human rights sphere. It addresses its emergence, permissibility, and attribution. Based on the analysis of human rights jurisprudence, this dissertation determines that while a trend in favour of a duty to protect is indisputable, a mandatory home state duty does not yet arise. Based on the concept of jurisdiction in public international law, it ascertains that a conditional exercise of home state protections in view of a recommended duty to protect is permissible. Finally, relying on the concept of jurisdiction in international human rights law, this dissertation concludes that a future mandatory duty may be attributed according to existing human rights law based on a cause-and-effect model of jurisdiction.

Keywords: Business and human rights, duty to protect, extraterritorial jurisdiction, cause-and-effect jurisdiction

„Povinnost domovských států chránit v oblasti byznysu a lidských práv prizmatem extrateritoriální jurisdikce“

Abstrakt v českém jazyce

Nadnárodní korporace se staly novými globálními mocenskými hráči. Jejich ekonomický vliv roste a spolu s ním i jejich schopnost, porušovat lidská práva. Žádná korporace však nemá přímé povinnosti v mezinárodním právu v oblasti lidských práv. Jsou to státy, především hostitelské státy, kde k porušování lidských práv dochází, a které musí dodržování lidských práv korporacemi v rámci své povinnosti chránit zajistit. V praxi se jedná převážně o rozvojové státy, které se vůči mocnějším korporacím často neumí/nechtějí prosadit, což má přímý negativní dopad na všeobecné uplatňování lidských práv.

V zájmu posílení ochrany lidských práv v oblasti byznysu a lidských práv proto začaly lidskoprávní orgány a odborníci povinnost chránit lidská práva ukládat *domovským státům* korporací působících v hostitelských státech. Výzkum povinnosti domovských států, chránit před extrateritoriálním porušováním lidských práv ze strany korporací, je teprve v počátcích. Zatím neexistuje právně závazný nástroj v oblasti podnikání a lidských práv, proto není ani ustanovení domovské povinnosti chránit jednoznačné. Zatímco většina odborníků na lidská práva zastává názor, že povinnost chránit lze domovským státům přisoudit již v rámci stávajícího rámce mezinárodního práva lidských práv, jiní právní odborníci tomuto názoru silně oponují.

Ve snaze přispět k objasnění lidskoprávního *status quo* a celkovému posílení ochrany lidských práv v oblasti byznysu a lidských práv tato disertační práce povinnost domovských států chránit lidská práva zkoumá. Konkrétně se zabývá její existencí, přípustností a přičitatelností. Na základě analýzy lidskoprávní judikatury disertační práce zjišťuje, že ačkoli je trend ve prospěch povinnosti chránit nesporný, závazná povinnost domovského státu zatím nevzniká. Na základě institutu jurisdikce v mezinárodním právu veřejném práce dále zjišťuje, že podmíněné uplatňování ochrany domovského státu, je přípustné. Konečně, opírajíc se o institut jurisdikce v mezinárodním právu v oblasti lidských práv, tato disertační práce dospívá k závěru, že dle stávajícího práva, lze v budoucnu závaznou povinnost domovským státům přičíst, a to v rámci příčinného pojetí jurisdikce.

Klíčová slova: Byznys a lidská práva, povinnost chránit, extrateritoriální jurisdikce, příčinné pojetí jurisdikce