Holding States Responsible for National Corporates’ Extraterritorial Human Rights Violations: Possibility or Absurdity?

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Abstract

Almost four decades have passed since the European Court of Human Rights introduced the concept of positive obligations. Positive obligations mean that the member states must take affirmative action in order to secure the rights and freedoms provided for by the European Convention on Human Rights. Since then, the scope of positive obligations has extended tremendously, and today all substantive rights generally contain positive obligations. The reason behind the development is to maintain the full effectiveness of human rights enforcement within the European context, and it has been enabled, inter alia, through dynamic interpretation and because the European Convention on Human Rights is considered a living instrument. The fact that European companies operating transnationally, i.e. in a non-European context, sometimes through its commercial activities violates human rights has given rise to discussion in legal doctrine on whether the scope of positive obligations should be further extended so that the member states to the European Convention on Human Rights will incur state responsibility for national corporates’ extraterritorial human rights violations. Thus, the purpose of the thesis is to examine whether the European Court of Human Rights can and should proceed with such expansion. An expansion creates methodological and technical problems as it challenges the traditional notion of jurisdiction, however, it is not impossible. Whatever the European Court of Human Rights will decide to do, the thesis will provide arguments both for why home state responsibility for national corporates’ extraterritorial activities that violates human rights can and should be imposed, as well for why it is beyond its (the European Court of Human Rights) competence.

Keywords: International Human Rights Law, European Convention on Human Rights, Extraterritorial Jurisdiction, Positive Obligations, Extraterritorial Obligations, State Responsibility, Non-State Actors, Corporations
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<tr>
<td>ARSIWA</td>
<td>Articles on the Responsibility of States for Internationally Wrongful Acts</td>
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<td>CERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>(dec)</td>
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<td>ECHR or Convention</td>
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<td>HRC</td>
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<td>ICCPR</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICJ Statute</td>
<td>Statute of the International Court of Justice</td>
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<td>ICPPED</td>
<td>International Convention for the Protection of All Persons from Enforced Disappearances</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>UN</td>
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1. Introduction

1.1 Background

International human rights law is confined to complaints against states. Consequently, non-state actors cannot be held accountable for human rights violations under international human rights instruments.¹ The term non-state actor can have different significance depending on the context. Non-state actors can have the ability both to promote and to violate human rights.² In this context, non-state actors signify transnational corporations and their ability to harm human rights. Moreover, the monitoring systems under international human rights law that provide for state accountability are based on traditional rules of state responsibility.³ The problem is that corporations operating internationally constitute a major threat to the realization of human rights.

With the globalization of the world economy and means of communication, corporations have gained lots of power, but there is still limited accountability for their human rights violations.⁴ In many situations the corporation might even be more economically powerful than the government of the state in which it is operating.⁵ Corporations can be guilty of severe crimes under international law, but more commonly, inter alia, their extraction, exploitation and other development activities (which, for example, lead to displacement and hinders access to natural resources) impact on international human rights. The human rights impact depends on the nature of the activity, but most often refers to violation of the right to life, personal integrity and health, property, privacy and family, access to information, public participation in decision-making and access to justice. Moreover, the activities effect on the environment, for example, pollution and contaminated water, relate to the right to life, personal security, physical, mental and moral integrity, and health.⁶

Globalization enables corporations to operate from multiple jurisdictions, which ought to make it easy to find accountability mechanisms. However, this is not the case. The distribution of power in those companies are arranged in ways that defy territorial boundaries:

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³ Clapham (n 2).
⁴ Clapham (n 2) 558-9.
the parent company is considered a national in one state, and the subsidiary company is contemplated a national in another state.\textsuperscript{7} Hence, corporations are many times not held accountable for human rights violations in the host state, which is unable or unwilling to uphold its positive obligations, and it is hard to argue that any other state (home state) is responsible for the acts of that corporation because of the host state jurisdiction.\textsuperscript{8}

One solution to the problem would be to create a new international legal order in which non-state actors directly can be held responsible for human rights violations – an international system with horizontal obligations.\textsuperscript{9} However, a more interesting (international)\textsuperscript{10} \textit{de lege ferenda} solution, found in legal doctrine, is to expand states positive obligations to include regulation of extraterritorial activities by corporate nationals.\textsuperscript{11} Thus, the suggestions is that (home) state responsibility should be engaged for national corporations’ extraterritorial activities that violates human rights, even though the acts cannot not be attributable to the state, but because the state might have extraterritorial obligations to protect human rights.\textsuperscript{12} This option, which ‘only’ requires interpretational changes, is according to the author closer to hand and therefore more viable in the near future, and will therefore be focused on in the thesis.

\subsection*{1.2 Aim and Research Questions}

The aim of the thesis is to investigate whether the European Court of Human Rights (ECtHR or the Court) can and should, in the light of \textit{de lege lata}, expand the scope of positive obligations and impose on the member states the duty to regulate for their national corporates’ extraterritorial acts, thus engaging (home) state responsibility for non-state actors human rights violations abroad? Put differently: to what extent do member states owe their human rights obligations abroad? Moreover, is such extensive interpretation of the European Convention on Human Rights (ECHR or the Convention),\textsuperscript{13} compatible with the Court’s case law, principles developed by the ECtHR, and prevailing legal principles in international law?

\begin{flushleft}
\textsuperscript{8} Clapham (n 2) 560 and McCorquodale and Simons (n 7) 599-60, 615.
\textsuperscript{9} McCorquodale and Simons (n 7) 599.
\textsuperscript{10} It has been suggested that national legal tools such as tort or contract law should regulate corporate activity.
See for example Clapham (n 2) 560.
\textsuperscript{11} McCorquodale and Simons (n 7) 619, 625.
\textsuperscript{12} McCorquodale and Simons (n 7) 599, 615.
\end{flushleft}
Rules on state responsibility stems from customary international law\textsuperscript{14} and holds that a state can be held responsible for a violation of an international legal obligation if the act in question is attributable to the state through its act or omission.\textsuperscript{15} The nature of obligations has been further elaborated in international human rights law, where a state can be held accountable for acts that are not attributable to it, for example, by not complying with its positive obligations.\textsuperscript{16} Positive obligations are restricted to states’ jurisdiction, although there is an extraterritorial dimension to it.\textsuperscript{17}

Accordingly, concepts of jurisdiction, state responsibility and state attribution are closely related and intertwined. But they are not the same and need, therefore, to be sorted out. Furthermore, to answer the research questions it is of significance to understand whether state responsibility and jurisdiction constitute coherent concepts, or whether they possess different characteristics in international human rights law and therefore must be autonomously understood.

1.3 Theory Formation

The thesis will examine the research topic from a theoretical perspective, with the notion of jurisdiction being the core of it. The reason is that jurisdiction must initially be established before there can be any identification of the member states duties \textit{vis-à-vis} recognition of the rights, and only if those rights and duties have been violated can there be state responsibility.\textsuperscript{18} The issue is technical because it is procedurally challenging since the acts the member state must regulate takes place in the host state’s jurisdiction. The issue also has a methodological aspect to it as it challenges the traditional distinction between the doctrines of jurisdiction in general international law and in international human rights law. General international law was initially created between and for states in order to regulate their conduct as sovereigns. International human rights law is part of general international law as it is also created between states, albeit it is generally \textit{for} individuals.\textsuperscript{19} Thus, when reference to international human rights law is made, it means pure human rights treaties that entails civil

\textsuperscript{14} This has been codified by the International Law Commission in its Articles on the Responsibility of States for Internationally Wrongful Acts, UNGAOR A/56/10 (10 August 2001) (ARSIWA) Report of the International Law Commission on the Work of its 53rd session, UN Doc A/56/10.

\textsuperscript{15} McCorquodale and Simons (n 7) 601.

\textsuperscript{16} Andrew Clapham, \textit{Human Rights Obligations of Non-State Actors} (OUP 2006) 348 and McCorquodale and Simons (n 7) 618.

\textsuperscript{17} McCorquodale and Simons (n 7) 618.


\textsuperscript{19} See discussion under section 3.1 (nn 118-24).
and political rights, or economic, social and cultural rights, such as the ECHR or the International Covenant on Economic, Social and Cultural Rights (ICESCR).\(^{20}\) Example of general international law is the Vienna Convention on the Law of Treaties (VCLT).\(^{21}\)

Jurisdiction is primarily territorial, albeit, it is indisputable that there is an extraterritorial dimension to it, i.e. member states can owe human rights obligations outside their territorial boundaries. Moreover, jurisdiction in general international law is often referred to as a right, meanwhile jurisdiction in international human rights law is generally considered a duty. This duty, purportedly, arises as a result of territorial legal competence or a factual relationship, spatial or personal, between the state and an individual.\(^{22}\) Those basis for jurisdiction are, however, inadequate for an expansion of states’ positive obligations to include regulation of corporate nationals’ extraterritorial acts, since there will neither be territorial legal competence, nor factual relationship between the home state and the individuals in the host state. Therefore, it is crucial to find a theory of jurisdiction that can solve the dilemma.\(^{23}\)

The Court’s case law does not provide clear guidance on how the notion of jurisdiction should be understand in the ECHR system. Consequently, legal doctrine will serve as a basis for finding a rational and conceptual apprehension of jurisdiction that is consistent with the ECtHR case law, and that can legitimize the type of jurisdiction required for the research topic. The conceptual theory formation will as such function as a tool and solid ground for further analysis.\(^{24}\)

### 1.4 Delimitations

In line with the purpose of this research, the thesis focuses on the ECtHR. Thus, other international tribunals are examined only to the extent necessary with the aim to analyze whether the Court can and should extend positive obligations and, as a result, hold its member states responsible for national corporates’ extraterritorial human rights violations. There are a vast number of cases concerned positive obligations, both in the Court’s case law, as well as in the case law of other international tribunals, and therefore the issue is examined in the light of selected groundbreaking case law. In the same vein, legal issues of extraterritorial jurisdiction, state responsibility and concerns on how the Convention should be interpreted.


\(^{22}\) See discussion under section 2.2 (nn 65-96).

\(^{23}\) See discussion under section 2.2 (nn 88-107).

\(^{24}\) Claes Sandgren, *Vad är Rättsvetenskap* (Jure Förlag AB 2009) 103, 106.
are examined and presented with reference to *selected groundbreaking* case law. In regard to general principles, only those principles that are relevant for the research topic will be discussed. Further on, international treaties will be investigated to the extent necessary in order to answer the research questions.

It must be mentioned, because of the research topic’s magnitude, in relations to issues on extraterritorial jurisdiction, that it has been asserted that the *forum necessity doctrine* can promote accountability for transnational corporations’ extraterritorial human rights violations.\(^{25}\) The principle allows domestic tribunals to assert jurisdiction where there is no other forum available in which the victims can pursue their claims.\(^{26}\) However, the Court held in its (key) judgment *Naït-Liman v. Switzerland* from 2018 that there is no (European) consensus on universal civil jurisdiction for torture, and that the member states have no customary or treaty obligation to provide forum necessity. However, it should also be noted that the separate opinions are as long as the judgment itself.\(^{27}\) Yet, as recently as 10th of April 2019, the United Kingdom Supreme Court accepted jurisdiction, based on the forum necessity principle, for Zambian communities to pursue civil suit against a parent company domiciled in the United Kingdom. Thus, there is no procedural impediment against the Supreme Court’s investigation of whether the parent company can be held accountable for human rights violations and environmental harm caused by its subsidiary under the merits.\(^{28}\) Nevertheless, because of the Court’s findings in *Naït-Liman v. Switzerland*, and since universal jurisdiction is much disputed, the forum necessity principle will fall outside the scope of this thesis.

### 1.5 Research Method and Materials

The thesis will analyze and investigate the research topic and questions from a legal dogmatic method. The legal dogmatic method has been criticized for only referring to practical formation of *de lege lata*.\(^{29}\) Although *de lege lata* must initially be established, the legal dogmatic method goes further by critically analyzing the current legal position and it provides *de lege ferenda* argumentation.\(^{30}\) It has been suggested that this part of the legal dogmatic

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\(^{26}\) Augenstein (n 25) 597.

\(^{27}\) *Naït-Liman v Switzerland* [GC] (ECtHR) app no 51357/07, 15 March 2018.

\(^{28}\) *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.

\(^{29}\) Sandgren (n 24) 119.

\(^{30}\) Sandgren (n 24) 118-9.
method should be named ‘legal analysis.’ This is, however, not generally accepted.\textsuperscript{31} Since the underlying legal problem of the thesis constitutes systematic challenges for the international legal order, and because the research questions that it attempts to answer entails \textit{de lege ferenda} solution to that legal problem, the thesis will be concerned with \textit{de lege ferenda} argumentation and how well such argumentation respond to \textit{de lege lata}. Hence, the thesis will, framed by international legal sources used together with the doctrine of sources,\textsuperscript{32} present a conceptual and theoretical formation,\textsuperscript{33} which it will apply on applicable international law (\textit{de lege lata}) in order to explain whether the Court in the future (\textit{de lege ferenda}) can, and whether it should, hold its member states responsible for national corporates’ extraterritorial activities that violates human rights through positive obligations. Thus, the method used here can be described as ‘legal analysis,’ or i.e. the jurisprudentially oriented aspect of the legal dogmatic method.\textsuperscript{34}

To use legal sources and apply them to a legal problem is the beginning for the legal dogmatic method.\textsuperscript{35} Sources of international law can be divided into ‘primary rules’ and ‘secondary rules.’ The primary rules set out the rights and obligations of states and other international actors, meanwhile secondary rules are concerned with rules that are applied to determine the existence and the content of primary rules, i.e. the doctrine of sources.\textsuperscript{36} The starting point for identifying sources of international law is Article 38(1) of the Statute of the International Court of Justice (ICJ Statute), which refers to treaties, international customs and general principles of law recognized by the international community. The Article also acknowledges two subsidiary means for determining rules of law: case law and legal doctrine.\textsuperscript{37}

It must be mentioned, though, that Article 38(1) of the ICJ Statute has been considerably criticized as a list of sources of international law for being inadequate, out of date, or ill adapted to modern international relations. Sources of international law, such as unilateral declarations, are missing from it, and the nature and weight of other sources, like case law, is misinterpreted.\textsuperscript{38} Although such critique is well founded, it will not affect the thesis to any

\textsuperscript{31} Jan Kleineman, ‘Rättsdogmatisk Metod’ in Fredric Korling and Mauro Zamboni (eds) \textit{Juridisk Metodlära} (Studentlitteratur 2013) 24.
\textsuperscript{32} Sandgren (n 24) 118.
\textsuperscript{33} Sandgren (n 24) 106.
\textsuperscript{34} Kleineman (n 31) 25.
\textsuperscript{35} Kleineman (n 31) 21.
\textsuperscript{36} Anthea Roberts and Sandesh Sivakumaran, ‘The Theory and Reality of Sources of International Law’ in Malcom D Evans (ed) \textit{International Law} (OUP 5th edn 2018) 89-90.
\textsuperscript{37} Article 38 (1) of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 25 October 1945) (ICJ Statute) 33 UNTS 933.
\textsuperscript{38} Roberts and Sivakumaran (n 36) 100.
greater extent. The legal sources that will be used are mainly the traditional: treaties, international customs and legal principles. However, in order to interpret these sources, case law is of fundamental importance.\textsuperscript{39} Thus, it will weigh equally to the three listed sources. As far as legal doctrine is concerned, it does not balance equally to case law in practice although Article 38(1) of the ICJ Statute places them on the same level.\textsuperscript{40} However, even though legal doctrine does not have the same formal authority as other legal sources, it does provide guidance and explanation on how the legal sources must be interpreted, and will as such have a great part in this thesis.\textsuperscript{41}

1.6 Disposition
The outline is constructed around the fact that jurisdiction must be established before any (human) rights and duties can arise, and that those rights and duties must be violated before the ECtHR can engage state responsibility.\textsuperscript{42} Thus, the discussion will proceed as follows.

Chapter 2 will investigate the technical and methodological challenges faced by the research topic. It will explore the notion of jurisdiction in relation to general international law and international human rights law. Further on, it will set a conceptual framework of the notion of jurisdiction that will serve as a basis for the \textit{de lege ferenda} analysis of whether state responsibility can be invoked for extraterritorial acts of corporate nationals. The starting point will be the perception of jurisdiction in ECtHR case law, although, references will be made to case law from other international tribunals as well. In this chapter it will become clear whether jurisdiction has the same significance in general international law and international human right law, or whether it must be autonomously understood in the latter. As the reader might already be aware of, the notion of jurisdiction can have considerably many different meanings. Hence, in order to facilitate for the reader, Annex 1 contains an illustrative table for section 2.1, and Annex 2 provides a clarifying table for section 2.2 and 2.3.

Chapter 3 will deal further with the technical difficulties. In this chapter, the nature of obligations will be presented. It can be submitted that general international law on state responsibility is ‘a law by states for states,’ meanwhile international human rights law focuses

\textsuperscript{39} Roberts and Sivakumaran (n 36) 106.
\textsuperscript{40} Roberts and Sivakumaran (n 36) 107.
\textsuperscript{41} Kleineman (n 31) 28.
\textsuperscript{42} Besson (n 18) 867-8.
on the protection of individuals.\textsuperscript{43} Therefore, the special character of human rights obligations will be explored. It must be mentioned, though, that there are several dimensions of human rights law’s special character.\textsuperscript{44} Nevertheless, because of the limited space of the thesis, only aspects that are relevant for the research topic will be put forward. Moreover, the ECtHR case law on positive obligations, as well as the extent of obligations, will be examined. The aim is to assess whether all human rights have positive obligations that applies extraterritorially, or, if only some have the ability to provide positive obligations abroad.

In Chapter 4 the concepts of state responsibility and state attribution will be introduced, and the circumstances under which a state can be held responsible for corporations’ extraterritorial human rights violations will be presented. This chapter will further examine the special characteristics of international human rights law and whether it has any implications on state responsibility. To do this, both ECtHR case law, as well as case law from other international tribunals and national courts will be assessed.

Chapter 5 is concerned with different interpretational methods at the Court’s disposal. Emphasis will be put on dynamic interpretation and the general principle of non-retroactivity in order to conclude whether the legal dilemma can be overcome, or if expanding the scope of positive obligations in fact is illegal under general international law.

Finally, in Chapter 6, the final discussion will be presented. Chapter 6 will analyze the research topic and discuss whether (home) state responsibility for national corporates’ extraterritorial acts is possible in the light of the Court’s case law, principles developed by the ECtHR, and general principles of international law. The discussion attempts to address both whether the court can engage (home) state responsibility, and whether the Court should (or should not) extend the scope of positive obligations.

In order to make the thesis tangible and comprehensible, key takeaways will be presented after chapter 2-5 containing the most fundamental legal principles from that specific chapter, which the reader should be aware of when reading the final discussion.


\textsuperscript{44} Reservations are an example of human rights law’s special character that will not be examined here. See for example: Frédéric Mégret, ‘Nature of Obligations’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) \textit{International Human Rights Law} (OUP 3rd 2018) 91-7.
2. The Meaning of Jurisdiction

2.1 The Doctrine of Jurisdiction in General International Law

Each State has the right to regulate its own public order, and to that end it is entitled to legislate for everyone within its territory. But States are also entitled to legislate for their nationals, and some actions extend over national boundaries.\(^{45}\)

The term jurisdiction refers to the authority of a state, based on and limited by international law, to regulate the conduct of natural and legal persons by means of domestic law.\(^{46}\) Further on, a state’s jurisdiction can be described as an aspect of its sovereignty, its right to regulate its own ordre public, and restrictions flow from the equal sovereignty of other states.\(^{47}\)

Jurisdiction can initially be classified in accordance to ‘types of jurisdiction’ and ‘bases for jurisdiction.’ The different ‘types of jurisdiction’ can be expressed through legislative, judicial or executive powers.\(^{48}\) Legislative jurisdiction is the state’s ability to enact or prescribe legal rules. The executive jurisdiction refers to the states power to enforce or apply the rules that have been enacted. Judicial jurisdiction is concerned with the power of the state to subject natural and legal persons to the process of its courts and administrative tribunals. Judicial jurisdiction can, therefore, be subsumed under the state’s legislative and executive powers.\(^{49}\) Moreover, there is a clear distinction between legislative and executive jurisdiction. Executive jurisdiction is regulated by the simple rule that a state may not exercise its enforcement power on the territory of another state, unless consent is given by that other state.\(^{50}\) The same is true for judicial jurisdiction.\(^{51}\) Legislative jurisdiction, on the other hand, can be exercised extraterritorially without the consent of that other state. Although, it is primarily territorial since the majority of the situations and relationships a state seek to regulate will take place on its own territory.\(^{52}\) Thus, executive and judicial jurisdiction is

\(^{45}\) Christopher Staker, ‘Jurisdiction,’ in Malcom D Evans (ed) International Law (OUP 5th edn 2018) 289 (emphasis added).
\(^{47}\) Antonio Cassese, International Law (OUP 2nd edn 2005) 49.
\(^{48}\) Staker (n 45) 292-3.
\(^{49}\) Lowe (n 46) 338-9.
\(^{50}\) Cassese (n 47) 50.
\(^{51}\) Staker (n 45) 290.
territorial; meanwhile legislative jurisdiction has the power to operate extraterritorially (see Annex 1).

The law of legislative jurisdiction is in fact about the exceptions to territoriality, i.e. the reach, scope or the ambit of a state’s laws. If a particular conduct, which the state seeks to regulate, takes place outside its territory, it may nonetheless regulate it if there is an additional basis for jurisdiction – a connecting factor (see Annex 1).\textsuperscript{53} As far as ‘bases for jurisdiction’ are concerned, there are two connecting factors that are firmly established in international law: territoriality and nationality.

The territoriality principle is a consequence of state sovereignty and entails the right of the state to legislate the boundaries of the public order of the state.\textsuperscript{54} Further on, there are two sub-categories under territorial jurisdiction: subjective territorial jurisdiction and objective territorial jurisdiction. The first is concerned with a state’s power to apply its laws to a situation, which is initiated within the territory but completed outside the territory. Objective territorial jurisdiction is when a state applies its law to a situation that is completed within its territory but was initiated outside its territory. Under the principle of objective territorial jurisdiction, the ‘effects doctrine,’ which shall only be briefly mentioned here, can be found. It relies on the economic repercussions within a territory rather than some element of intraterritorial conduct.\textsuperscript{55}

The nationality principle (or active personality principle) entitles the state to regulate the conduct of its nationals, even when they are abroad. The nationality of companies is a matter for each state to determine under its domestic law. This is a complex issue though as there is a divergence in state practice. In general, common law countries accord nationality to companies on the basis of their incorporation in the territory, regardless of where the actual business takes place. Meanwhile, at least some, civil law countries confer their nationality not on the basis of incorporation but rather on the basis of the place where the company has its seat.\textsuperscript{56} A problem that arises when concerned with transnational corporations, in regard to general international law, is that a subsidiary company is considered a separate legal entity and therefore distinct from its parent company and as a result, they are subject to different

\footnotesize{\textsuperscript{53} Lowe (n 46) 342.  
\textsuperscript{54} Staker (n 45) 296.  
\textsuperscript{55} Staker (n 45) 297-8.  
\textsuperscript{56} Staker (n 45) 299.}
jurisdictions. However, state jurisdiction can and do overlap, and more than one system of laws might be applicable to the same conduct.

Other connecting factors for jurisdiction are: the passive personality principle, under which a state, within certain limits, may prohibit conduct that directly harms its nationals, even if the perpetrator is not its national and the harmful conduct takes place outside its territory; the protective principle, which enables a state to punish persons who seek to harm its most vital interests; the universality principle according to which a state may criminalize conduct without any direct connection to whether that conduct harms the international community as a whole; and the treaty based extension of jurisdiction in which states cooperate to secure the effective and efficient subjection to the law of offences of common interest. The universality principle and the passive personality principle are, however, considered to be controversial bases for jurisdiction.

All the above-mentioned principles concern regulation of extraterritorial activities and none of them is necessarily subordinate to another. Moreover, the territorial principle is not on top of some kind of ‘jurisdictional hierarchy.’ Therefore, it is interesting, that the ECtHR, although claiming that Article 1 of ECHR embodies the notion of jurisdiction from general international law, and even though it enumerated the generally recognized bases for legislative jurisdiction (the nationality principle, the passive personality principle, the protective principle and the universality principle i.e. connecting factors), it was of the view that Article 1 ECHR reflects the ordinary territorial meaning of jurisdiction. Other bases for jurisdiction are exceptional and require special justification on a case-by-case basis. But is there really an ordinary meaning of jurisdiction?

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57 McCorquodale, ‘Corporate Social Responsibility and International Human Rights Law’ [2009] 87 Journal of Business Ethics, 385, 390. This will be further examined under section 4.3.
58 Milanovic (n 52) 25.
59 Milanovic (n 52) 24.
60 Milanovic (n 52) 25.
61 Staker (n 45) 303.
62 Milanovic (n 52) 25. Other controversial bases of prescriptive jurisdiction are: national technology and unprincipled assertion of jurisdiction. See Staker (n 45) 306-8.
63 Milanovic (n 52) 25.
64 Bankovic and Others v Belgium and Others [GC] (ECtHR) app no 52207/99 (dec) 12 December 2001, paras 59-61. See also Jaloud v the Netherlands [GC] (ECtHR) app no 47708/08, 20 November 2014, para 139 and Al-Skeini and Others v the United Kingdom [GC] (ECtHR) app no 55721/07, 7 July 2011, paras 130-9.
2.2 The Significance of Jurisdiction in International Human Rights Law

Most international human rights treaties in force entail *prima facie* territorial jurisdiction clauses. According to Article 1 of the ECHR: ‘The High Contracting Parties shall secure [the rights and freedoms] to everyone within their jurisdiction.’ The International Covenant on Civil and Political Rights (ICCPR) states that: ‘Each State Party … undertakes to respect and ensure [the rights recognized] within its territory and subject to its jurisdiction.’ Meanwhile, some treaties, like the ICESCR, contain no general jurisdiction clause at all. Although, the International Court of Justice (ICJ) has held that the ICESCR imposes essentially territorial obligations.

It is, nevertheless, indisputable that every international human rights treaty may impose at least some extraterritorial obligations and that the notion of jurisdiction is central to this issue. In fact, mere the notion of extraterritoriality implies that territorial application is the principle, but that there can be exceptions. Loizidou is the landmark case of extraterritorial application of the ECHR. In the case, the Court held that even though Article 1 ECHR limits the scope of the Convention, the concept of jurisdiction is not restricted to national territory. The Court, for the first time, imposed jurisdiction based on territorial control (spatial jurisdiction). It held that Article 1 ECHR could also be engaged when a member state exercises *effective control over an area* outside its territory, independent of whether such effective control is undertaken lawfully or unlawfully.

Extraterritorial application of human rights refers to the recognition by those (human rights) treaties’ member states of international human rights of individuals or groups of individuals situated outside their territory and, at a second stage, to the identification of their

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68 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR) 993 UNTS 14531. See, however, special jurisdiction clause under Article 14 ICESCR.
71 Besson (n 65) 862. See also *Al-Skeini and Others v the United Kingdom* [GC] (ECtHR) app no 55721/07, 7 July 2011 and *Bankovic and Others v Belgium and Others* [GC] (ECtHR) app no 52207/99 (dec) 12 December 2001.
72 *Loizidou v Turkey* (ECtHR) app no 15318/89, 18 December 1996.
73 *Loizidou v Turkey* (n 72) para 62 (preliminary objection), the ruling was also affirmed under the merits, paras 52-7. See also *Cyprus v Turkey* (ECtHR) app no 25781/94, 10 May 2001, paras 77-8.
corresponding duties to those individuals. But with that said, as mentioned above, there are instances where the ECtHR insists that jurisdiction is ‘primarily territorial.’ At the same time, the Court claims that jurisdiction in international human rights law is the exception of territoriality, which entail that jurisdiction does not only come from territory, but that extraterritorial jurisdiction can constitute justified exceptions. So how should we then understand jurisdiction in international human rights law?

First of all, jurisdiction is a threshold criterion, which needs to be satisfied – it must be met by a state in relation to an individual - in order for the obligations to arise in the first place. Secondly, the notion of jurisdiction in human rights treaties can signify the jurisdiction of a state, as well as the jurisdiction of an international court. International human rights law is, moreover, agnostic towards the question of whether the state acts lawfully, i.e. respects the sovereignty of other states exercising their jurisdiction. Thus, when a state has jurisdiction, that state enjoys no discretion as to whether the human rights obligations should apply or not.

Apart from what was just stated above, the perceptions on how the notion of jurisdiction should be understand are nearly endless, and there are numerous of potential distinctions that can be drawn. One important distinction, Raible stresses, is jurisdiction as traditionally conceived in international law, which is a question of right, and jurisdiction in international human rights law, as a question of duty. Also Milanovic distinguishes between the doctrines of jurisdiction in general international law and in international human rights law. The former relates solely to a state’s right to regulate the conduct of natural or legal persons, and the consequences for their actions under domestic law, meanwhile, the latter (the notion of jurisdiction in international human rights law) is a synonym for power, authority and control. Although Milanovic admits that jurisdiction connotes a relationship between a state and an individual, he claims that this is purely a result from the factual power that the state

74 Besson (n 65) 858. See also Al-Skeini and Others v the United Kingdom (n 71) para 130.
75 Bankovic and Others v Belgium and Others (n 71) para 59 and Raible (n 70) 318.
76 Raible (n 70) 318.
77 Milanovic (n 52) 19 and Raible (n 70) 318.
78 Raible (n 70) 320 and Milanovic (n 52) 19. Albeit, jurisdiction of the ECtHR is affected by the member state’s jurisdiction. If the ECtHR does not apply due to lack of the state’s jurisdiction, the ECtHR will automatically not have jurisdiction ratione materiae, and it will lose jurisdiction ratione personae if it found that the wrongful act complained of was not attributable to the defendant state. See for example Saddam Hussein v Albania and Others (ECtHR) app no 23276/04 (dec) 14 March 2006.
80 Raible (n 70) 320.
81 Milanovic (n 52) 33, 39.
Thus, jurisdiction cannot be based solely on legal authority (because this type of jurisdiction belongs to general international law); there must also be factual power, authority and control over territory.

Besson argues that jurisdiction is a duty that stems from *de facto* legal (and political) authority, and therefore it is rather functional than territorial.\(^8^3\) She signifies the notion of jurisdiction in international human rights law as a factual relationship between the state and an individual. Thus, legal authority is possible as a result of factual relationship (and not purely a legal relationship). When assessing jurisdiction, Besson accentuate, one must distinguish between the constitutive element of jurisdiction (types of control) and the types of jurisdiction. The types of constitutive elements correspond to a type of jurisdiction: territorial (spatial) or personal. A state may have control over territory as well as control over people.\(^8^4\)

She identifies three types of constitutive elements of jurisdiction: effective control, overall control, and normative guidance. The authority of the state should be exercised and not claimed (effective); it should be exercised over a large number of independent stakes, and not only once over a single matter only (overall), and it should also be exercised in a normative fashion so as to give reason for action, and not mere coercion (normative).\(^8^5\) Besson’s understanding of jurisdiction, however, is disproven by the ECtHR case law. In the case of *Issa v. Turkey*, the Court stated that *temporary* effective overall control of *only a particular area* was sufficient to bring individuals present in that area within the state’s jurisdiction.\(^8^6\)

Both Besson and Milanovic have in common distinguishing the meaning of jurisdiction in general international law from that conceived in international human rights treaties. Further on, they base their understanding of jurisdiction in international human rights law merely on a factual power (Milanovic) or on a *de facto* legal authority, i.e. factual relationship between the state and an individual (Besson). Yet, these views are inadequate in regard to the research topic because neither is the home state going to have factual power over the host state’s territory and its people, nor will there be a factual relationship between the home state and the people of the host state that enables legal authority.\(^8^7\)

King, on the other hand, provides a tripartite typology of jurisdiction: (1) jurisdiction resulting from territorial based legal competence; (2) jurisdiction resulting from non-territorial based legal competence, and (3) purely factual relationship between the state and an

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\(^8^2\) Milanovic (n 52) 33.

\(^8^3\) Besson (n 65) 862.

\(^8^4\) Besson (n 65) 874.

\(^8^5\) Besson (n 65) 872.

\(^8^6\) *Issa and Others v Turkey* (ECtHR) app no 31821/96, 16 November 2004.

\(^8^7\) King (n 79) 530, 536.
individual (see Annex 2). The last category of jurisdiction can be engaged even though the state acts beyond what is allowed under general international law. The different categories will, however, impose different types of obligations on states. We will come back to this issue under Chapter 3. King makes a distinction between technical exercise of jurisdiction and an exercise of power attributable to a state and claims that both factual and legal relationships underline the concept of jurisdiction in international human rights law.

King’s approach to jurisdiction can rebut jurisdiction as merely factual. Jurisdiction based on territorial legal competence brings every person under the territory of the member state within that state’s jurisdiction for human rights purposes. This type of territorial legal competence also has an extraterritorial dimension to it since a state might legally exercise extraterritorial jurisdiction, for example, by invitation or occupation (see Annex 2). Such legal extraterritorial jurisdiction can be found in, for example, *Cyprus v. Turkey*.

Jurisdiction based on factual relationship (which can be spatial or personal) constitutes a particular cause and effect notion created by a conduct (see Annex 2). When a state, through its agents, acts beyond its lawful competence, it brings any person affected by its acts within its jurisdiction for the purposes of ECHR and the ICCPR. The ECtHR held in *Öcalan v. Turkey* that ‘an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person concerned’s individual rights.’

Moreover, the Human Rights Committee (HRC) has stated that when a state is operating on a foreign state’s territory, it can do so ‘with the acquiescence of the Government of that state or in opposition to it.’ ‘With the acquiescence of the Government’ can translate into extraterritorial jurisdiction based on territorial legal competence, meanwhile ‘in oppose to it’ means jurisdiction based on factual relationship.

The case of *Loizidou* can be placed under jurisdiction based on factual relationship as it concerned spatial jurisdiction. Also, the case of *Bankovic* can be considered to belong to this category, although, the Court did not establish jurisdiction under Article 1 of the ECHR. In

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88 King (n 79) 522.
89 See for example *Öcalan v Turkey* [GC] (ECtHR) app no 46221/99, 12 May 2005, para 85 and King (n 79) 538.
90 King (n 79) 538.
91 King (n 79) 526.
92 King (n 79) 547.
93 King (n 79) 528, 542.
94 *Cyprus v Turkey* (n 73) para 77.
95 King (n 79) 551.
96 *Öcalan v Turkey* (n 89) para 85.
97 Sergio Ruben Lopez Burgos v Uruguay (HRC) communication no R.12/52, UN Doc supp no 40 (A/36/40) at 176, 29 July 1981, para 12(3).
the case, the Court held that the legal space (*espace juridique*) of the Convention is limited, i.e. the Court ensures observance of the engagements undertaken by the member states within the legal space of the Convention. The Court suggested that there was no jurisdicitional link between the victims and the respondent states (as needed in accordance to the doctrine of jurisdiction in general international law) and held that when the state exercises unlawful jurisdiction abroad, no jurisdiction can be obtained for the purpose of the Convention.98

The case of *Bankovic* was retained in the case of *Al-Skeini*, where the Court stated that recognition of extraterritorial jurisdiction must remain exceptional, and somehow requires justification on the basis of general international law.99 In the case of *Al-Skeini*, which concerned personal jurisdiction (as opposed to spatial jurisdiction which was the case in *Bankovic*), the ECtHR recognized that the exercise of extraterritorial jurisdiction by a member state, *when through invitation or acquiesce of the government of that territory, it is exercising all or some of the public powers normally to be exercised by that government*, the member state may be responsible for breaches of the ECHR.100 The Court’s reasoning corresponds to what King calls, (extraterritorial) jurisdiction based on legal competence over territory. The fact that the ECtHR did not find jurisdiction in the case of *Bankovic* can be, wrongly, explained by the fact that the Court could not established a jurisdicitional link between the victims of the act complained of and the respondent states. The case was, however, as closely as one can get, overruled in the case of *Al-Skeini* because the Court stated that, although the state agents used (unlawful) force, it is clear that whenever a state through its agents exercises control and authority over an individual, it exercises its jurisdiction and is therefore under an obligation to secure the rights and freedoms according to Article 1 ECHR, thus bringing the victims within the ambit of the Convention.101 The reasoning correlates to personal jurisdiction based on a factual relationship between a state and an individual that is unlawfully obtained.

The Court’s case law on extraterritorial application of the Convention is conflicting and it is not providing any clear guidance on how the notion of jurisdiction should be understand, or how it relates to the doctrine of jurisdiction in general international law. The Court itself considers the most authoritative jurisdicitional principles in regard to Article 1 ECHR to be: jurisdiction as primarily territorial; only exceptional circumstances can give rise to state jurisdiction outside the member state’s territorial boundaries; jurisdiction is a question of fact;

98 *Bankovic and Others v Belgium and Others* (n 71) paras 59-61, 80.
99 *Al-Skeini and Others v the United Kingdom* (n 71).
100 *Al-Skeini and Others v the United Kingdom* (n 71) para 135.
101 *Al-Skeini and Others v the United Kingdom* (n 71) paras 136-7.
there are two principal exceptions to territoriality: a member state’s agent authority and control and effective control over an area; and, the ‘agent, authority and control exception applies to the acts of diplomatic and consular agents present on foreign territory;’ to circumstances where a member state, ‘through custom, treaty or agreement, exercises executive public powers or carries out judicial or executive functions on the territory of another State;’ and circumstances where the member state ‘through its agents exercises control and authority over an individual outside its territory, such as using force to take a person into custody or exerting full physical control over a person through apprehension or detention.’

The principles come from the Court’s most authoritative, up to date, case law on the subject matter: Al-Skeini.103 They imply that extraterritorial jurisdiction based on territorial legal competence and extraterritorial jurisdictions based on factual relationship (see Annex 2) constitute valid exceptions to jurisdiction as primarily territorial. Further on, because ‘recent’ exceptional situations have been concerned with factual relationship jurisdiction (spatial and personal), it might be the reason for why the legal doctrine focuses on factual theories of jurisdiction. The notion of jurisdiction has been the subject of a long evolution in the Court’s case law.104 However, re-stating the most authoritative jurisdictional principles does not mean that the evolution is completed or that the list is exhaustive. Moreover, there are in fact cases that cannot be explained through factual theories or the Court’s principal exceptions.

The European Commission on Human Rights (EComHR) has, for example, held that the nationals of a member state are within that state’s jurisdiction even when domiciled or resident abroad, thus making the member state liable in respect of the Convention.105 The applicability of the ECHR can, in this case, only be explained with reference to the member state’s lawful, non-territorial, competence (see Annex 2). This means that, insofar as the member state can lawfully prescribe legislation controlling the behavior of its nationals abroad, based on the nationality principle (connecting factor), those nationals are within the

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102 Chagos Islanders v the United Kingdom (ECtHR) app no 35622/04 (dec) 11 December 2012, para 70 (emphasis added).
103 Al-Skeini and Others v the United Kingdom (n 71). The most recent jurisdictional (key) case is Naït-Liman v Switzerland [GC] (ECtHR) app no 51357/07, 15 March 2018. The case is concerned with universal civil jurisdiction for torture and the forum necessity principle. Although universal jurisdiction constitutes a connecting factor, it is controversial, and therefore it is not examined to any greater extent in this thesis. The Court held in Naït-Liman v Switzerland that there is no consensus around universal civil jurisdiction for torture, and that states have no customary or treaty obligation to provide jurisdiction (forum) by necessity. Thus, these aspects will fall outside the scope of the thesis.
105 X v Federal Republic of Germany (EComHR) (1965) 17 HRCD 42, para 47.
member state’s jurisdiction for the purpose of the ECHR.\textsuperscript{106} The idea that persons abroad can be affected by a state's lawful legislation and therefore fall within the state's jurisdiction can also be found in the HRC case law.\textsuperscript{107}

The ECtHR has held that ‘a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence.’\textsuperscript{108} This is true in relation to enforcement powers, which are dependent on territorial legal basis.\textsuperscript{109} Yet, legislative jurisdiction can be exercised extraterritorially without the consent of the host state, and earlier case law suggest that a non-territorial legal basis for jurisdiction is possible under the ECHR system. Further on, the extraterritorial dimension of legislative jurisdiction enables accountability (judicial and executive powers), albeit within national territorial boundaries.

2.3 Home State Jurisdiction for Corporate Nationals’ Extraterritorial Activities

It can be argued that the concept of jurisdiction in general international law has nothing to do with the one in human rights treaties, because the former refers to a right and the latter to a duty.\textsuperscript{110} Additionally, the notion of jurisdiction has special characteristics in international human rights law because a member state can incur jurisdiction even though it was obtained unlawfully. Although it has been suggested that the notion of jurisdiction is an autonomous concept specific to human rights treaties,\textsuperscript{111} this is not the case, as proven above.

Moreover, Article 9(2) of the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED), for example, holds that ‘Each State Party shall … establish … jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction.’\textsuperscript{112} The first use of jurisdiction refers to a treaty based universal jurisdiction, but the second notion of jurisdiction refers to a particular kind of factual power, authority or control that a state has over territory, which is the same

\textsuperscript{106} King (n 79) 537.
\textsuperscript{108} Bankovic and Others v Belgium and Others (n 71) para 60.
\textsuperscript{109} Al-Skeini and Others v the United Kingdom (n 71) para 135.
\textsuperscript{110} Milanovic (n 52) 26 and Raible (n 70) 320.
\textsuperscript{111} Partially Dissenting Opinion of Judge Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Pantiru in Ilascu and Others v Moldova and Russia [GC] (ECtHR) app no 48787/99, 8 July 2004, para 8.
significance that can be found in human rights treaties.\textsuperscript{113} It is this concept of jurisdiction that the ECtHR developed in the case of Loizidou.\textsuperscript{114} Thus, the factual relationship between a state and an individual exists in both general international law and in international human right law. According to King, although claims have been made that there is a distinction between jurisdictions in general international law and jurisdiction in international human rights law, both factual and legal relationships underline the understanding of jurisdiction in international human rights law. Extensive prescriptive power can be established in treaties (for example treaty based universal jurisdiction),\textsuperscript{115} as well as in, because the nationality principle constitutes a connecting factor, case law from human rights tribunals. Hence, the notion of jurisdiction is not an autonomous concept in international human rights treaties, albeit it possesses special characteristics because it is a duty, rather than a right, and the state can incur jurisdiction although it was obtained unlawfully.

Accordingly, jurisdiction is a threshold criterion that needs to be satisfied in order for human rights obligations to arise. The threshold criterion can, according to King, be satisfied due to territorial legal competence, non-territorial legal competence, and factual relationship between the state and an individual. Therefore, the member states of the ECHR can have jurisdiction for national corporates’ extraterritorial acts based on the legislative power the state has over its nationals, i.e. legal competence based on non-territorial factors.\textsuperscript{116} Judicial and executive powers are limited to a state’s territorial legal competence. Nevertheless, extensive legislative power, in turn, gives rise to enforcement powers within the home state’s territorial boundaries.

Additionally, subjective territorial jurisdiction (non-territorial legal competence), can possibly also serve as a basis for home state jurisdiction. Subjective territorial jurisdiction is concerned with a state’s power to apply its laws to a situation, which is initiated within the territory but completed outside the territory. The burden of proof might be difficult, however, if a state know that its corporate national is causing harm to people in another state,\textsuperscript{117} it can be argued that there is no impediment under general international law against that state claiming subjective territorial jurisdiction to punish the behavior of that company. Yet, emphasis will be put on extensive legislative jurisdiction and the nationality principle.

\textsuperscript{113} Milovanovic (n 52) 32.
\textsuperscript{114} Loizidou v Turkey (n 72).
\textsuperscript{115} See for example Article 9(2) ICPPED (n 112).
\textsuperscript{116} See reasoning in regard to consular officials in King (n 79) 548.
\textsuperscript{117} McCorquodale (n 57) 389.
Key takeaways: Jurisdiction is a threshold criterion that must be met for an obligation to arise. The threshold criterion can be met by territorial legal competence (which also can operate extraterritorially through, for example, invitation), non-territorial legal competence and factual relationship between the state and an individual. The ECtHR has so far only accepted extraterritorial jurisdiction based on legal territorial competence and jurisdiction based on factual relationship between the state and an individual. Albeit, jurisdiction based on non-territorial legal competence, in this case extensive legislative jurisdiction as a result of the nationality principle, is possible according to general international law.

3. The Nature of Human Rights Obligations

3.1 Special Characteristics of Human Rights Obligations

International law has, traditionally, been created by, between and for states, and it has been signified by concepts such as state sovereignty and state voluntarism. It has been dedicated to ensuring that state sovereignty is respected, and that states are only bound by those obligations that they have consented to. This strict protection of sovereignty in general international law is, however, in principle, incompatible with international human rights law, since human rights law deal essentially with issues that are usually considered to be part of states’ exclusive domestic powers. Thus, the fundamental idea is that human rights obligations are in some ways distinct from other types of obligations that exist under general international law. Human rights obligations are concerned with the obligations of states towards individuals rather than obligations between states.\textsuperscript{118}

Human rights treaties, though, derive much from general international law of treaties, including the way they come into existence \textit{vis-à-vis} states are bound by treaties they ratify as a result of the principle of \textit{pacta sunt servanda}. Nevertheless, to describe human rights treaties as contractual would be deceptive: states do not commit to respect human right in exchange for other states to do so, rather states are formally binding themselves to other states. Further on, the fact that traditional treaties create rights and obligations between states, thus excluding other actors, mean that the benefits enjoyed by any other actor are merely ‘accidental’ or an objective consequence stemming from that arrangement. Human rights

\footnote{\textsuperscript{118} Frédéric Mégret, ‘Nature of Obligations’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) \textit{International Human Rights Law} (OUP 3\textsuperscript{rd} edn 2018) 86-8.}
treaties, on the other hand, which are typically between states, target third parties, i.e. individuals are the beneficiaries.\textsuperscript{119}

Reference to human rights treaties special character was first made when the General Assembly sought an advisory opinion from the ICJ on reservations to the Genocide Convention.\textsuperscript{120} The ICJ distinguished between ordinary treaties and those of humanitarian or human rights character and held in relation to the latter that:

[T]he contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, accomplishment of those high purposes which are the raison d’être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.\textsuperscript{121}

The EComHR took a similar approach, that human rights express something greater than the member states will, when it affirmed that:

The obligations undertaken by the High Contracting Parties in the [European] Convention [on Human Rights] are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.\textsuperscript{122}

Hence, despite that a human rights treaty has been concluded between states, there is a unilateral element to it as states promise the international community, and individuals within their jurisdiction, adherence to the right and freedoms.\textsuperscript{123}

The member states’ adherence to the rights and freedoms contained in human rights treaties have traditionally been associated with a vertical dimension of obligations, which means that the state is the duty bearer in relation to the individual, the right holder, who can invoke human rights against the state. This dimension of obligations challenged the classical

\textsuperscript{119} Mégret (n 118) 89.
\textsuperscript{121} Reservation to the Genocide Convention, Advisory Opinion (ICJ) 28 May 1951 [1951] ICJ Rep 15, para 23.
\textsuperscript{122} Austria v Italy (Pfunders Case) (EComHR) (1961) 4 YB 116, para 138.
\textsuperscript{123} Mégret (n 118) 90.
horizontal dimension of obligations, which is typical for general international law *vis-a-vis* regulations of direct obligations between states, in that it recognized individuals as subjects under international law, as opposed to being mere objects.\textsuperscript{124} The nature of obligations has then been further elaborated in international human rights law, and has expanded to include a diagonal dimension of obligations. Diagonal obligations are usually referred to as a state’s positive obligations or due diligence.\textsuperscript{125}

There is a distinction in international human rights law between, one the one hand, negative obligations and, on the other hand, positive obligations. The former relates to the obligations to *respect* human rights, which means that the member state, in general, must refrain from interference with individuals’ rights and freedoms, meanwhile the latter refers to the obligations to *protect* and *ensure* human rights, which require member states to take action in order to secure human rights, i.e. to protect one non-state actor from another in certain situations.\textsuperscript{126} It must be mentioned that a different distinction exists, a tripartite typology, which is well established and used by the United Nations (UN) Committee on Economic, Social and Cultural Rights.\textsuperscript{127} In the typology, the obligations to *respect* constitute negative obligations, and the obligations to *protect* (one non-state actor from another) and *fulfill* (a human right) are positive obligations.\textsuperscript{128} Negative and positive obligations are interdependent: they complement each other because negative obligations cannot be respected without positive obligations to protect and aid, and vice versa.\textsuperscript{129} Due to the nature of the research topic, however, emphasis will be put on positive obligations.

### 3.2 The Scope of Positive Obligations

Positive obligations are not explicit in the Convention, but stem from Article 1 ECHR, which require states to *secure* convention rights to everyone within their jurisdiction. Article 1 has, together with the substantive rights of the ECHR, been interpreted as imposing both negative and positive obligations upon the member states.\textsuperscript{130}

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\textsuperscript{125} Hessbruegge (n 124) 24-5, 27.


\textsuperscript{127} First formulated in UN Doc E/CN.4/Sub.2/1987/23.

\textsuperscript{128} Harris et al (n 126) 22.


\textsuperscript{130} Harris et al (n 126) 21.
The concept was first introduced in *Young, James and Webster v. the United Kingdom* where the Court attributed the omission by the legislature to the state.131 Such interpretation comes from the principle of effectiveness, which has been adopted by the Court. The principle is embedded in the idea that the ECHR is a *living instrument*.132 It has, further on, been submitted that the ECtHR interprets the Convention as creating affirmative actions that member states must implement in order to comply with their obligations as created by civil and political rights. All substantive rights leave, in principle, room for implied positive obligations.133

The Court has not determine any general theory of positive obligations, thus, their requirements depend on the circumstances of the case *vis-à-vis* the importance of the right and the resources required to meet the positive obligation.134 Nevertheless, positive obligations generate some general obligations: The Convention creates obligations for member states which ‘involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals and between themselves’,135 The member state is, in line with its positive obligations, expected to *prevent*,136 *protect*,137 *investigate*,138 *prosecute*,139 and *punish*140 non-state actors for Convention violations. The member state must *take appropriate steps*, beyond the primary duty to put in place *effective criminal laws*, to *safeguard those within its jurisdiction*.141 Further on, both *implementation of regulation*, as well as *failure to regulate* might trigger a member state’s positive obligations.142

In order to prevent a human rights violation by a non-state actor, the member state might be obliged (in well-defined situations where an individual’s life is at risk) to take *operational*
measures in order to protect an individual from criminal acts committed by another individual. 143 Positive obligations, nonetheless, cannot place an impossible or disproportionate burden on the member states. It must, for example, in terms of preventive operational measures, be established that the authorities knew or ought to have known that there was a real and immediate risk to the life of an individual or groups of individuals coming from a third party. 144 Thus, positive obligations are restricted by considerations of the effectiveness principle and fairness. 145 The above-mentioned requirements are all procedural; yet, the Court has even developed substantive obligations with respect to the definition of the crime rape and the burden of proof in regard to that crime. 146

It can be submitted that the distinction between positive and negative obligations is rather formal than practical. The ECtHR has held that ‘the boundaries between the State’s positive and negative obligations … do not lend themselves to precise definition’ and that the ‘applicable principles are, none the less, similar.’ 147 Moreover, the member states obligations under the Convention are not limited to territory. The Court has stated that because ‘[t]he term jurisdiction is not limited to the national territory … responsibility can be involved because of the acts of [the member state produce] effects outside their own territory.’ 148 Thus, both negative and positive obligations can apply extraterritorially. However, it can be argued that the distinction between positive and negative obligations is still of practical relevance when it comes to the extraterritorial application of the ECHR. Positive obligations are limited by general international law, since a state cannot act within another state’s territory without the consent from the latter (except in circumstances of invitation or lawful occupation). 149

According to Kamchibekova, one must distinguish between cases concerned with extraterritorial conduct, which give rise to extraterritorial application of the Convention, and cases merely having an extraterritorial element. She argues that extraterritorial conduct is only engaged when a member state, through its agents, acts beyond its lawful competence, and, as a result obtain jurisdiction based on a (spatial or personal) factual relationship. 150 Hence, contrary to what the Court held in Bankovic, 151 when a member state acts beyond its lawful

143 Osman v the United Kingdom (n 136) para 115.
144 Osman v the United Kingdom (n 136) para 116.
145 Kamchibekova (n 132) 97.
146 MC v Bulgaria (n 135).
147 Keegan v Ireland (ECtHR) app no 16969/90, 26 May 1994, para 49.
148 Drozd and Janousek v France and Spain (ECtHR) app no 12747/87, 26 June 1992, para 91.
149 Kamchibekova (n 132) 97.
150 Kamchibekova (n 132) 95. See for example Loizidou v Turkey (ECtHR) app no 15318/89, 18 December 1996, para 62 (preliminary objection).
151 Bankovic and Others v Belgium and Others [GC] (ECtHR) app no 52207/99 (dec) 12 December 2001.
competence as lay down in international law, it should bring those affected by its illegal actions within its jurisdiction, thus engaging its extraterritorial human rights obligations. Example of cases only having an extraterritorial element or effect are cases concerned with extradition or expulsion to third countries, where there is a real risk (a foreseeable consequence) that the extradited person will face treatment contrary to the obligations a member state has under a particular treaty i.e. the principle of non-refoulement. Because the applicant, in such cases, facing extradition or expulsion, is within the respondent state’s territory, the member state is not exercising extraterritorial competence or jurisdiction, but merely the objective territorial principle (jurisdiction based on territorial legal competence).

This is of relevance because the extent of the member state’s obligations is restricted by the extent of the state’s lawful competence. The Court has held that:

[W]henever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms … that are relevant to the situation of that individual. In this sense … the Convention rights can be “divided and tailored.”

Thus, in cases concerned with extraterritorial conduct (jurisdiction based on factual relationships) the member state is only obliged to secure those rights that are relevant for the situation. Whereas, in cases concerned with extraterritorial element (territorial legal competence) the member state must secure the Convention obligations in its entirety. None of these options, however, can respond correctly to home state regulation of national corporates’ extraterritorial activities, as they only explain extraterritoriality in relation to jurisdiction based on territorial legal competence and jurisdiction based on factual relationship. Because the corporation, and not the member state, conducts the extraterritorial activities, it is obvious that it is not suitable to consider it extraterritorial conduct by the state, but rather it is an extraterritorial element involved because the violation is committed

153 Kamchibekova (n 132) 93. See for example Soering v the United Kingdom (EChHR) app no 14038/88, 7 July 1989 and Othman (Abu Qatada) v the United Kingdom (EChHR) app no 8139/09, 17 January 2012.
154 Kamchibekova (n 132) 93.
155 King (n 152) 538, 547.
156 Al-Skeini and Others v the United Kingdom [GC] (EChHR) app no 55721/07, 7 July 2011, para 137 (emphasis added).
extraterritorially. The extraterritorial violation can, in turn, engage jurisdictions based on non-territorial legal competence: the nationality principle (and the subjective territoriality principle).

As far as positive obligations are concerned, except where a member state has legal competence to act, it should rarely be obliged to owe positive duties.\(^{157}\) Thus, the extent of lawful authority impacts on the extent of positive (and negative) obligations.\(^ {158}\) However, in regard to jurisdiction based on non-territorial legal competence, i.e. the nationality principle, the home state will have the extent of lawful authority needed to guarantee \textit{all} the rights and freedoms in the ECHR, because the enactment of law, as well as any enforcement measures, will take place within the member state’s territory, in which it can lawfully act. Only the violation, and the law as such, will be extraterritorial - not the acts of the state.

3.3 The Obligation to Regulate National Corporates’ Extraterritorial Activities

Human rights treaties have a special character in that they aim to protect individuals, and that they express something beyond the member states will. It is in the light of these special characteristics that positive obligations (due diligence) have been developed. It places a duty on member states to take affirmative actions within their jurisdictions.

The obligation on member states, according to Article 1 ECHR, is to secure the rights and freedoms set forth in the Convention, and this give rise to positive obligations. Three, interrelated, possibilities that arise, according to Harris \textit{et al.}, are ‘the obligations of the authorities to take steps to make sure that:’ (1) ‘the enjoyment of a right is effective;’ (2) ‘the enjoyment of the right is not interfered with by other private persons,’ and (3) ‘private persons take steps to ensure the effective enjoyment by other individuals of the right.’\(^ {159}\) Thus, the state must, for example, protect potential and actual victims from infringement by non-state actors through adoption of legislation or any other measure, in order to ensure or realize the human rights in the treaty.\(^ {160}\) Further on, where the non-state actor behavior is illegal under national law, there may still be positive obligations to ensure the enjoyment of the ECHR, for example, through the deployment of law enforcement officers. These types of

\(^{157}\) King (n 152) 538-9.

\(^{158}\) King (n 152) 551.

\(^{159}\) Harris \textit{et al} (n 126) 504.

obligations may be restricted based on what is reasonably foreseeable, the steps that reasonably can be expected in such situations, and the extent of lawful authority.  

The scope of positive obligations is not limited to territory; positive obligations can and do apply beyond national borders. Extraterritorial positive obligations have mostly been associated with member states extraterritorial conduct (jurisdiction based on factual relationship), which has resulted in that member states must secure the right and freedoms that are relevant for that particular situation. The positive obligation to enact law has, instead, been examined in relation to cases concerned with jurisdiction based on territorial legal competence. However, older case law suggests, that if the member state can lawfully prescribe legislation controlling the behavior of its nationals abroad, based on the nationality principle, those nationals are within the member state’s jurisdiction for the purpose of the ECHR. Thus, there is an extraterritorial dimension to legislative jurisdiction if it is connected to the nationality principle (jurisdiction based on non-territorial legal competence), that can be found both in general international law and in the Convention system. Accordingly, all the ingredients needed to oblige member states to regulate national corporates’ extraterritorial activities exist. Albeit, the particular recipe has not yet been put together by the Court.

All regional human rights instrument have developed positive obligations, but in different contexts and as a response to different threats. The ECtHR has developed positive obligations in the light of responsibilities to protect people from private violence, and it has focused on what is reasonably foreseeable for the authorities. It is an open-ended set of responsibilities. Further on, the Court has focused on what can be considered the ‘essence’ of the rights, as a result of competing human rights claims where different interests needed to be weighed against each other. The Inter-American Court of Human Rights (IACtHR), faced with disappearances and killings perpetrated by unknown agents, has focused on the member states due diligence to prevent, investigate and punish such violations. It has, moreover, focused on judicial protection of fundamental rights (the right to life, personal integrity and

161 Clapham (n 160) 420 and King (n 152) 551. See for example Osman v the United Kingdom (n 136) para 116.
162 Drozd and Janousek v France and Spain (n 148) para 91.
163 X v Federal Republic of Germany (EComHR) (1965) 17 HRCD 42, para 47 and King (n 152) 537.
165 Clapham (n 160) 436.
166 See in particular the landmark case of Velasquez-Rodriguez v Honduras (IACtHR) series C no 4, 29 July 1988.
health, property, privacy and family etc.), in relation to corporate exploitation and extraction of natural resources of lands inhabited by native people. The African Commission has held that member states can be held responsible for human rights violations where they have failed to protect economic, social and cultural rights (the right to life, the right to food and housing etc.) as a result of commercial activity by non-state actors. It has, further on, focused on new procedures involving greater participation in decision making by the people affected and external human rights assessment, as a result of complaints of environmental damage through, for example, oil extraction activities.

What can be concluded is that the ECtHR has not been faced with the kind of threats to human rights from commercial activities in the same way as the IACtHR or the African Commission has. Most probably because the victims of those violations are situated in third countries, meanwhile the perpetrators come from the member states to the Convention. Positive obligations are, in general, correlated with economic, social and cultural rights, and they usually have financial implications, as, for example, with an obligation to provide medical treatment in fulfillment of the right to health. However, as presented above, positive obligations are also imposed in relation to civil and political rights. Further on, the Court has not been totally screened off from environmental cases or cases concerned with economic, social and cultural rights, as they sometime fall within the ambit of the civil and political rights contained in the Convention. Hatton v. the United Kingdom concerned complaints about the environment. Although the Court held that implementation of regulation, as well as failure to regulate might trigger a member state’s positive obligations, the reasoning was rather about whether the member state had struck a fair balance between competing interests, and the member state was granted a wide margin of appreciation. The Court, in Guerra and Others v. Italy, stated that, in relation to the environment, the member states must take the necessary step to ensure effective protection of the right to private life. Moreover, it can be submitted that the Convention contains a right to adequate health care, however the extent of that right is very uncertain.

169 Clapham (n 160) 436.
170 Harris et al (n 126) 22.
171 Hatton and Others v the United Kingdom (n 142).
172 Guerra and Others v Italy (ECtHR) app no 116/1996/735/932, 19 February 1998.
173 Cyprus v Turkey (ECtHR) app no 25781/94, 10 May 2001, para 219.
The fact that corporations operating transnationally constitute a major threat to the realization of human rights globally, and that these corporations many times originate from a European context speaks in favor of an expansion of positive obligations. Moreover, the set of responsibilities is open-ended, thus, the Court has the possibility to put together the special recipe needed. Notwithstanding, the fact that each state has a general duty not to act in such a way to cause harm outside its territory, and that there is a growing support for the view that if a state know that its nationals’ activities will cause, or is causing harm, to people in other states, that state has a general duty to prevent such harm, which implicate that an expansion is suitable.174

However, the ECHR has been described, by the Court, as a ‘constitutional instrument of European public order’175 and third countries are situated outside that public order. Also in the case of Bankovic, the ECtHR held that the legal space of the Convention is essentially regional.176 Further on, there are other legal alternatives to the Convention and international human rights law to protect the fundamental interests of those affected by the member states to the ECHR acting abroad, when those individuals are not subject to the member states’ jurisdiction. For example, private actors operating abroad have duties under international criminal law, and the states whose territory is concerned have their own international human rights law duties to respect and protect.177 In relation to international criminal law, though, not every human rights violation committed by a corporation will involve an international crime. For example, if a company is alleged of supporting a government in restricting freedom of expression, neither the violation by the government nor the aid given by the corporation is on its own an international crime.178

Whatever, positive obligations can apply extraterritorially, and if the Court would expand positive obligations to include regulation by national corporates’ extraterritorial activities, it can be concluded that the member states would be obliged to owe positive duties to the extent they have lawful entitlement to act. The member state will have lawful entitlement to act within its territory and can therefore enact legislation to prevent human rights violations, which extend abroad, based on non-territorial factors (the nationality principle). Although judicial and executive powers are confined to territorial jurisdiction, i.e.

175 Loizidou v Turkey (n 150) para 75 (preliminary objection).
176 Bankovic and Others v Belgium and Others (n 151) para 80.
177 Besson (n 129) 884.
the home state will not have any legal authority in the host state, the extraterritorial dimension of legislative jurisdiction would enable enforcement mechanisms in the home state for extraterritorial human rights violations by national corporates.

**Key takeaways:** Positive obligations have been developed as a result of international human rights law’s special character. Positive obligations are not confined to territory, i.e. they have the ability to operate extraterritorially, and the duty to regulate *per se* is already considered a positive obligation in the Convention system. However, it should be noted that positive obligations are still subject to limitations, as for example, restrictions resulting from the effectiveness principle and considerations of fairness.

4. State Responsibility Beyond National Boundaries

4.1 The General Character of State Responsibility

The law of state responsibility entails responsibility for states internationally wrongful conduct. The rationale is that state responsibility can be engaged for breaches of international law, that is, for conduct which is internationally wrongful as it involves a violation of an international obligation applicable and binding on the state. The commission of an internationally wrongful act presupposes that there is an *act or omission* that is *attributable* to the state under international law and constitutes a *breach* of the state’s *international obligations*.179

Claims of responsibility were traditionally brought directly between states at the international level. However, because non-state actors (such as individuals) are given access to international tribunals, as for example the ECtHR, there is now a further range of state responsibility possibilities.180 Moreover, the general law of state responsibility is a law created for states about when states are legally responsible to *other* states, which implies that the principles developed by this law would be unable to interact with international human

179 Article 1 and 2 in International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, UNGAOR A/56/10 (10 August 2001) (ARSIWA) Report of the International Law Commission on the Work of its 53rd session, UN Doc A/56/10. James Crawford and Simon Olleson, ‘The Character and Forms of International Responsibility’ in Malcom D Evans (ed) *International Law* (OUP 5th edn 2018) 419-25. Sometimes, the respondent state might claim that its non-performance is justified, for example, since it was subject to a *force majeure* situation or because it was acting in self-defense. Such justifications fall, however, outside the scope of this thesis.

180 Crawford and Olleson (n 179) 421.
rights law, because the focus is protection of the individual. This is, however, not the case. The law of state responsibility stems from customary international law, but has been codified by the International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). The ARSIWA express secondary rules that indicate the consequences of a breach of an applicable primary obligation. And it is clear that international human rights law constitute such obligations, albeit, the compliance and enforcement mechanisms differ from other international legal systems.

Although there is an exclusion of application of the ARSIWA where the existence, content or implementation of state responsibility is governed by lex specialis of international law, and it can be argued that international human rights law has special rules and procedures, the ILC has held that international human rights law constitutes ‘special regimes’ and they fall within the scope of the framework of general international law. The ECtHR seems to support this view since it has recognized that it must take into account relevant rules of international law when examining questions concerned with jurisdiction, and as a result, it must determine state responsibility in conformity and harmony with governing principles of international law, of which the Court forms part. Nevertheless, the Court must also remain mindful of the ECHR special character as a human rights treaty.

Articles 4-11 of the ARSIWA specify the rules of attribution, for which the responsibility of the state can be engaged. The law of state responsibility makes a distinction between, on the one hand, public actions for which the state is accountable, and, on the other hand, private actions for which the state does not have to answer internationally. A state is responsible for acts and omissions of its legislative, executive, judicial and any other state organ, and its officials. This customary international law position has been frequently confirmed in international human rights law, where states have been found responsible for actions and omissions of state organs or officials, even when they acted outside their official authority.

182 ARSIWA (n 179).
184 McCorquodale (n 181) 237.
186 Behrami and Behrami v France and Saramati v France, Germany and Norway (ECtHR) app nos 71412/01 and 78166/01 (dec) 2 May 2007, para 122.
187 Crawford and Olleson (n 179) 425.
188 McCorquodale (n 181) 235.
189 Article 4 in ARSIWA (n 179).
By contrast, acts of private persons or entities are, in general, not attributable to the state.\textsuperscript{191}

Despite of what was just stated, there are in fact circumstances where acts in violations of human rights law, committed by corporations, are attributable to the state under general international law on state responsibility, i.e., home state responsibility can be engaged for national corporates’ extraterritorial acts in certain situation. Such situations encompass: (1) where a corporation acts on the instructions of, or under the direction or control of, a state;\textsuperscript{192} and (2) where a state empowers a corporation to exercise elements of public authority.\textsuperscript{193} Additionally, where the state through aiding or assisting corporate activity is complicit in the commission of an internationally wrongful act, committed by the corporation itself or by another state, the state will be held responsible.\textsuperscript{194} The state’s responsibility for such acts is not limited to territory, but apply also to acts committed abroad.\textsuperscript{195}

For the conduct by the national corporate to be attributable to the state it must relate to ‘governmental authority and not other private or commercial activity.’\textsuperscript{196} Further on, even if the corporation is not exercising governmental authority (or it cannot be proven that it is doing so) its activities may nevertheless be attributable to the state if the corporation is acting on the instructions of, or the direction and control of the state. The activities, though, must be directly part of the instructions and not merely incidental. Moreover, even if the national corporate contravened or ignored the particular instructions, the activities can still be attributable.\textsuperscript{197} What is crucial is the extent of control the state has over the non-state actor that is operating extraterritorially.\textsuperscript{198}

In the Nicaragua case, the ICJ established a test for control over non-state actors acting extraterritorially.\textsuperscript{199} Although the state could be held responsible for particular acts (financing, training, supplying, equipping etc.), i.e. even though some of the acts were attributable to the state, there was no complete dependence that extended to all the fields of activity (strict control).\textsuperscript{200} Thus, the ICJ established a considerably high threshold for finding state control

\textsuperscript{190} McCorquodale (n 181) 239.
\textsuperscript{191} ILC Commentaries (n 183) 47 [1].
\textsuperscript{192} Article 8 in ARSIWA (n 179).
\textsuperscript{193} Article 9 in ARSIWA (n 179).
\textsuperscript{194} Article 16 in ARSIWA (n 179).
\textsuperscript{197} McCorquodale and Simons (n 195) 608.
\textsuperscript{198} McCorquodale and Simons (n 195) 608.
\textsuperscript{200} Nicaragua v the United States of America (n 199) para 109.
over non-state actors. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) criticized the high threshold test in *Prosecutor v. Tadic*.²⁰¹ It held that a lower threshold of ‘overall control’ is applicable, and it exists:

> when a State … has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.²⁰²

Further on, the ICTY was of the opinion that the degree of control may vary, depending on the factual circumstances of the case.²⁰³

Also, the ECtHR has applied a lower threshold test for control. In *Ilascu v. Moldova and Russia*, the Court held that the degree of control necessary was reached when Russia had provided political and military support to a separatist regime. Thus, the separatist regime ‘remain[ed] under the effective authority, or at the very least the decisive influence, of the Russian Federation.’²⁰⁴ The Court decided that the threshold criteria was satisfied, even though Russia did not have effective control over the (Transdniestrian) region. This indicate that the ECtHR is neither requiring a high degree of effective control, nor is it requiring territorial control, in order for the Court to attribute non-state actors actions in another state’s territory to the (home) state, i.e. a state is considered to have jurisdiction over such non-state actors, and therefore, has extraterritorial obligations under the ECHR.²⁰⁵

The case of *Ilascu* differs from that of *Loizidou* because in the former there is no point in whether the members of the armed opposition group could be seen as state officials. International human rights treaties’ monitoring bodies often implicitly apply general international law of state responsibility,²⁰⁶ but if one tries to clarify the cases of *Ilascu*²⁰⁷ and *Loizidou*²⁰⁸ the former relates to Article 8 of the ARSIWA (conduct directed or controlled by a state), meanwhile the latter refers to Article 4 of the ARSIWA (conduct of organs of a state). Also, *Bankovic*²⁰⁹ and *Al-Skeini*²¹⁰ were Article 4 of the ARSIWA types of cases. In fact,
Milanovic quit successfully explains the confusing case of Bankovic\textsuperscript{211} in terms of attribution. The difficult question of state responsibility that was never resolved (because the case was inadmissible) was whether the bombing was attributable to the member states, to NATO as a separate legal person, or to both. For sure, the bombings were attributable to someone, however, the Court could not establish that the NATO states exercised effective overall control over Serbia, and as a result had obligations under the ECHR towards the people of Serbia.\textsuperscript{212}

The exceedingly high threshold test, applied by the ICJ, for finding control of non-state actors by a state, which was first established in the Nicaragua case,\textsuperscript{213} has been widely criticized. The ICJ in the Genocide case, nonetheless, upheld the test.\textsuperscript{214} The reasoning appear to have the interests of states alone in mind, and not the interests of those persons whose human rights have been violated.\textsuperscript{215} This, in turn, motivates the lower threshold test for control applied by the ECtHR since the Court must remain mindful of the ECHR special character as a human rights treaty \textit{vis-a-vis} it is primarily designed to protect individuals.\textsuperscript{216} Just because the ICJ, in the Genocide case,\textsuperscript{217} rejected any other test of control in terms of attribution other than its own ‘effective control test,’ and therefore directly and indirectly rejected the approaches taken by an international criminal tribunal and an appreciated regional human rights court, it does not mean that human rights treaties’ monitoring bodies are prohibited from applying a lower threshold test.\textsuperscript{218} In fact, the ICJ in \textit{DRC v. Uganda} indicated that international human rights law is applicable to states extraterritorial conduct even when the level of control is less than that of the occupying power.\textsuperscript{219} It seems like the ICJ is fine with the possibility that a lower test of control is possible under international human rights law, albeit it is not adopting such test under general international law of state responsibility.\textsuperscript{220}

\begin{itemize}
\item \textsuperscript{211} Bankovic and Others v Belgium and Others (n 209).
\item \textsuperscript{212} Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy (OUP 2011) 50.
\item \textsuperscript{213} Nicaragua v the United States of America (n 199).
\item \textsuperscript{214} Bosnia and Herzegovina v Serbia and Montenegro (ICJ) 26 February 2007 [2007] ICJ Rep 43.
\item \textsuperscript{215} Bosnia and Herzegovina v Serbia and Montenegro (n 214) para 406 and McCorquodale (n 181) 244.
\item \textsuperscript{216} See for example Behrami and Behrami v France and Saramati v France, Germany and Norway (n 186) para 122.
\item \textsuperscript{217} Bosnia and Herzegovina v Serbia and Montenegro (214).
\item \textsuperscript{218} McCorquodale (n 181) 245.
\item \textsuperscript{219} Democratic Republic of the Congo v Uganda (ICJ) 19 December 2005 [2005] ICJ Rep 168.
\item \textsuperscript{220} McCorquodale (n 181) 245.
\end{itemize}
4.2 Positive Obligations in State Responsibility

Attribution is one aspect of the principle of state responsibility; the international obligation is the other. As already ascertained in previous chapter, international human rights obligations can be negative and positive in nature. Positive obligations signify that illegal acts and omissions by a state (and by non-state actors if attributable to the state) can breach provisions of international law, and that the state might breach international human rights obligations even though the acts of the non-state actor cannot be attributable to the state. Hence, states have been found to be in violation of their international human rights obligations in relation to activities of non-state actors (such as corporations), within their territories, because the acts or omissions by the state facilitated or otherwise contributed to a situation in which violations by the non-state actor occurred.

For example, states have been held responsible for situations where corporations: dismissed employees for joining trade unions; polluted the air and land; and, used native peoples land. Moreover, these obligations extend, as established above, extraterritorially, i.e. states obligations are not confined to territory. Also the ICJ has dealt with the nature of positive obligations under international human rights law. In its *Advisory Opinion on the Legal Consequences on the Construction of a Wall*, the ICJ held that the state had obligations under ICCPR, ICESCR and the Convention on the Rights of the Child (CRC) in relation to the occupied (Palestinian) territories, and that the ICCPR in particular was ‘applicable in respect of the acts done by a State in the exercise of its jurisdiction outside its own territory.’ Accordingly, both positive and negative obligations under the ICCPR apply extraterritorially. The position was confirmed in the *DRC v. Uganda* decision where the ICJ went further by stating that ‘[i]nternational human rights instruments are applicable … [when the state] exercise[s] … its jurisdiction outside its own territory, particular in occupied territories. Hence, positive and negative obligations in *all* international human rights

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221 McCorquodale (n 181) 247.
222 McCorquodale (n 181) 247-8.
223 Young, James and Webster v the United Kingdom (ECtHR) app no 7601/76;7806/72, 13 August 1981.
224 López Ostra v Spain (ECtHR) app no 16798/90, 9 December 1994.
225 People of Sarayaku v Ecuador (IACtHR) series C no 245, 27 June 2012.
226 See for example Drozd and Janousek v France and Spain (ECtHR) app no 12747/87, 26 June 1992.
229 *Democratic Republic of the Congo v Uganda* (n 219) para 216.
treaties (not just the ICCPR), to which a state is party, have an extraterritorial dimension. Furthermore, the scope of obligations is ‘only’ restricted by the jurisdictional requirement.\textsuperscript{230}

Positive obligations are, in fact, applied beyond international human rights law: for example, to actions where there are transboundary environmental effects, and the state in question should have had control over the activities that caused these effects. The ICJ has, thus, adopted the international human rights tribunals’ approach to the scope of obligations under general international law of state responsibility to include positive obligations. Consequently, it can be argued that international human rights law have impacted on general international law of state responsibility.\textsuperscript{231}

\section*{4.3 State Responsibility for Extraterritorial Human Rights Violations}
There are ways in which state responsibility can be engaged, in general international law, for corporations’ extraterritorial activities that violates human rights. If a corporation’s activities are attributable to the state, and the violation occurred as result of the state’s act or omission, the state can be held responsible.\textsuperscript{232} Furthermore, for the state to incur responsibility for such acts the activities must be of public nature.\textsuperscript{233} If the acts are attributable to the state, the treaty body must determine the extent of power, effective control or authority exercised by the state or its agents over a territory or over the victims, in order to decide whether it is sufficient to bring the victims within the jurisdiction of the respondent state.\textsuperscript{234} Due to the commercial nature of extraction, exploitation and other development activities, which were the examples used in the introduction, most of national corporates’ extraterritorial activities fall outside the scope of attribution.

Positive obligations, on the other hand, more commonly associated with international human rights law, do not require attribution to engage state responsibility. Instead, states have been found to be in violation of their positive obligations in relation to corporations’ activities, within their territories, because the state’s acts or omissions enabled the corporation to act in the way it did.\textsuperscript{235} Moreover, positive obligations are not limited to territory, but extend beyond boarders, as long as the state in question has jurisdiction.\textsuperscript{236} Consequently,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{230} McCorquodale (n 181) 249-50.
\item \textsuperscript{231} McCorquodale (n 181) 250-1.
\item \textsuperscript{232} McCorquodale and Simons (n 195) 599.
\item \textsuperscript{233} ILC Commentaries (n 183) 43 [5].
\item \textsuperscript{234} McCorquodale and Simons (n 195) 610.
\item \textsuperscript{235} McCorquodale and Simons (n 195) 618.
\item \textsuperscript{236} See for example \textit{Democratic Republic of the Congo v Uganda} (n 219) para 216 and \textit{Drozd and Janousek v France and Spain} (n 226) para 91.
\end{itemize}
\end{footnotesize}
positive obligations have the possibility to hold states accountable for national corporates’ extraterritorial commercial activities that violates human rights.

As briefly mentioned in section 2.1, because corporations, in general, operate extraterritorially through subsidiary companies, incorporated in the host state, the question arises whether home state responsibility should be engaged. However, it can be argued that a home state may have extraterritorial obligations to protect human rights to the extent that it should exercise due diligence in relation to the acts of such foreign subsidiaries. A subsidiary has, for a long time, been considered a separate legal entity, and as a result, distinct from its parent company. Thus, the parent company and the subsidiary are each subject to different jurisdictions (host state jurisdiction and home state jurisdiction). This view is, however, as put forward by McCorquodale and Simons, to a great extent based on the ICJ decision in the Barcelona Traction case. McCorquodale and Simons are correct when they claim that the position in this case should be revisit in the light of both its own context (it was decided for the purposes of diplomatic protection in international law) and in the light of successive development of how corporate groups are seen.

In fact, some courts consider the whole operation of a transnational corporation, and not just the separate subsidiaries, in order to bring a foreign parent corporation within the jurisdiction of a state. The approach of the (European) Court of Justice, for example, in competition cases has been to investigate the structure of the corporation and the reality of the interrelationships within the corporate group. Moreover, a parent company can be held responsible for injuries committed by other units performing specific functions, if the parent company’s function is to provide expertise, technology, supervision and finance, and as long as the transnational company is regarded as a conglomerate of units. The comparison to the (European) Court of Justice is problematic though, as it operates under the European Union, which is a supranational organ. Hence it possesses different competence than international human rights bodies. Also national courts have begun to examine the whole corporate group in order to impose liability on the parent company, i.e. examine whether the national corporate should be held responsible for human rights violations committed by foreign

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237 McCorquodale and Simons (n 195) 615.
238 McCorquodale and Simons (n 195) 616.
240 McCorquodale and Simons (n 195) 616.
241 McCorquodale Simons (n 195) 616.
The conceptual support in state practice for extending the home state’s legislative and enforcement jurisdiction (jurisdiction based on non-territorial legal competence, which enables jurisdiction based on territorial legal competence – see Annex 2) to include activities of national corporates’ foreign subsidiaries is considerable.\textsuperscript{245} Such practice shows that (home) states can and do extend their jurisdiction to extraterritorial activities of their corporate nationals.

Moreover, states do in fact have, according to international law, the extensive authority and capacity to exercise legislative jurisdiction beyond national boundaries. States have even concluded treaties that impose on them the obligation to regulate extraterritorial conduct of corporate nationals and their subsidiaries when it comes to bribery and corruption.\textsuperscript{246} All member states to the ICESCR have extraterritorial obligations, which in certain situations include obligations to regulate activities of corporate nationals.\textsuperscript{247} Thus, if the ECtHR would extend the scope of positive obligations to include home state regulation of national corporates’ extraterritorial activities, it would hardly be revolutionary. It cannot reasonably be argued that states today are unaware that their national corporates, through their foreign subsidiaries, may engage in human rights violations, because the negative impact of some extraterritorial corporate activity (particularly on economic, social and cultural rights) is well documented.\textsuperscript{248} If the member states to the ECHR would, against all odds, be surprised by such expansion, it may nevertheless contribute to increase the political will within the UN, or any other international fora, for the development of an international legal framework where corporations can be held internationally responsible for their human rights violations.\textsuperscript{249}

**Key takeaways:** States can be held responsible for extraterritorial human rights violations caused by a national corporation if the corporation is directed or controlled by the state, or if the corporation in fact is performing public functions. This means that even though positive obligations can operate extraterritorially, state responsibility can only be imposed on the


\textsuperscript{245} McCorquodale and Simons (n 195) 617.

\textsuperscript{246} See for example the Convention Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 31 October 2003, entered into force 14 December 2005) (CAC) 2349 UNTS 41.

\textsuperscript{247} McCorquodale and Simons (n 195) 619.


\textsuperscript{249} McCorquodale and Simons (n 195) 601.
member state if there is attribution, i.e. corporations’ extraterritorial commercial activities fall outside the attribution necessity. However, a state can be held responsible for national corporates territorial commercial activities that violate human rights because the state enabled the corporations’ activities by, for example, not complying with its positive obligations.

5. Extending the Scope of Positive Obligations with Dynamic Interpretation

5.1 Interpretation of the European Convention on Human Rights

The rules on treaty interpretation can be found in the VCLT. As a treaty, the ECHR must be interpreted in accordance with those international law rules, more specifically the rules contained in Articles 31 to 33 of the VCLT, on interpretation. The Court explicitly stated in the case of Fogarty v. the United Kingdom that it must take into account relevant international rules when interpreting the ECHR; hence, it cannot be interpreted in a vacuum. Consequently, the Convention ‘shall be interpreted in good faith in accordance with the ordinary meaning … in the light of its object and purpose.’ At the same time, the Court must observe the special character of the Convention. [R]egard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Nevertheless, this does not mean that the ECtHR is deviating from international interpretative rules because the rules of the VCLT, in fact, reflect a non-exhaustive approximation of general principles.

When interpreting the Convention, considerable emphasis has been put on realizing its object and purpose, i.e. teleological interpretation. To realize the object and purpose the ECHR has, generally, been identified as ‘the protection of individual human rights’ and the protection and promotion of ‘the ideals and values of a democratic society.’ There is no definition of a democratic society, however, the Court has held that it assumes ‘pluralism,
tolerance and broadmindedness.' Furthermore, several core interpretative principles run from this (Article 31 VCLT) teleological interpretation principle.

In order to protect individual human rights and the ideals and values of a democratic society, i.e. because of the Convention’s role as a European human rights guarantee, the ECHR must be interpreted so as to allow for its development with time. Hence, it follows from the emphasis put on the object and purpose that it must be given a dynamic or evaluative interpretation. The Court held in *Tyrer v. the United Kingdom* that the Convention is ‘a living instrument which … must be interpreted in the light of present-day conditions.’ The Convention as a living instrument implies that it must reflect changes in the policy of the law in European states resulting from changed social attitudes. Yet, the ECHR cannot be interpreted as, in response to present day conditions, to introduce into it a new right, which was not included when the Convention was drafted. The right to marry in Article 12, for example, could not be interpreted as including a right to divorce, although such a right generally exists in Europe. When the Court decides a case on the basis of dynamic interpretation, it should be the result of a change in the policy of law that has achieved sufficiently wide acceptance in the European states, i.e. the Court makes a comparative interpretation. The notion of dynamic and comparative interpretation is often linked to the margin of appreciation doctrine, even though comparative interpretation is a generally applicable method of interpretation that is appropriate beyond the scope of the margin of appreciation as it refers to national and international standards.

Another important interpretation technique adopted by the Court is practical and effective interpretations, i.e. the effectiveness principle (*effet utile*).

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260 *Handyside v the United Kingdom* (ECtHR) app no 5493/72, 7 December 1976, para 49.
262 Harris *et al* (n 257) 8.
263 *Tyrer v the United Kingdom* (ECtHR) app no 5856/72, 25 April 1978, para 31 (emphasis added).
264 For example, towards children born out of wedlock, as was the case in *Marckx v Belgium* (ECtHR) app no 6833/74, 13 June 1979; or towards homosexuals, as was the case in *Dudgeon v the United Kingdom* (ECtHR) app no 7525/76, 24 February 1983.
265 Harris *et al* (n 257) 9.
266 *Johnston and Others v Ireland* (ECtHR) app no 9697/82, 18 December 1986.
267 Harris *et al* (n 257) 9. See for example *Marckx v Belgium* (n 264) where a great majority of the states had adopted a new approach towards the legal status of children born out of wedlock.
268 Christoffersen (n 256) 47-8.
270 Harris *et al* (n 257) 18.
illusory, but rights that are practical and effective.' 271 The Court has relied on the effectiveness principle in a wide range of issues, including cases concerned with positive obligations and state responsibility. 272 While the Court’s emphasis is on the object and purpose of the Convention, it must be mentioned that it has sometimes found itself limited to the clear meaning of the text. 273 Nevertheless, the Court has also gone against the wording of the ECHR in order to achieve a restrictive result. 274

According to Article 32 of the VCLT ‘recourse may be had to … preparatory work of the treaty’ if interpretations according to Article 31 ‘leaves the meaning ambiguous or obscure’ or ‘leads to a result which is manifestly absurd or unreasonable.’ 275 In reality, though, the ECtHR has only occasionally made use of the travaux préparatoires, or the preparatory work, since it is not always helpful due to the significance of dynamic interpretation, which focuses on the current European standards, rather than the intentions of the drafters of the ECHR. 276

Only the Court interprets the Convention and there is no doctrine of binding precedent vis-à-vis the Court is bound by its previous interpretations of the Convention. 277 Also this is a consequence stemming from the fact that the ECHR is a living instrument, thus the Court can depart from previous rulings if there are ‘cogent reasons’ for doing so, which might include the need to ‘ensure that the interpretation reflect societal changes and remains in line with present-day conditions.’ 278 Hence, the Court has given primacy to the text of the ECHR, 279 read in the light of its object and purpose, 280 the effectiveness principle, and general principles of international law. 281

5.2 Dynamic Interpretation or Retroactive Application?

It is evident that the member states to the Convention have an extensive duty to protect human rights, which probably will keep expanding with dynamic interpretation. 282 In fact, it is through dynamic interpretation member states potentially can be found to have the positive

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271 Artico v Italy (ECtHR) app no 6694/74, 13 May 1980, para 33.
272 Kamchibekova (n 269) 114 and Harris et al (n 257) 18.
273 Wemhoff v Germany (ECtHR) app no 2122/64, 27 June 1968.
274 Pretto and Others v Italy (ECtHR) app no 7984/77, 8 December 1983.
275 Article 31 of the VCLT (n 250).
276 Harris et al (n 257) 20.
277 Harris et al (n 257) 20.
278 Cossey v the United Kingdom (ECtHR) app no 10843/84, 27 September 1990, para 35.
279 Lawless v Ireland (ECtHR) app no 332/57, 1 July 1961, para 14.
280 Wemhoff v Germany (n 273) para 8.
281 Golder v the United Kingdom (n 251) paras 34-35.
obligation to regulate for their national corporates’ extraterritorial activities. However, dynamic interpretation can be subjected to criticism.

There is a line to be drawn between, on the one hand, judicial interpretation, which is permitted, and on the other hand, judicial legislation, which is not permitted. Nevertheless, it is difficult to draw the line sought to be drawn because a decision can be seen either as instances of creativity or as the elaboration of rights that are already protected. Positive obligations, for example, can either be seen as the discovery of obligations that where always implicit in the ECHR, or as the addition of new obligations.  

The scope of a treaty can be restricted in various ways: it can be restricted by its parties (application ratione personae); by its content (application ratione materiae); its territorial application (application ratione loci), and by its temporal applicability (application ratione temporis). So far the thesis has been concerned with application ratione loci and application ratione materiae. Now, application ratione temporis will be addressed since it can be argued that to add new obligations could constitute a breach of the non-retroactivity principle, as comprehended in Article 28 of the VCLT. The prohibition of retroactivity comes from the fact that states are, according to Article 26 VCLT, only bound by those obligations, which they have consented to, through ratification of a treaty, as a result of the principle of pacta sunt servanda (application ratione personae).

The principle of non-retroactivity is considered to be both a rule of customary international law and a general principle of law. Moreover, the Court is, in accordance with the general rules on international law, more specifically the principle of non-retroactivity of treaties, obliged not to bind a member state under the provisions of the Convention in relation to any act or fact which took place, or any situation which ceased to exist, before the date of the entry into force of the ECHR in respect of that member state. Furthermore, the principle of non-retroactivity is part of the rule of law principle, which is a core principle explicitly mentioned in the Preamble and in Article 3 of the Statute of the Council of Europe.

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283 Harris et al (n 257) 9.
285 Dörr and Schmalenbach (n 284) 479.
286 ECtHR ’Practical Guide on Admissibility Criteria’ (n 284) 51 [220]. See for example Varnava and Others v Turkey [GC] (ECtHR) app nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, para 130.
287 European Commission for Democracy Through Law (Venice Commission) ’Rule of Law Checklist’ (11-12 March 2016) Adopted by the Venice Commission at its 106th Plenary Session, 16.
additionally, declared as an element of common heritage in the Preamble of the Convention.\textsuperscript{289} Thus, it can, \textit{prima facie}, be submitted that the Court is violating this non-retroactivity principle when it creates new positive obligations, through its case law, i.e. judicial legislation. Hence, it can be argued that it is in breach of both its own rules and other rules found in general international law.

However, the Court has held that its ‘judgment is essentially \textit{declaratory} and leaves to the State the choice of means to be utilized in its domestic legal system.’\textsuperscript{290} Meaning that the ECtHR judgments are not prescriptive, and therefore there is no judicial legislation, because the implementation measure lies with the member states. This rationale accentuates the Courts subsidiary role. Several norms in the ECHR system indicate that the role of the ECtHR is subsidiary to that of the member states, which have, according to Article 1 ECHR, the primary responsibility to secure the right and freedoms contained in the Convention.\textsuperscript{291} The fact that the Court’s role is essentially one of review rather than that of a final court of appeal is made explicit in Article 19 of the ECHR, which provides that ‘the observance of the engagements undertaken by the High Contracting Parties shall be ensured by the European Court of Human Rights.’

Moreover, states are, according to Article 28 of the VCLT, free to give a treaty, or some of its provisions, retroactive effect. It depends on whether the intention \textit{has to be explicitly laid down by the treaty or not.}\textsuperscript{292} The ILC purposely chose the phrase ‘[u]nless a different intention appears from the treaty or is otherwise established’\textsuperscript{293} in order to allow for cases where it is not the specific provision, but the very nature of the treaty that indicates its intention to have retroactive effects.\textsuperscript{294} Hence, the ECHR’s collective enforcement of human rights character, as oppose to creating reciprocal obligations between states, can be considered to constitute the nature of a treaty needed for it to have retroactive effects. Moreover, the formula (‘[u]nless a different intention appears from the treaty or is otherwise established’)\textsuperscript{295} applies to cases in which the retroactive effects results from the \textit{interpretation} of a treaty provision.\textsuperscript{296} Thus, the Court’s dynamic interpretation of treaty provisions, i.e. judicial interpretation, is legitimate and is neither in breach of the Court’s own rules, nor is it violating

\textsuperscript{290} \textit{Marckx v Belgium} (n 264) para 58 (emphasis added).
\textsuperscript{291} \textit{Greer} (n 261) 19.
\textsuperscript{292} Dörr and Schmalenback (n 284) 480.
\textsuperscript{293} Article 28 of the VCLT (n 250).
\textsuperscript{294} Dörr and Schmalenback (n 284) 480.
\textsuperscript{295} Article 28 of the VCLT (n 250).
\textsuperscript{296} Dörr and Schmalenback (n 284) 480.
any general international law regulating retroactivity. Permissible retroactive effect stems, in fact, from the object and purpose interpretation as enshrined in Article 31 of the VCLT.\footnote{Dörr and Schmalenback (n 284) 480.} However, because the Convention is a ‘constitutional instrument of European public order’\footnote{Loizidou v Turkey (ECtHR) app no 15318/89, 18 December 1996, para 75 (preliminary objection).} and third countries are situated outside that public order, and because the legal space of the Convention is essentially regional,\footnote{Bankovic and Others v Belgium and Others [GC] (ECtHR) app no 52207/99 (dec) 12 December 2001, para 80.} it can also be argued that the object and the purpose of the ECHR is not secure human rights of those victims that are situated outside the European context. Thus, the retroactive effects that will be the result if the Court would decide to engage home state responsibility for national corporates’ extraterritorial activities that violates human rights would constitute illegal retroactive application. But then again, if the interpretational changes of the Convention result from changed social attitudes within the European community – is it then really retroactive effects?

When the Court decides a case on the basis of dynamic interpretation, thus affecting the meaning of the Convention, it should be the result of a change in the policy of law that has achieved sufficiently wide acceptance in the European states, i.e. state practice pointing in the direction of a new approach.\footnote{Harris et al (n 257) 9. See for example Marcks v Belgium (n 264) app no 6833/74 where a great majority of the states had adopted a new approach towards the legal status of children born out of wedlock.} Yet, the Court does not always await such considerable change in state practice, but sometimes adopts a less demanding approach, as was the case in Christine Goodwin v. the United Kingdom.\footnote{Christine Goodwin v the United Kingdom (ECtHR) app no 28957/95, 11 July 2002.} In the case the Court recognized that there was no common European approach on the recognition of the new sexual identity of post-operative transsexuals, but it nevertheless found evidence of a continuing international trend, in Europe and elsewhere, and did therefore not require a great majority of the member states to follow this approach.\footnote{Christine Goodwin v the United Kingdom (n 301).} To go through state practice of every member state to the ECHR is too time consuming for this thesis and therefore beyond the scope of it. However, if McCorquodale and Simon’s argument that: the conceptual support in state practice for extending the home state’s legislative and enforcement jurisdiction to include activities of corporate nationals’ foreign subsidiaries are considerable,\footnote{Robert McCorquodale and Penelope Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations in International Human Rights Law’ [2007] 70 Mod L Rev, 598, 617.} is true, then there is evidential reason for the Court to expand the scope of positive obligations because state practice is pointing in the direction of a new approach.
Key takeaways: The Convention shall be interpreted in accordance with its object and purpose. In order to realize its object and purpose, the Convention must be able to develop through time. Hence, the ECHR is considered to be a living instrument and must therefore be interpreted in the light of present day conditions. The Court can, through declaratory judgments and judicial (dynamic) interpretations, affect the meaning of the Convention.

6. Final Discussion

6.1 Can the Court Engage (Home) State Responsibility?

The crucial question for whether states should be held responsible for their national corporates’ extraterritorial human rights violations is whether they have jurisdiction or not. As far as transnational corporations are concerned, they have traditionally, in general international law, been subject to different jurisdiction depending on where the corporation has its seat or where it has been incorporated (home state jurisdiction) and where the subsidiary company is active (host state jurisdiction).\(^\text{304}\) Both national and international tribunals however have in certain areas of law abandoned this view as they instead focus on the whole business constellation as one unit.\(^\text{305}\) This suggests that there is a continuing international trend towards a new approach – an approach that the Court has the capability to follow.\(^\text{306}\)

Jurisdiction in international human rights law is a threshold criterion, which needs to be satisfied for an (positive) obligation to arise. The ECtHR has held that jurisdiction is primary territorial, albeit extraterritorial application of the Convention is possible in exceptional circumstances.\(^\text{307}\) The principal exceptions to territoriality are member states agent authority or control, and member states effective control over an area.\(^\text{308}\) The former is the technical exercise of jurisdiction which relates, for example, to diplomatic and consular agents,’ which through custom, treaty or agreement, exercises executive public powers or executive or judicial functions, i.e. the extraterritorial dimension of jurisdiction based on territorial legal competence acquired through, for example, invitation (as a result of custom, treaty or

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\(^{304}\) See discussion under section 2.1 (nn 56-8).

\(^{305}\) See discussion under section 4.3 (nn 237-40).

\(^{306}\) See discussion under section 5.2 (nn 300-2).

\(^{307}\) See discussion under section 2.2 (nn 65-77).

\(^{308}\) Chagos Islanders v the United Kingdom (ECtHR) app no 35622/04 (dec) 11 December 2012, para 70.
agreement). The latter, the *effective control over an area* exception, is the exercise of public power attributable to the state, i.e. jurisdiction based on factual relationship between a state and an individual. The effective control over an area can be the result of either *conduct directed or controlled by the state*, or *conduct of organs of a state*. Both these exceptions, however, are inadequate for imposing state responsibility on the member states for national corporates’ extraterritorial human rights violations because none of them, due to their public activity character and the attribution necessity, engage the jurisdiction needed.

The required jurisdiction is technical in nature and must be able to impose on the member states the duty to *regulate* for their national corporates’ extraterritorial commercial activities. The law on legislative jurisdiction is about the exceptions to territoriality and can as such form a jurisdictional basis for holding member states accountable for corporations’ extraterritorial human rights violations. Legislative jurisdiction is, further on, extensive as it can operate extraterritorially, presupposed there is a connecting factor, i.e. jurisdiction based on non-territorial legal competence. The nationality principle constitutes a connecting factor and is as such firmly established in general international law. The EComHR held that the nationality principle, as a connecting factor, could make member states liable under the Convention. The Court, though, has stated that ‘a State’s competence to exercise jurisdiction over its own nationals abroad is *subordinate* to that State’s and other States’ territorial competence.’ Yet, if that state, or those other states, is unable or unwilling to comply with their positive obligations, there might be reason to impose home state responsibility. This will be further discussed under section 6.2. The Court’s judgment prevails over the EComHR. However, the Court is not bound by its previous judgments.

The Court has the power to depart from its previous judgments if there are ‘cogent reasons’ for doing so. This is a consequence of the fact that the Convention is a *living instrument*. The ECHR allow for its development through time with dynamic interpretations and the Court must ‘ensure that the interpretation reflect societal changes and remains in line

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309 See for example *Cyprus v Turkey* (ECtHR) app no 25781/94, 10 May 2001.
311 Article 4 in ARSIWA (n 310). See for example *Loizidou v Turkey* (ECtHR) app no 15318/89, 18 December 1996, *Bankovic and Others v Belgium and Others [GC]* (ECtHR) app no 52207/99 (dec) 12 December 2001 and *Al-Skeini and Others v the United Kingdom [GC]* (ECtHR) app no 55721/07, 7 July 2011.
312 See discussion under section 4.1 (nn 187-98).
313 See discussion under section 2.1 (nn 49-53).
314 *Federal Republic of Germany* (EComHR) (1965) 17 HRCD 42, para 47.
315 *Bankovic and Others v Belgium and Others* (n 311) para 60 (emphasis added).
with present-day conditions.\textsuperscript{316} Thus, the Court can affect the meaning of the Convention with judicial interpretations and declaratory judgments, which the member states then by their own choice of mean must implement.\textsuperscript{317} The Court must be able to affect the meaning of the Convention in order for the rights and freedoms to be effective.\textsuperscript{318} It is from the logic of the effectiveness principle and the special character of the ECHR to protect individuals, i.e. the collective enforcement of human rights and freedoms, that the Court ‘found’ positive obligations, which have always been inherent in the Convention system.\textsuperscript{319} Without positive obligations, negative obligations would not be as effective because positive and negative obligations are interdependent.

Member states have extensive positive obligations that apply beyond national boundaries, i.e. they apply \textit{extraterritorially}.\textsuperscript{320} The state must, in line with its positive obligations, for example, through \textit{enactment of legislation} or any other measure, protect potential and actual victims from infringement by non-state actors, in order to ensure the human rights in the Convention.\textsuperscript{321} Thus, the duty to regulate already exists under the ECHR system as a positive obligation, and positive obligations have the ability to operate extraterritorially. However, state responsibility for extraterritorial violations of positive obligations has so far been restricted by the attribution requirement. Meaning that a state can only be held responsible for extraterritorial human rights violations committed by corporations if the corporation is directed or controlled by the state, or if the corporation in fact is performing public functions.\textsuperscript{322} Only the Court can decide whether the two elements: the duty to regulate and extraterritorial application of the Convention, should be added together in order to regulate extraterritorial violations resulting from corporations’ commercial activities, yet, in the light of dynamic interpretations and the effectiveness principle, it is vested with the power to do so. The lack of attribution \textit{per se} is no impediment neither in general international law,\textsuperscript{323} nor international human rights law.\textsuperscript{324}

All substantive rights, in general, can impose positive obligations upon the member state. The fact that the extraterritorial human rights violation sought to be regulated often engage

\begin{footnotesize}
\begin{enumerate}
\item \textit{Cossey v the United Kingdom} (ECtHR) app no 10843/84, 27 September 1990, para 35.
\item See discussion under section 5.2 (nn 290-7).
\item \textit{Artico v Italy} (ECtHR) app no 6694/74, 13 May 1980, para 33.
\item See discussion under section 3.1 and 3.2 (nn 129-32).
\item \textit{Drozd and Janousek v France and Spain} (ECtHR) app no 12747/87, 26 June 1992, para 91.
\item See discussion under section 3.3 (nn 159-61).
\item Articles 4 and 8 in ARSIWA (n 320).
\item See for example \textit{Young, James and Webster v the United Kingdom} (ECtHR) app no 7601/76;7806/72, 13 August 1981.
\end{enumerate}
\end{footnotesize}
economic, social, and cultural rights, as was suggested in the introduction, does not mean that the Convention cannot be applicable to such violations. The Court has interpreted economic, social and cultural rights to fall within the ambit of the Convention, which is concerned with civil and political rights.\textsuperscript{325} Moreover, realization of Article 8 of the ECHR ‘involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals and between themselves,’\textsuperscript{326} and can therefore be highly current in cases concerned with extraction, exploitation and other development activities.

The crucial question, once again, is whether the member state has jurisdiction or not because when a state has jurisdiction, that state enjoys no discretion as to whether the human rights obligations should apply or not.\textsuperscript{327} Extensive legislative jurisdiction is neither explicit in the Convention, nor is it established in the Court’s case law. Albeit, it exists in other treaties such as the ICPPED,\textsuperscript{328} and some treaties even establish extensive legislative jurisdiction in relation to corporations \textit{per se}.\textsuperscript{329} Even though the Court, so far, only has extended jurisdiction, i.e. extraterritorial application of the Convention, in relation to jurisdiction based on territorial legal competence and jurisdiction based on factual relationship between the state and an individual, jurisdiction based on non-territorial legal competence is still permitted in general international law. Hence, it is in the view of the author possible for the Court to find (extensive legislative) jurisdiction, and therefore the Court \textit{can}, with dynamic interpretation, impose upon the member states the duty to regulate for their national corporates’ extraterritorial activities. If a national corporate then violates human rights abroad, without facing any consequences in the home state, state responsibility \textit{can} be engaged.

\textbf{6.2 Should the Court Expand the Scope of Positive Obligations?}

Traditionally, legislative jurisdiction has been associated with the state’s ability to enact law for its nationals. Yet, human rights law deals essentially with issues that are usually considered to be part of states’ exclusive domestic powers. This is the result of the Convention’s special character as it deals with the collective enforcement of human rights and

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\textsuperscript{325} See for example \textit{Hatton and Other v the United Kingdom} [GC] (ECtHR) app no 36022/97, 8 July 2003 and \textit{Guerra and Others v Italy} (ECtHR) app no 116/1996/735/932, 19 February 1998.
\textsuperscript{326} \textit{X and Y v The Netherlands} (ECtHR) app no 8978/80, 26 March 1985, para 23. See also \textit{MC v Bulgaria} (ECtHR) app no 39272/98, 4 December 2004.
\textsuperscript{327} See discussion under section 2.2 (n 79).
\textsuperscript{328} Article 9(2) International Convention for the Protection of All Persons from Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) (ICPPED) 2716 UNTS 48088.
\end{flushleft}
fundamental freedoms and, thus, it expresses something beyond the member states will. Nevertheless, it can be argued that the Court should not enter this (commercial activities) area of law because other international treaties regulate the behavior of private entities. International human rights law is not the answer to all the global problems that exists. Private actors that operate abroad already have duties under international criminal law. States have concluded anti-bribery and anti-corruption treaties that impose on their member states the obligation to regulate national corporates’ extraterritorial activities. Further on, the host state, which jurisdiction is concerned and where the subsidiary company is active, has its own regional human rights duties to respect and protect. If those states do not comply with their positive obligations there are international human rights treaties, such as the ICESCR, that in certain situations require home state regulation for their national corporates’ host state activities.

However, corporations operating transnationally are many times not held accountable for their human rights violations because the host state is unable or unwilling to comply with its positive obligations. Hence, the member state’s power to legislate for its nationals abroad ought not to be subordinate vis-à-vis other states territorial competence. Even though other international forum exists, for example international criminal law, not every human rights violation constitutes an international crime. The problem with transnational corporations’ human rights violations remain and the corporations’ impact on human rights, in particular economic, social and cultural rights, is well documented. Thus, there are evidential reasons for why the ECtHR should extend the scope of positive obligations, because many violations fall outside the scope of, for example, international criminal law and are therefore not dealt with.

Under general international law, state responsibility must be preceded by an act or omission that is attributable to the state and constitute a violation of an international

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330 See discussion under section 3.1 (n 118).
331 See discussion under section 3.3 (nn 175-8).
332 CAC (n 329).
333 See discussion under section 3.3 (nn 175-8).
334 See discussion under section 4.3 (nn 246-7).
335 Cf. Bankovic and Others v Belgium and Others (n 311) para 60.
336 See discussion under section 3.3 (nn 178).
obligation. Positive obligations constitute such international obligations and when states are in breach of their positive obligations the Court can adjudicate on state responsibility. This is because the acts or omissions by the state facilitated, or otherwise contributed to, a situation in which the corporation could violate human rights. Extraterritorial activities that violates international obligations and are committed by corporations can be attributable to the state depending on, inter alia, the extent of control the state has over the corporation. The rationale is that a state can only incur state responsibility for situation falling within its ability to act. It can be submitted that this rationale is the reason for why the Court should not extend the scope of positive obligations because the state cannot be considered to have control over its national corporates’ extraterritorial (commercial) activities, hence, the lack of attribution in such situations would place an disproportionate burden on the member states.

Nevertheless, there is a general duty of each state not to act in such a way as to cause harm outside its territory, and a growing support for the view that if a state know that its nationals activities will cause, or is causing harm, to people in other states, that state has a general duty to prevent such harm, which implicate that positive obligations do extend over national boundaries independent of whether the nationals’ activities are public or commercial in nature. Thus, it can be argued that this general duty should not be confined to extraterritorial harm caused by, for example, public officials (the attribution necessity), because the extraterritorial harm committed by corporations (lack of attribution) is, as stated above, well documented. Hence, states ought to be aware of the harm their national corporates are causing on foreign soil, which suggests that states, in fact, have the ability to act on such situations. Further on, expanding the scope of positive obligations to include (home) state regulation for national corporates’ extraterritorial activities would not place an disproportionate burden on the member state as positive obligations, in general, are limited by, inter alia, the effectiveness principle and considerations of fairness. Thus, the Court should be able to impose state responsibility upon the member states, through positive obligations, for acts or omissions that facilitates extraterritorial harm. This in turn might

338 Article 1 and 2 in ARSIWA (n 310).
339 See discussion under section 4.2 (nn 221-6).
340 See discussion under section 4.1 (nn 192-205).
341 See discussion under section 3.3 (n 174).
343 See discussion under section 3.2 (nn 144-9).
create the incentive needed in order to create a new international horizontal regime where corporations directly can be held accountable for their human rights violations – it may help to create the political will that is necessary in order to develop such binding international legal framework.\textsuperscript{344}

The obligation not to cause extraterritorial harm is a duty of states. The Court’s duty is to review the member states compliance with the Conventions as a ‘constitutional instrument of European public order.’\textsuperscript{345} Further on, the \textit{espace juridique} of the Convention is essentially regional.\textsuperscript{346} Thus, it is beyond the object and purpose of the ECHR to secure human rights of people in third countries. The Court \textit{should not} impose on its member states the duty to regulate for national corporates’ extraterritorial activities because then it will bring third country victims within the ambit of the Convention. Nevertheless, the Court has already opened up for the possibility of third country victims, if their human rights have been violated by a member state to the Convention, in the case of \textit{Al-Skeini} - its most authoritative case on jurisdiction.\textsuperscript{347} Hence, those victims are already within the member states jurisdiction for the purpose of the ECHR, and such reasoning, consequently, does not constitute impediment, and therefore, the Court \textit{should} expand the member states’ positive obligations.

It can be argued that to draw inspiration from, one the one hand, how national courts have used extensive legislative jurisdiction in order to hold their national corporates accountable for extraterritorial human right violations, and on the other hand, how the (European) Court of Justice in certain areas of law considers the whole operation of a corporation when adjudicating upon violations of EU law is misleading. The Court \textit{should not} oblige its member state to regulate for their national corporates’ extraterritorial activities because it does neither have the same competence as sovereign states, nor as the EU being a supranational organization (and the Court of Justice is vested with the judicial legislation power).\textsuperscript{348} The member states to the Convention have the primary responsibility to secure the human rights and fundamental freedoms contained in it. Meanwhile the Court’s role is subsidiary, i.e. the role of the Court is to review the member states compliance with the ECHR. The choice of implementation means (for example legislation) lies with the member states, and the more the Court enters that domain, the more it starts to look like a Court of fourth instance.\textsuperscript{349}

\textsuperscript{344} See discussion under section 4.3 (nn 248-9).
\textsuperscript{345} \textit{Loizidou v Turkey} (n 311) para 75 (preliminary objection).
\textsuperscript{346} \textit{Bankovic and Others v Belgium and Others} (n 311) para 80.
\textsuperscript{347} \textit{Al-Skeini and Others v the United Kingdom} (n 311) paras 136-7.
\textsuperscript{348} See discussion under section 4.3 (nn 241-5).
\textsuperscript{349} See discussion under section 5.2 (nn 291).
On the contrary, the fact that international and national tribunals considers the whole operation of a transnational corporation in their judgments, and because national courts relies on extensive legislative jurisdiction when concerned with national corporates’ extraterritorial human rights violations speaks in favor of an ongoing international trend that can affect the meaning of the Convention. State practice and international practice enables the Court, through dynamic interpretation, i.e. judicial interpretation, to modify the meaning of the Convention so that it is in line with present day conditions. Consequently, the Court should extend the scope of positive obligations because present day conditions requires states to prevent their nationals from causing extraterritorial harm, and the conceptual support in state practice for extending the home state’s legislative and enforcement jurisdiction to include activities of corporate nationals’ foreign subsidiaries are considerable.

6.3 Final Remarks

The ECtHR is one of the most effective instances for protecting human rights because it is a judicial body, as oppose to the HRC, which is a quasi-judicial institution, and because of its strong enforcement mechanism and numerous amount of case law. Moreover, soft law that has emerged, for example the OECD Guidelines and the UN ‘Respect, Protect and Remedy’ Framework and Guiding Principles, speaks in favor of an ongoing international approach towards the need to combat transnational corporations’ human rights violations. Because of their non-binding and voluntary character, and because of the remaining problem with corporations’ human right violations, there is a need for legal responsibility. The author is of the opinion that legal regulation and enforcement mechanisms are necessary in order to change the behavior of transnational corporations that continues to violate human rights extraterritorially. Until an international and horizontal legal order, in which corporations can be directly held responsible, has emerged, the author is of the view that imposing on states the duty to regulate for their national corporates’ extraterritorial activities is closer to hand and

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350 See discussion under section 5.2 (nn 299-303).
more viable in the near future. Lastly, there is still need for more research on the subject, especially European research on the grey area that exists between what constitutes judicial legislation and judicial interpretation. Hopefully, this thesis has provided some clarity and opened for further interest about the topic.
## Table of Cases

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- *A and Others v the United Kingdom* [GC] app no 3455/05, 15 February 2009
- *Al-Skeini and Others v the United Kingdom* [GC] app no 55721/07, 7 July 2011
- *Artico v Italy*, app no 6694/74, 13 May 1980
- *Austria v Italy* (Plünders Case) (European Commission of Human Rights) (1961) 4 YB 116
- *Bankovic and Others v Belgium and Others* [GC] app no 52207/99 (dec) 12 December 2001
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- *Chagos Islanders v the United Kingdom*, app no 35622/04 (dec) 11 December 2012
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- *Cossey v the United Kingdom*, app no 10843/84, 27 September 1990
- *Cyprus v Turkey*, app no 25781/94, 10 May 2001
- *Drozd and Janousek v France and Spain*, app no 12747/87, 26 June 1992
- *Dudgeon v the United Kingdom*, app no 7525/76, 24 February 1983
- *Fogarty v the United Kingdom*, app no 37112/97, 21 November 2001
- *Golder v the United Kingdom*, app no 4451/70, 21 February 1975
- *Guerra and Others v Italy*, app no 116/1996/735/932, 19 February 1998
- *Handyside v the United Kingdom*, app no 5493/72, 7 December 1976
- *Hatton and Other v the United Kingdom* [GC] app no 36022/97, 8 July 2003
- *Ilascu and Others v Moldova and Russia* [GC] app no 48787/99, 8 July 2004
- *Issa and Others v Turkey*, app no 31821/96, 16 November 2004
- *Jaloud v the Netherlands* [GC] app no 47708/08, 20 November 2014
- *Johnston and Others v Ireland*, app no 9697/82, 18 December 1986
- *Keegan v Ireland*, app no 16969/90, 26 May 1994
- *Kjeldsen, Busk Madsen and Pedersen v Denmark*, app no 5095/71;5920/72;5926/72, 7 December 1976
- *Lawless v Ireland*, app no 332/57, 1 July 1961
- *Loižidou v Turkey*, app no 15318/89, 18 December 1996
- *López Ostra v Spain*, app no 16798/90, 9 December 1994
- *Marckx v Belgium*, app no 6833/74, 13 June 1979
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- *Naït-Liman v Switzerland* [GC] app no 51357/07, 15 March 2018
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- *Pretto and Others v Italy*, app no 7984/77, 8 December 1983
- *Saddam Hussein v Albania and Others*, app no 23276/04 (dec) 14 March 2006
- *Silaidin v France*, app no 73316/01, 26 July 2005
- *Soering v the United Kingdom*, app no 14038/88, 7 July 1989
- *Tyrer v the United Kingdom*, app no 5856/72, 25 April 1978
- *Varnava and Others v Turkey* [GC] app nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009
- *Wemhoff v Germany*, app no 2122/64, 27 June 1968
- *X v Federal Republic of Germany* (1965) (European Commission of Human Rights) 17 HRCD 42
- *X and Y v the Netherlands*, app no 8978/80, 26 March 1985
- *Young, James and Webster v the United Kingdom*, app no 7601/76;7806/72, 13 August 1981
Z and Others v the United Kingdom, app no 29392/45, 10 May 2001
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Steven Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights (Human Rights Files No 17) (Council of Europe Publishing 2000)


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Raible L, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship’ [2018] 31 Leiden Journal of International Law, 315
Annex 1

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<th>Jurisdiction</th>
<th>Legislative power</th>
<th>Judicial power</th>
<th>Executive power</th>
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<tr>
<td><strong>Territorial</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td><strong>Extraterritorial</strong></td>
<td>Yes, if connecting factor:</td>
<td>No</td>
<td>No</td>
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<td></td>
<td>• Territoriality principle: objective or subjective</td>
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<td>• Nationality principle</td>
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<td>• Treaty based extension</td>
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### Annex 2

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<tr>
<th>Jurisdiction</th>
<th>Territorial legal competence (Legislative, judicial, executive)</th>
<th>Non-territorial legal competence (Legislative)</th>
<th>Factual relationship (Extraterritorial conduct)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Territorial</strong></td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>
| **Extraterritorial** | Yes Invitation or lawful occupation | Yes, if connecting factor:  
- Territoriality principle: objective or subjective  
- Nationality principle  
- Passive personality principle  
- Protective principle  
- Universality principle  
- Treaty based extension | Yes  
- Spatial or personal |