Beyond the 100 Acre Wood: in which international human rights law finds new ways to tame global corporate power

Daniel Augenstein & David Kinley

To cite this article: Daniel Augenstein & David Kinley (2015) Beyond the 100 Acre Wood: in which international human rights law finds new ways to tame global corporate power, The International Journal of Human Rights, 19:6, 828-848, DOI: 10.1080/13642987.2015.1006904

To link to this article: http://dx.doi.org/10.1080/13642987.2015.1006904

Published online: 08 May 2015.
Beyond the 100 Acre Wood: in which international human rights law finds new ways to tame global corporate power

Daniel Augenstein\textsuperscript{a}\textsuperscript{*} and David Kinley\textsuperscript{b}

\textsuperscript{a}Tilburg Law School, The Netherlands; \textsuperscript{b}Sydney Law School, Australia

States and corporations are being forced out of their comfort zones. A consensus is building among international human rights courts and committees that states can and will be held accountable for overseas human rights abuses by corporations domiciled in their respective territories. The authors suggest that this development is rooted in a transition from a territory-based to a subject-based approach to human rights obligations that de-centres international human rights law from state territory. In this article, they construct a conceptual framework for understanding how and why this is happening and articulate what are and will be the consequences for the theory and practice of international human rights law.

Keywords: Human rights and business; extra-territorial obligations; international law; Winnie-the-Pooh

“\textquote{You can’t stay in your corner of the Forest waiting for others to come to you. You have to go to them sometimes.\textquote}” AA Milne (per Winnie-the-Pooh)

1. International human rights law between universal aspiration and global corporate power

The universality of human rights is often treated as a truism: human rights are universal because they belong to all human beings by virtue of their being human; or put the other way around, unless they are universal rights they cannot be human rights.\textsuperscript{1} This despite the fact that propositions of the kind that all human beings are \textquote{born free and equal in dignity and rights} (Article 1 UDHR) have little empirical purchase. Geography plays a decisive role in the global birth lottery and most Northerners happen to live a freer and less unequal life than people in the so-called Global South. What is more, the criteria for membership in the human family are far from settled, with prospective candidates ranging from animals and artificially intelligent machines to corporate beings that claim protection of their \textquote{human} rights to privacy, property and so on against the rest of \textquote{us}.\textsuperscript{2} Both of these challenges combine in the well-known difficulty of \textquote{mapping} humanity’s universality-by-abstraction onto concrete right-bearing subjects that come with a gender,
age, race, class, and so on. While this would appear to rebut any easy inference from being human to having rights, it arguably leaves unscathed the normative thrust of human rights’ proclaimed universality, namely that we ought to be treated as if we were born free and equal in dignity and rights.

However, such an approach still falls short of constituting universal legal rights of all human beings to be treated as free and equal. The universal aspirations of human rights constantly run up against the limitations inherent in the state-centred (‘Westphalian’) architecture of international law. Far from giving rise to legal entitlements to have one’s human rights respected, protected and fulfilled by anyone and anywhere, the international order of states has traditionally confined them to a territorially circumscribed relationship between public authorities and private individuals. Each state has a singular legal obligation and entitlement (to the exclusion of other states) to respect, protect and fulfil the human rights of individuals located on its own territory in relation to acts of its own public authorities. An important presumption behind this legal compartmentalisation of human rights is that, at least as a general rule, victims and perpetrators of human rights violations will reside in the same state territory. An important consequence thereof is that human rights protection outside the state’s borders is traditionally considered to require special justification in the light of the sovereign territorial rights of other states.

What is more, the state-centrism of international human rights law entails that corporations are by and large treated analogously to individual rights holders – that is, as putative victims rather than perpetrators of human rights violations. Corporations enter the world as private legal artefacts subject to the state’s territorially confined public authority to assist individuals in accumulating wealth without undue risk of personal liability. Qua private subjects of the state they are entitled to its legal protection of their ‘disembodied’ human rights. At the same time, they are conceptually incapable of violating (as opposed to merely ‘abusing’) the rights of those human beings they have been fashioned to serve. The result is an uneven treatment of human and corporate beings in international human rights law. As the Council of Europe’s Parliamentary Assembly notes, ‘while a company may bring a case before the Court [ECtHR] claiming a violation by a state authority of its rights protected under the European Convention on Human Rights, an individual alleging a violation of his rights by a private company cannot effectively raise his or her claims before this jurisdiction’.

The legal compartmentalisation of universal human rights in the international order of states is challenged by the globalisation of corporate power. Today, the Westphalian imaginary of global business entities as ‘multi-national’ corporations subject to the public authority of territorially confined state entities has lost much of its plausibility. The attribution of multiple state-based ‘nationalities’ to corporations that operate as globally integrated economic entities appears increasingly factitious – as if, say, the Shell Transport and Trading Company incorporated in Nigeria really ‘belonged’ to the Nigerian state (and its people) rather than to its Anglo-Dutch parent, the Royal Dutch Shell Petroleum Corporation. Moreover, for all but the most stubborn positivists and government officials, it is far from obvious that states still regulate and control corporations (or have the capacity to do so) rather than corporations assuming regulatory and enforcement powers over the state or states.

Indeed, we may – as Catá Backer nicely puts it – be witnessing a shift from a discussion of the legitimacy or foundations of the authority of the United States to impose its legislation over chemicals in consumer products on Chinese manufacturers, to one in which the legitimacy and foundations of the authority of the global corporation Wal-
Mart to impose its own standards on the same regulatory subject (by determining the content of the products that it will order and sell) on both the United States and China moves to centre-stage.6

From a domestic point of view, global corporate power erodes the substance of public authority that states wield over their territory. Global business operations escape the regulatory grasp of territorial states while at the same time limiting states’ ability ‘to set the social, economic and political agenda within their respective political space’, which undermines their capacity ‘to secure the livelihoods of their respective citizens by narrowing the parameters of legitimate state action’.7 Internationally, global corporate power transforms states’ external relations with each other. As de Feyter says, ‘companies that organise across borders define the primary role of a state in terms of creating a space for the play of market forces. Not only should a state adopt a market-based system within its own territory …, the same system should apply to economic relationships among countries’.8 Developed states are under pressure to create a global ‘level playing field’ for their corporate nationals by further dismantling legal barriers to the free flow of capital, production and labour in the developing world. At the same time, developing states will be reluctant to raise national standards of social and environmental protection for fear of losing their competitive advantage in attracting foreign investment in the global market.

In a nutshell, while human rights are traditionally protected against public emanations of the state for the benefit of individuals located on the state’s territory, human rights violations committed in the course of global business operations call for their extraterritorial protection in relation to private actors. Yet the globalisation of corporate power has not been accompanied by a corresponding universalisation of legal human rights obligations. On the contrary, the resilience of the state-centred world-view has hampered international legal reform and propelled the marginalisation of international human rights law. Sections two and three below illustrate this predicament by considering two important legal avenues for taming the human rights impacts of global corporate power – namely the direct imposition of human rights obligations on corporations under international law and the indirect control of corporate power through positive state obligations. Section four examines the presently dominant international business and human rights instrument – the UN Guiding Principles on Business and Human Rights (UNGPs) developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business entities (SRSG).9 We contend that the failure of the international order of states to account for the human rights impacts of global corporate power engenders a transition from territorial human rights government to global human rights governance that challenges the state-centred conception of international human rights law. Against this threefold background, section five argues that taming corporate power overseas requires a subject-based approach to international human rights law that disentangles the territorial nexus between states, corporate human rights ‘abusers’ and victims of human rights violations into a triangular relationship mediated by state power and control. Section six shows how the proposed subject-based approach to international human rights law yields the recognition of state obligations to regulate and control corporate actors operating from their territory with a view to protecting the human rights of third-country victims against corporate violations. By de-centring international human rights law from the public and territorial state, we conclude, in the seventh and final section, that this contributes to recovering human rights’ universal aspirations in the face of global corporate power.
2. ‘Public’ versus ‘private’: the direct imposition of human rights obligations on corporations under international law

Whereas in certain areas of international law, most prominently international criminal and humanitarian law, states have moved towards imposing direct legal obligations on private actors that (also) serve to vindicate values embodied in human rights,\textsuperscript{10} international human rights law traditionally has little to say about the human rights impacts of non-state actors other than tying them back to its state-centred premises.\textsuperscript{11} According to the Westphalian orthodoxy, states are the principal subjects and authors of international human rights law that only becomes directly effective in the relationship between corporate perpetrators and individual victims of human rights violations through its translation via domestic state laws and legislation. Human rights ‘abuses’ by ‘multi-national’ corporations are treated as a domestic failure of the state and as a problem of international cooperation between states; inversely, globally operating business entities only register in international human rights law as corporate nationals of the public and territorial state.

To date, the most prominent attempt to address this lacuna of protection in international human rights law was the 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Entities with regard to Human Rights (UN Norms) that suggested, obliquely, that human rights obligations might be directly applicable to private actors.\textsuperscript{12} Building on key international human rights instruments, the UN Norms envisaged extending existing human rights obligations of states to transnational corporations and other business entities, within their sphere of influence and activity:

\begin{quote}
States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of indigenous people and other vulnerable groups.\textsuperscript{13}
\end{quote}

Whatever the shortcomings of the UN Norms (and let it be made clear that they were presented in a draft form), it is fair to say that an important reason for their eventual failure was the vested interests of powerful corporations and their (Western) home states not to see corporate responsibility for human rights extended beyond the ‘soft’ model of self-regulation through corporate codes of conduct, corporate social responsibility, and the like.\textsuperscript{14} A false dichotomy was construed between the UN Norms’ attempt to prevent and redress corporate human rights violations (the UN’s ‘anti-business agenda’\textsuperscript{15}) and the positive contributions corporations can make to global economic well-being, technological improvement and international development. Yet another dichotomy – that between ‘public’ states and ‘private’ corporations – fuelled contrived concerns that the direct imposition of human rights obligations on corporations would undermine state sovereignty and dilute state responsibility for human rights violations.\textsuperscript{16}

Leaving aside partisan politics and political polemics, the imposition of direct human rights obligations on private corporations clearly poses significant structural and normative challenges to the state-centred conception of international law. Although the UN Norms duly recognised the primacy of state obligations to respect, protect and fulfil human rights, their attempt to extend human obligations to corporations \textit{qua} private actors was interpreted by many as an exercise in international law-making at odds with the basic tenets of the
international order of states. Notwithstanding the fact that corporations have *de facto* become important participants in international law-making and enforcement, and have been endowed with (partial) international legal personality, international law continues to strive against their formal recognition as its authors on par with the state. Thus, while there is nothing natural or neutral about the distinction between ‘public’ states and ‘private’ corporations, it plays a constitutive role in the construction of the collective self-understanding of the international order of states and the global political economy. An important structural role played by the public/private divide in (international) human rights law is the allocation of rights and duties in the triangular relationship between states, corporations and natural persons. Whereas corporations are traditionally treated akin to private (legal) persons, the recognition of direct human rights obligations in international law would appear to align them with public states. Does this entail that other non-state actors (for example, individual consumers that have thus far resisted the fair-trade trend) also have international legal obligations to respect, protect and fulfill human rights within their particular sphere of influence and activity (i.e. shopping)? Or should we rather treat corporations as proto-state entities that are publically accountable to their stakeholders for the realisation of the common good? As Ratner remarks, the challenge is to ‘construct a theory both *down* from state responsibility and *up* from individual responsibility’ that accommodates the fact that ‘a corporation is, as it were, more than an individual and less than a state’.20

This problem of re-situating ‘private’ actors in relation to ‘public’ states raises broader normative concerns with imposing direct international human rights obligations on corporations. As Fleur Johns notes, the formal recognition of global corporations as authors of international law would ‘effectively be sanctioning the exercise of legal authority not conferred by political process’.21 The state-based national/international law divide institutionalises a bifurcation between, on the one hand, domestic human rights obligations that structure the political relationship between states and non-state actors (including corporations) within the state legal order and, on the other hand, international human rights obligations that structure the political relationship between states *inter se*. An important consequence of this divide is that, as Knox says,

> [a] legal obligation that international law directly places on an individual differs from one that it imposes indirectly, through a duty on governments. In the first case, the international community as a whole exercises prescriptive jurisdiction over individuals in a way that makes them directly subject to international law apart from the mediating intervention of domestic law. In the second, domestic jurisdiction over individuals is left intact. For this reason, the political and practical pressures against regulation of private conduct by international human rights law greatly increase in strength when the regulation is direct rather than filtered through domestic law … [Whereas] individuals acknowledge that their governments have jurisdiction to determine and enforce their rights and duties, they are less likely to accept that international bodies controlled by foreign governments have such jurisdiction.22

There is thus a direct correlation between the legal sequestration of global business entities into ‘multi-national’ corporations subject to one or more states’ public authority and public international law’s distinction between direct human rights obligations (imposed on states) and indirect human rights obligations (imposed on corporations via domestic state legislation). It is because corporations are treated as subjects of the state that they appear in international law as mere ‘objects’ whose interests are to be represented, and whose obligations are to be determined, by that very state.

None of this is to suggest that states lack the competence or capacity to establish an international mechanism that considers and settles disputes involving cross-border
corporate human rights violations, or to agree upon an international treaty that directly imposes human rights obligations on corporations. Indeed, as the SRSG made clear early on in his mandate, there are ‘no inherent conceptual barriers to states deciding to hold corporations directly responsible [for violations of international law] … by establishing some form of international jurisdiction’. All we seek to argue here is that the direct imposition of international human rights obligations on corporations is likely to entail a more radical departure from international law’s state-centred heritage, including its distinction between ‘public’ states and ‘private’ corporations, than many proponents of the UN Norms may have recognised or acknowledged.

3. ‘Territorial’ versus ‘extraterritorial’: the indirect imposition of human rights obligations on corporations via positive state obligations

Whereas international law presently does not directly impose human rights obligations on corporations, it requires states to take positive steps to prevent and redress corporate human rights ‘abuses’. Such positive human rights obligations entail duties of conduct on the part of the state to take all reasonable and appropriate measures to protect human rights in relationships between non-state actors. While, for instance, the human rights obligations imposed by the International Covenant on Civil and Political Rights are binding on states parties and do not, as such, have direct horizontal effect as a matter of international law, they nevertheless require states to ‘take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by … private persons or entities’. Similarly, according to the Inter-American Court of Human Rights ‘an illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the convention’. Or, as in Fadeyeva v. Russia – a case concerning environmental pollution emitting from a Russian steel plant owned and operated by a private corporation – the European Court of Human Rights (ECtHR) considered that ‘the state’s responsibility in environmental cases may arise from a failure to regulate private industry. Accordingly, the applicant’s complaints fall to be analysed in terms of a positive duty on the state to take reasonable and appropriate measures to secure the applicant’s rights under Article 8(1) of the Convention’. As the SRSG puts it, international law imposes obligations on states not only to ‘refrain from violating’ human rights, but also ‘to “ensure” (or some functionally equivalent verb) the enjoyment or realization of those rights by the rights holders’. The latter obligation ‘requires protection by states against other social actors, including business, who impede or negate those rights. Guidance from international human rights bodies suggests that the state duty to protect applies to all recognized rights that private parties are capable of impairing and to all types of business enterprises’.

The recognition of positive state obligations mitigates the practical relevance of the distinction between ‘public’ states and ‘private’ corporations that has thus far hampered the recognition of direct corporate human rights obligations under international law. As de Schutter says:

Although we may be trained, as international lawyers, to think that the international responsibility of a state may not be engaged by the conduct of actors not belonging to the state apparatus unless they are in fact acting under the instructions of, or under the direction or control of, that state in carrying out the conduct, the private-public distinction on which this rule of attribution
is based is mooted (though not contradicted) by the imposition of positive state obligations …:

once a situation is found to fall under [its] ‘jurisdiction’ … the state must accept responsibility not only for the acts its organs have adopted, but also for the omissions of these organs, where such omissions result in an insufficient protection of private persons whose rights or freedoms are violated by acts of other non-state actors.32

However, the public/private divide resurfaces in cases of human rights violations committed outside the state’s territory. While it is widely accepted that states have negative obligations to respect (that is, to refrain from violating) the human rights of individuals outside their borders, international law has been slow in recognising positive extraterritorial state obligations to protect individuals against violations by private actors. Positive state obligations have traditionally been premised on state control over territory with the consequence that – apart from situations of extraterritorial (military) occupation – they are confined to individuals within the state’s territorial jurisdiction. Accordingly, international human rights law has generally not been thought to impose obligations on states to control the activities of their (corporate) nationals abroad even where these activities impair the human rights of third-country victims: ‘although, under the active personality principle, the state could impose a liability, in particular a criminal liability, on its nationals wherever they conduct their activities, a failure by a state … to exercise this power would not engage its responsibility [under international human rights law], even though certain individuals’ human rights could be affected by this failure to act’.33

One important rationale behind this limitation is a concern with the effectiveness of international human rights law, namely that the realisation of positive obligations requires states to be in full and effective control of the territory where the putative violation takes place. As Milanović puts it:

In order to be realistically complied with, the obligation to respect human rights requires the state to have nothing more than control over the conduct of its own agents. It is the positive obligation to secure or ensure human rights which requires a far greater degree of control over the area in question, control which allows the state to create institutions and mechanisms of government, to impose its laws, and punish violations thereof.34

Relatedly, whereas negative extraterritorial obligations are merely predicated on states exercising power over individuals outside their borders, whether lawfully or unlawfully,35 positive extraterritorial obligations require states to take active measures in relation to individuals located on another state’s territory. Accordingly, it has been argued with some force that the scope of positive extraterritorial obligations, qua duties of conduct, is delimited by what states are legally permitted to do in relation to other states as it cannot be considered ‘reasonable’ or ‘appropriate’ to require them to take steps to protect human rights in violation of general international law.36 This relates to broader concerns that extraterritorial human rights protection may interfere with the sovereign rights that third states claim over their territory and private actors therein. As the ECtHR held in its (much critiqued) admissibility decision in Banković, ‘while international law does not exclude a state’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction … are, as a general rule, defined and limited by the sovereign territorial rights of other relevant states’.37 Particularly in the area of social, economic and cultural rights that often involve questions of distributive justice, what is considered a human rights violation in one (developed) country may be considered a legitimate exercise of state authority in another (developing) country, with the consequence that the latter may claim an overriding interest in the non-regulation of corporations operating on its territory.
In such cases, the recognition of extraterritorial positive obligations to regulate and control
global corporate power is likely to result in normative competency conflicts between home
and host states of ‘multi-national’ corporations.38

Both the difficulties with directly imposing human rights obligations on corporations
and the territorial confinement of positive state obligations can be plausibly explained by
virtue of the resilience of the international order of states. However, such an approach
that reifies the state-centred worldview in the face of global corporate power proves unsa-
satisfactory for three main reasons. By construing international human rights law from the
vantage point of (public/private) perpetrators of human rights violations, it fails to acknowl-
edge that from the perspective of the victims, it is immaterial whether their human rights are
violated or abused by a public state or a private corporation. Concurrently, by assimilating
universal human rights and global business operations to state territory, it disarms inter-
national human rights law where it is most needed: for the benefit of individuals in weak
(developing) host states which lack the capacity (and at times also the willingness) to
protect human rights in relation to business operations conducted with the active support
or passive connivance of strong (developed) home state governments. Finally, or so we
shall argue in what follows, this lacuna of protection contributes to further undermining
the state-centred conception of international law in relation to global corporate power.

4. From international human rights law to global human rights governance
Following the burial of the UN Norms, John Ruggie was appointed SRSG on business and
human rights in 2005. In a series of reports over the coming years, he developed his
‘Protect, Respect and Remedy’ Framework that culminated in a set of Guiding Principles
on Business and Human Rights (UNGPs) endorsed by the UN Human Rights Council in
June 2011.39 The UNGPs build on three pillars: the state duty to protect human rights
against violations by third parties (including corporations) through appropriate policies,
regulation, adjudication and enforcement; the corporate responsibility to respect human
rights, meaning to act with due diligence to avoid infringing the rights of others; and
greater access to effective remedies, both judicial and non-judicial, for victims of corpo-
rate-related human rights abuses. The SRSG was not tasked to develop a new legally
binding instrument (but merely to restate the law ‘as it is’),40 and accordingly, his approach
to legal obligations governing corporate human rights violations remained firmly rooted in
the state-centred conception of international law. The ‘corporate responsibility to respect’
human rights lacks binding legal effect as ‘respecting rights is not an obligation that
current international human rights law generally imposes directly on companies’.41 Relat-
edly, while the ‘state duty to protect’ requires states to secure human rights against ‘abuses’
by corporations, this duty is confined to violations committed on the state’s territory as its
extraterritorial application remains ‘unsettled’ in international law.42 Thus, rather than
directly addressing the legal protection gaps resulting from the exposure of the international
order of states to the human impacts of global corporate power, the SRSG reframed them as
‘governance gaps created by globalisation’:

The root cause of the business and human rights predicament today lies in the governance gaps
created by globalisation – between the scope and impact of economic forces and actors, and the
capacity of societies to manage their adverse consequences. These governance gaps provide the
permissive environment for wrongful acts by companies of all kinds without adequate sanc-
tioning or reparation. How to narrow and ultimately bridge the gaps in relation to human
rights is our fundamental challenge.43
While the language of closing ‘governance gaps’ may be a useful vehicle to mainstream human rights concerns into business-related law and policies, it risks concealing how today’s ‘business and human rights predicament’ is rooted in the very structure of the state-centred conception of international law. Such language engenders a transition from obligations imposed on states by virtue of international human rights law, to appeals to states’ policy rationales to protect human rights in their external relations. This is perhaps most visible in the UNGPs’ treatment of human rights violations in the ‘state-business nexus’ that concurrently implicate public and territorial states and private and globally operating corporations. According to the SRSG, ‘states should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the state, or that receive substantial support and services from state agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence’. The commentary appended to this provision recognises that ‘where a business enterprise is controlled by the state, or where its acts can be attributed otherwise to the state, an abuse of human rights by the business enterprise may entail a violation of the state’s own international law obligations’. This tentative language of legal obligations is bolstered by an appeal to states’ reputational, prudential, and business-related ‘policy rationales’ for ensuring that corporations respect human rights. Moreover, the UNGPs stress that a failure of home states to prevent and redress corporate harm outside their territory may ‘add to the human rights challenges faced by the recipient state’ (i.e., the host state of corporate investment). Yet, crucially, these human rights challenges faced by the host state are not met with corresponding human rights obligations of the home state to protect third-country victims against corporate violations. There are, as advanced by the UNGPs, ‘strong policy reasons for home states to set out clearly the expectation that businesses respect human rights abroad, especially when the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation.’ However, home states are ‘not generally required under international law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis.’

The assertion that states are neither ‘generally required’ nor ‘generally prohibited’ to regulate business operations outside their territories shapes the SRSG’s approach to extraterritorial human rights protection against global corporate power. The UNGPs focus on the permissibility of extraterritorial assertions of state authority in accordance with a recognised basis of jurisdiction under general international law. What is at issue is the competence of states, as delimited by general international law, to assert authority over conduct not exclusively of domestic concern. Relatedly, the UNGPs are primarily concerned with the territorial location and/or nationality of the business entity as the perpetrator of human rights violations. The inquiry thus turns on whether a state can exercise jurisdiction over corporate actors violating human rights abroad because they reside within the state’s territory (the territoriality principle) and/or because they can be considered ‘corporate nationals’ of that state (the nationality principle). This twofold focus is perpetuated in a further distinction the SRSG introduces, namely between instances of ‘direct extra-territorial jurisdiction’ and ‘domestic measures with extra-territorial implications’.

In the heated debates about extra-territoriality regarding business and human rights, a critical distinction between two very different phenomena is usually obscured. One is jurisdiction exercised directly in relation to actors or activities overseas, such as criminal regimes governing
child sex tourism, which rely on the nationality of the perpetrator no matter where the offence occurs. The other is domestic measures with extraterritorial implications; for example, requiring corporate parents to report on the company’s overall human rights policy and impacts, including those of its overseas subsidiaries. The latter phenomenon relies on territory as the jurisdictional basis, even though it may have extraterritorial implications.50

The SRSG’s ‘critical distinction’ between ‘direct extraterritorial jurisdiction’ and ‘domestic measures with extraterritorial implications’ obscures another critical distinction, namely that between extraterritorial obligations imposed on states by virtue of international human rights law and states’ domestic policy rationales to protect human rights against extra-territorial corporate violations. While the UNGP’s marginalisation of the former is the upshot of the SRSG’s (negative) assertion that states ‘are not generally required … to regulate the extraterritorial activities of businesses’, their championing of the latter relates to his (positive) assertion that states are not ‘prohibited from doing so, provided there is a recognized jurisdictional basis’.51 However, the question whether states are permitted to assert extraterritorial authority over corporate perpetrators of human rights violations is not reducible to the question whether they are obligated to protect third-country victims against corporate violations. Whereas extraterritorial jurisdiction in general international law is a function of state sovereignty and concerns the state’s entitlement to exercise jurisdiction abroad,52 extraterritorial jurisdiction under international human rights treaties is a function of protecting the rights of the individual and concerns the state’s obligations when exercising jurisdiction abroad. Put differently, whereas the former establishes whether the state has jurisdiction to act extraterritorially, the latter establishes whether an extraterritorial act brings the individual within the state’s jurisdiction for the purpose of the state’s extra-territorial obligations under international human rights law.53

The UNGPs’ appeal to states’ policy rationales to prevent and redress human rights violations committed in the course of global business operations is certainly to be welcomed. However, it is equally the expression of a persistent failure of the state-centred conception of international human rights law to account for the human rights impacts of global corporate power. It is one question whether states are permitted to adjust their policies and regulation to better promote and protect human rights in relation to extraterritorial corporate violations. It is quite a different question whether states are obliged to do so as a matter of international human rights law. Absent a clear recognition of international legal obligations to regulate and control the human rights impacts of their corporate nationals abroad, states will have little incentive to adopt so-called ‘home-state’ or ‘parent-based’ regulation to protect third-country victims against human rights violations committed in the course of global business operations.54 Whereas the profits of corporate undertakings largely accrue on the home state’s territory, the prevention and redress of corporate human rights violations falls within the legal and political responsibility of the host state. Below the surface of ‘governance gaps created by globalisation’ thus lies another ‘business and human rights predicament’ that is rooted in the interrelation between the international order of states and global corporate power that unleashes the human rights impacts of global business operations from the constraints of narrowly construed international human rights law.

5. From a territory-based to a subject-based approach to international human rights law
The described transition from state obligations imposed by international human rights law to states’ policy rationales to protect human rights (through domestic law) is but an attempt
to respond to the discrepancy between the global human rights impacts of corporate power and the territorial limitations of the state-centred conception of international law. As our above analysis demonstrates, there are three different ways in which ‘territory’ determines the allocation of human rights obligations to states under international law. First, the location of the putative victim in relation to the state that holds the obligation determines whether human rights protection is considered territorial or extraterritorial. Second, the way in which states operate on foreign soil determines the type of obligation owed to the individual rights holder: whereas negative extraterritorial obligations only require state agents asserting power and control over individuals abroad, positive extraterritorial obligations are traditionally premised on a state exercising effective control over the territory of another state. Third, the territorial location of a non-state actor (corporation) ‘abusing’ human rights determines whether, in the terminology of the SRSG, state regulation of that corporate perpetrator is considered ‘direct extraterritorial jurisdiction’ or merely a ‘domestic measure with extraterritorial implications’. The cumulative effect of this threefold legal territorialisation of human rights is that international law has traditionally been primarily concerned with restraining states from exercising extraterritorial authority to regulate and control the human rights impacts of their ‘corporate nationals’ abroad. The state-centred conception of international law privileges the sovereign territorial rights that states claim over their territory and (corporate) persons therein over the claims of third-country victims to have their human rights protected against violations committed in the course of global business operations.

However, in so far as the operations of powerful non-state actors that penetrate territorial borders challenge the legal compartmentalisation of universal human rights in the international order of states, they have also led to a gradual de-centring of international human rights law from the public and territorial state. One important ramification of this development is the destabilisation of the constitutive relationship between control over territory and positive human rights obligations. In Ilașcu and Others v. Moldova and Russia, for instance, the ECtHR considered that the Moldovan government had positive obligations to protect the human rights of individuals located on parts of its territory occupied by Russia (the ‘Moldovan Republic of Transdniestria’) despite the fact that Moldova did not exercise effective control over the area in question: ‘Even in absence of effective control over the Transdniestrian region, Moldova still had positive obligations under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that were in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention’. Moreover, in one of the Cyprus cases the same court held that Turkey’s human rights obligations in Northern Cyprus extended not only to acts of its own soldiers and officials as well as acts of the local administration (the Turkish Republic of Northern Cyprus, TRNC), but also to acts of private parties violating the rights of Greek and Turkish Cypriots. It remains somewhat unclear in this case whether the court thought that acts of the TRNC could be directly attributed to Turkey with the consequence that the latter could be said to exercise effective control over the territory in question. This notwithstanding, the ECtHR was affirmative on the question of Turkey’s extraterritorial positive human rights obligations: ‘the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State’s responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention.’ The same point was reiterated in the more recent Cyprus case of Isaak concerning a demonstration in the neutral UN buffer zone established between the Turkish and the Greek Cypriot ceasefire lines, in the
course of which one participant was beaten to death by TRNC policemen and private actors (the ‘Turkish mob’). The circumstances of the case precluded any finding of Turkey exercising effective territorial control over the area in question. Nevertheless, having established that ‘despite the presence of the Turkish armed forces and other “TRNC” police officers in the area, nothing was done to prevent or stop the attack [by civilian demonstrators] or to help the victim’, the court reiterated its earlier dictum that ‘the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate Convention rights of other individuals within its jurisdiction may engage that State’s responsibility under the Convention’. Absent effective control over territory, Turkey’s extraterritorial positive obligations are apparently directly grounded in the state’s acquiescence in the human rights violations committed by private actors outside its territory.

While at variance with the court’s traditional approach to ‘jurisdiction’ under Article 1 of the European Convention on Human Rights (ECHR), the dissociation of positive obligations from control over territory may be indicative of a transition in its jurisprudence from a territory-based to a subject-based approach to (extra-) territorial human rights obligations. Such an approach pays tribute to the fact that in cases of human rights violations committed by non-state actors across territorial borders, the territorial nexus between the state, the perpetrator and the victim will often be tenuous. In the relationship between the state and the victim, a subject-based approach to international human rights law focuses on the power the state wields over circumstances of the individual rights holder and treats control over territory as a mere presumption of control over persons. Grounding human rights obligations in state power over individuals finds support in the interpretation of (extra-) territorial human rights jurisdiction adopted by various other international courts and treaty bodies. In this vein, the ECtHR considers that the ‘essential question’ to be examined is ‘whether the applicants … were, as a result of [the] extra-territorial act, capable of falling within the jurisdiction of the respondent States’. According to the Inter-American Commission of Human Rights, whether a person is subject to the state’s jurisdiction under Article 1 of the American Convention on Human Rights does not depend ‘on the presumed victim’s nationality or presence within a particular geographic area but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control’. And for the UN Human Rights Committee, the International Covenant on Civil and Political Rights’ reference to individuals subject to a state’s jurisdiction ‘is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant’.

In the relationship between the state and the corporate perpetrator of human rights violations, the subject-based approach to international human rights law entails a relaxation of the state-based distinction between, on the one hand, the direct attribution of private conduct to public authority (which triggers negative extraterritorial state obligations) and, on the other hand, state control over the foreign territory in which the private conduct takes place (which triggers positive extraterritorial state obligations). As Hakimi points out, both the questions of attribution and third-party responsibility ultimately turn on a ‘normative judgment about the nature of the state’s relationship [with the human rights abuser]: should international law require the state to exercise governmental authority over – and thereby to influence – the particular third party at issue?’ This places the binary distinction between negative and positive state obligations on a continuum of measures that states are required to take to respect and protect human rights in relation to violations by non-state actors. Instead of an ‘all or nothing’ approach to positive state obligations premised on (extra-) territorial control, the subject-based approach imposes (extra-) territorial obligations to protect against corporate violations that are commensurate with the state’s
control over the corporate perpetrator. This entails that, absent the degree of control over the perpetrator required for direct attribution and absent control over the territory in which the victim resides, a state’s influence over the non-state actor violating human rights can still trigger corresponding human rights obligations towards the victim of human rights violations.

6. Taming corporate power overseas

The subject-based approach to international human rights law disentangles the triangular relationship between states, corporate human rights abusers and victims of human rights violations mediated by state territory into de-territorialised relationships between the state and the victim and the state and the perpetrator constituted by state power and control. By de-centring human rights obligations from state territory, this approach is instrumental in addressing a constellation of human rights violations of particular concern to ‘business and human rights’, namely where the corporate perpetrator (or a constituent part of it), is located on the state’s territory while the victim resides on the territory of another state. In these cases, the influence and control a state asserts over a corporate human rights abuser within its territorial borders constitutes an assertion of state power in relation to third-country victims that attracts a corresponding human rights obligation to protect against extraterritorial corporate violations. The territorial location of the corporate perpetrator thus not only determines whether states are permitted to protect human rights against extraterritorial corporate abuse (the SRSG’s distinction between ‘direct extraterritorial jurisdiction’ and ‘domestic measures with extraterritorial implications’). It is also decisive for establishing a state’s human rights obligations under international law to protect third-country victims against corporate-related human rights violations. Moreover, the territorial location of the corporate perpetrator influences the scope of such positive extraterritorial human rights obligations. With regard to corporate actors residing outside the state’s territory, that state’s positive human rights obligations are delimited by its legal competence to exercise extraterritorial jurisdiction as it cannot be considered ‘reasonable’ or ‘appropriate’ to require states to take positive steps to protect human rights in violation of general international law. Such concerns are mitigated by corporate presence within the state’s territorial jurisdiction, which entails that its extra-territorial positive human rights obligations to protect third-country victims against corporate violations will be both more stringent and encompassing.

In this vein, the ECtHR distinguishes acts of state agents performed outside the state’s territory from acts performed inside the state’s territory that merely produce effects outside the state’s territory: the ‘real connection between the applicants and the respondent states [for the purpose of Article 1 ECHR] is the impugned act which, wherever decided, was performed, or had effects, outside the territory of those States (“the extra-territorial act”). In extraterritorial effects cases, the influence and control a state asserts, or fails to assert, over a non-state actor on its territory can constitute human rights obligations towards third-country victims. The case of Kovačić, for example, concerned the domestic regulation of business activities that allegedly violated human rights outside the state’s territory. The Croatian applicants complained that they were prevented by a Slovenian law from withdrawing funds from their accounts in the Croatian branch of a Slovenian bank. The Slovenian government submitted that its obligation to secure property rights under Article 1 of Protocol 1 of the ECHR was confined to property within its jurisdiction, and that none of the instances of extraterritorial jurisdiction recognised by the ECtHR was applicable in the present case. Nevertheless, the ECtHR, after reiterating that ‘the responsibility of [the High] Contracting
Parties can be involved by acts and omissions of their authorities which produce effects outside their own territory’, accepted that the banking legislation introduced by the Slovenian National Assembly ‘affected’ the applicants’ property rights in Croatia. ‘This being so’, the ECtHR found that ‘the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged’.75 Similarly, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights define extraterritorial human rights obligations as ‘obligations relating to the acts and omissions of a state, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory’.76 In relation to business entities this entails that ‘states must adopt and enforce measures to protect economic, social and cultural rights through legal and other means…where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the state concerned’.77

A cognate approach to state obligations to prevent and redress corporate human rights violations in extraterritorial effects cases can also be discerned in a series of General Comments, Statements and Concluding Observations issued by UN human rights treaty bodies over the past decade. Thus, for example, in its well-known General Comment No. 14 concerning the right to health, the Committee on Economic, Social and Cultural Rights noted:

To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.78

With regard to the right to water, the same committee has called upon states parties ‘to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where states parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.’79 The committee’s general comment on social security also provides that ‘State parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries’.80 In 2011, the committee further adopted a ‘Statement of the obligations of states parties regarding the corporate sector and economic, social and cultural rights’ in which it called upon states to ‘take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host states under the Covenant’.81 In a similar vein, the recent General Comment No. 16 from the Committee on the Rights of the Child provides that home states ‘have obligations … to respect, protect and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned’.82 What is more, in both these particular statements, the respective committees recognise the part played by the extraterritorial obligations of states regarding corporate human rights abuses, in fulfilling their wider (and still ill-defined) responsibilities to engage in international assistance and cooperation in the realisation of the relevant treaty rights.83

The UN treaty bodies have also been active on this issue in respect of their Concluding Observations on individual states’ reports. For example, the Committee on the Elimination
of Racial Discrimination has called upon the United Kingdom ‘to take appropriate legisla-
tive and administrative measures to ensure that acts of transnational corporations registered
in the State party comply with the provisions of the Convention’. With regard to Australia,
the committee recently noted ‘with concern the absence of a legal framework regulating the
obligation of Australian corporations at home and overseas whose activities, notably in the
extractive sector, when carried out on the traditional territories of Indigenous peoples, have
had a negative impact on Indigenous peoples’ rights to land, health, living environment and
livelihoods’. Accordingly, the committee encouraged the state party to ‘regulate the extra-
territorial activities of Australian corporations abroad’. The same committee has made
similar observations with regard to Canada and the United States, and most recently,
China, including recommendations that state parties should explore ways to hold business
entities incorporated within their jurisdiction accountable for extra-territorial violations of
the convention. Finally, noting with concern reported participation and complicity of Aus-
tralian mining companies in serious human rights violations in third countries, the Commit-
tee on the Rights of the Child has called upon the state party to ‘examine and adapt its
legislative framework (civil, criminal and administrative) … regarding abuses to human
rights, especially child rights, committed in the territory of the State party or overseas
and establish monitoring mechanisms, investigation, and redress of such abuses, with a
view towards improved accountability, transparency and prevention of violations’.

7. Beyond the 100 Acre Wood

There is now a substantial and growing body of authoritative interpretation of international
human rights by leading international human rights courts, commissions, committees and
commentators, suggesting that states’ hitherto latent extraterritorial obligations are now
recognised as material and operative. This expanding body of jurisprudence and comment-
tary illustrates clearly that there is nothing preordained about the nature of a state’s jurisdic-
tional territory, the manner by which it structures relations between legal actors, and the
form in which it allocates rights and responsibilities. Certainly, the texts of international
human rights law themselves accommodate – indeed prescribe – a state’s scope of respon-
sibility that stretches beyond purely territorial boundaries, and an allocation of duties
(whether direct or indirect) that encompass private as well as public actors. What this
means in cases of alleged human rights abuses by corporations operating overseas, is
that home states (as well as, or even instead of, host states) may
find that they are bound
under international human rights laws to provide a forum in which to entertain the
dispute, and – where the allegations are upheld – to discipline the corporation and
provide remedies for the victims.

The recognition of extraterritorial state obligations to protect human rights against cor-
porate-related violations presents a formidable challenge to international law’s state-centred
heritage. Yet it also uncovers the epistemic biases of a positivist legal doctrine that has long
treated the compartmentalisation of the globe into territorial state entities as a matter of fact,
thus insulating it from normative critique. The global human rights impacts of business
operations undermine the very normativity of a state-centred conception of international
law that assimilates universal human rights and global business entities to state territory.
Such tendencies of the legal mind to compartmentalisation seldom troubled AA Milne’s
writings, and his 100 Acre Wood offers an agreeable metaphor for the complications one
faces when straying into the borderlands. The 100 Acre Wood did not comprise the
extent of the world known to Winnie-the-Pooh and friends. It was in fact just one, specific
part of a larger forest, throughout which the writ of Milne’s pen freely roamed. Moreover,
what sets the 100 Acre Wood apart from the rest of the forest is not a ‘natural’ territorial border but the stories and practices of its inhabitants through which they claim it as their own. And while the tremendous and sometimes terrible prospects that Milne had his characters believe would accompany their ventures through foreign and strange parts of the forest never quite materialised, through these ventures they were confronted with the challenge of encountering the ‘beyond’ from within their own domain, including through the appropriate distribution of responsibilities (for plans, promises and making amends), dealing with external threats and dangers (environmental and existential), and the reception and treatment of individuals new to their jurisdiction. In a similar vein, there is nothing preordained or immutable about a state’s jurisdictional territory and the way in which it structures relations between spaces, events and people, including the allocation of rights and responsibilities. In the area of international human rights law, this is reflected in the growing body of case-law and commentary suggesting that the state-based distinction between the ‘territorial’ and the ‘extraterritorial’ is of decreasing significance in allocating human rights obligations to states. We have argued that from a doctrinal perspective, this development may be indicative of a transition to a subject-based approach to international human rights law that de-centres human rights obligations from the public and territorial state. From a normative perspective, it contributes to recovering human rights’ universal aspirations in the face of global corporate power.

Disclosure statement

No potential conflict of interest was reported by the author.

Notes on contributors

**Daniel Augenstein** is Associate Professor in the Department of European and International Law at Tilburg University. In 2015 he works as a Humboldt Senior Research Fellow at the Wissenschaftszentrum Berlin. Daniel’s main research interests are in the areas of business and human rights, and transnational and global law.

**Professor David Kinley** holds the Chair in Human Rights Law at University of Sydney. He is also an Academic Panel member of Doughty Street Chambers in London. He works and writes principally in the area of human rights and the global economy.

Notes

5. For example, a study dating back to the year 2000 asserts that when comparing corporate sales with states’ gross domestic products (GDPs), 51 of the 100 largest economies in the world are corporations, while only 49 are states. Moreover, the largest 200 corporations are estimated to account for 27.5% of the world’s economic activity, see S. Anderson and U. Cavanagh, *Top 200: The Rise of Corporate Global Power* (Washington, DC: Institute for Policy Studies, December 2000).


13. Ibid., para. 1.


19. For a critique that traces the ideological roots of the public/private divide in modern international law to the co-emergence of state-based legal positivism and free-market liberalism see C. Cutler, Private Power and Global Authority: Transnational Merchant Law and the Global Political Economy (Cambridge: Cambridge University Press, 2003), 3. For an analysis of how that divide ought and might be overcome, by way of ‘de-closeting’ private international law in a way that enables it to ‘reclaim its governance potential’ by, for example, holding non-state actors accountable for their international human rights abuses, see Horatio Muir Watt, ‘Private International Law Beyond the Schism’, Transnational Legal Theory 2, no. 3 (2011): 347–428, at 427.


24. Ecuador, also on behalf of African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru, has recently initiated a new initiative towards developing a legally binding international instrument on business and human rights. It delivered
a statement at the September 2013 session of the UN HRC stressing ‘the necessity of moving forward toward a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses resulting from or related to the activities of some transnational corporations and other business entities’. To this effect, Ecuador has convened an expert workshop on this issue during the HRC’s session in March 2014, see ‘Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council, General Debate – Item 3: “Transnational Corporations and Human Rights”’ (Geneva, September 2013), http://www.business-humanrights.org/Links/Repository/1024755


26. Apart from requiring states to protect human rights against ‘abuses’ by corporations as third parties, international human rights law also imposes obligations on states to respect human rights in relation to corporations acting as state agents. In the latter case, the corporate act is attributed to the state so that the state is considered thereby to interfere directly with the victim’s rights.


29. ECtHR, Fadeyeva v. Russia (Judgment of 9 June 2005), para. 89.


33. Ibid., 13.


37. ECtHR (Grand Chamber), Banković & Others v. Belgium & Others (Admissibility Decision of 12 December 2001), para. 59. While the bulk of Banković has meanwhile been overruled, the court continues to hold fast to the view that extraterritorial human rights protection is exceptional and in need of special justification in the light of the rights of third states, see ECtHR (Grand Chamber), Al-Skeini and Others v. United Kingdom (Judgment of 7 July 2011), para. 131.

38. C. Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’, in Global Justice, State Duties, ed. M. Langford et al. (Cambridge: Cambridge University Press, 2013), 192, 207–10. According to Ryngaert, ‘the home state might even be prohibited from regulating the overseas conduct of its MNCs [multi-national corporations] when such regulation collides with the sovereign interest of the host state’ (ibid., 209).


40. The UNGPs are explicit in this regard: ‘The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for states and businesses …’, see ibid., para. 14.


42. UN HRC, ‘Business and Human Rights’, para. 15.

44. See UN HRC, ‘Guiding Principles on Business and Human Rights’, para. 4.
45. Ibid.
46. Ibid.
47. Ibid.
48. Ibid., para. 2; the commentary adds that ‘some human rights treaty bodies recommend that home states take steps to prevent abuse abroad by business enterprises within their jurisdiction’.
49. In his earlier work, the SRSG also explored other bases of extra-territorial jurisdiction under general international law, including the nationality of the victim (i.e., the passive personality principle), see, for example, UN HRC, ‘Corporate Responsibility under International Law and Issues of Extraterritorial Regulation’, A/HRC/4/35/Add.2 (15 February 2007).
52. F.A. Mann, ‘The Doctrine of Jurisdiction in International Law’, Recueil des Cours 111 (The Hague: The Hague Academy of International Law, 1994), 1, 15: the concept of jurisdiction fulfils ‘one of the fundamental functions of public international law’, namely ‘the function of regulating and delimiting the respective [legislative, judicial and administrative] competences of States’.
53. We have previously distinguished between these two forms of a state jurisdiction in respect of human rights by characterising the first as the ‘permissive question’ and the second as ‘the prescriptive question’; see D. Augenstein and D. Kinley, ‘When Human Rights “Responsibilities” Become “Duties”: The Extra-territorial Obligations of States that Bind Corporations’, in Obligations of Business: Beyond the Corporate Responsibility to Respect?, ed. S. Deva and D. Bilchitz (Cambridge: Cambridge University Press, 2013), 271–94.
56. An important example of this trajectory outside ‘business and human rights’ is the increasing currency of the ‘responsibility to protect’ (R2P), see for example, A. Peters, ‘Humanity as the A and Ω of Sovereignty’, European Journal of International Law 20, no. 3 (2009): 513–44.
57. ECtHR (Grand Chamber), Ilașcu and Others v. Moldova and Russia (Judgment of 8 July 2004), para. 331.
58. ECtHR, Cyprus v. Turkey (Judgment of 10 May 2001).
59. Ibid., para. 81.
60. ECtHR, Isaak and Others v. Turkey (Admissibility Decision of 28 September 2006).
61. Ibid., para. 21.
63. See de Schutter, ‘Globalisation and Jurisdiction’; and Milanović, Extraterritorial Application of Human Rights Treaties.
64. For a discussion of the parallel evolution of the ‘control over territory’ and the ‘control over persons’ test in the jurisprudence of the ECtHR see M. Gondek, The Reach of Human Rights in a Globalising World: Extra-territorial Application of Human Rights Treaties (Antwerp: Intersentia, 2009). The further specification of the kind and degree of state control necessary to trigger a corresponding human rights obligation is beyond the scope of this article. Propositions to this regard range from (very restrictive) direct physical capture to (very broad) cause-and-effect notions of control. Behind this doctrinal debate lies the normative issue regarding the conditions necessary and appropriate for states to accept positive human rights obligations in cross-border contexts, see also further section 6.
65. ECtHR, Banković, para. 54; see further R (Al-Skeini and Others) v. Secretary of State for Defence [2007] UKHL 26, 34 (HL), para. 64. Having regard to the case law of the ECtHR, Lord Roger remarked: ‘It is important therefore to recognise that, when considering the question of jurisdiction under the Convention, the focus has shifted to the victim or, more precisely, to the link between the victim and the contracting state.’
69. Indeed, research conducted by the SRSG suggests that today the majority of corporate-related human rights violations are committed in developing countries by business entities that are based in, and remain controlled from, states in the developed world, see UN HRC, ‘Interim Report’.
70. Such an approach can be discerned in the ECtHR’s holding Russia responsible for human rights violations committed in Transdniestria because it exercised ‘decisive influence’ over the Moldovan separatists, see ECtHR, Ilașcu, para. 392; and further Hakimi, ‘State Bystander Responsibility’, 376–9.
72. See section 3.
73. ECtHR, Banković, para. 54.
74. ECtHR, Kovačić and Others v. Slovenia (Admissibility Decision of 1 April 2004). The case was struck out at the merits stage due to new facts that had come to the court’s attention.
75. Ibid.
77. Ibid., Principle 25.
82. CRC, ‘General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights’, CRC/C/CG/16 (17 April 2013), para. 43.
83. Respectively, CESCR, ‘General Comment 19’, at para. 3, and CRC, ‘General Comment 16’, at para. 41. In a similar vein, the Maastricht Principles list ‘obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realise human rights universally’. Such ‘international assistance and cooperation’ stipulations also exist in a number of other principal human rights instruments, including: the Universal Declaration on Human Rights (Preamble) and the Convention on the Rights of Persons with Disabilities (Art 32); and it is implied in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Art. 7). In addition, the Vienna Declaration and Programme of Action (1993) reiterates (in para. 4) the command in Article 56 of the UN Charter that states ‘take joint and separate action’ to achieve (inter alia) the UN’s human rights goals, which, the Declaration adds, ‘must be considered a priority objective of the UN’.
86. Ibid.


89. The existence of places beyond the 100 Acre Wood in both Winnie-the-Pooh (1926) and the House at Pooh Corner (1928) collected stories is based on the simple fact that Milne himself did not seem to have a fixed idea of its boundaries, such that its coverage and dimensions, as well as those of the forest as a whole, differ between stories; see AA Milne, The World of Pooh: The Complete Winnie-the-Pooh and The House at Pooh Corner (1958).

90. For example: ‘In which Christopher Robin leads an Expotition (sic) to the North Pole’, and ‘In which Tigger is unbounced’ (The World of Pooh).

91. As to the former – the inclemency of the weather, for example: (i) ‘In which Piglet is Entirely surrounded by Water’; (ii) ‘In which a House is built at Pooh Corner for Eeyore’ (snow); and (iii) ‘In which Piglet does a Very Grand Thing’ (wind), ibid.; and as to the latter – the spectres of Heffalumps and Woozles (‘In which Piglet meets a Heffalump’ and ‘In which Pooh and Piglet go Hunting and nearly catch a Woozle’, ibid.

92. For example: Tigger (‘In which Tigger comes to the Forest and has Breakfast’), and Kanga and Roo (‘In which Kanga and Baby Roo come to the Forest, and Piglet has a Bath’); ibid.