

# Jurisdiction of territorial non-state entities in international law

Citation for published version (APA):

Leontiev, L. (2023). *Jurisdiction of territorial non-state entities in international law*. [Doctoral Thesis, Maastricht University, Scuola Superiore Sant'Anna]. Maastricht University. <https://doi.org/10.26481/dis.20230621II>

## Document status and date:

Published: 01/01/2023

## DOI:

[10.26481/dis.20230621II](https://doi.org/10.26481/dis.20230621II)

## Document Version:

Publisher's PDF, also known as Version of record

## Please check the document version of this publication:

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## SUMMARY

Jurisdiction and extraterritoriality in international law are state-based concepts. States have the sovereign authority to prescribe, adjudicate and enforce their jurisdiction on territory and population and, under certain circumstances, abroad. The mainstream international law scholarship discusses issues related to jurisdiction mainly from a statehood perspective. This is because jurisdiction in international law is an expression of states' sovereign authority, and thus it is exclusively the prerogative of the state. This thesis questions and potentially rebuts this state-based approach to jurisdiction (and extraterritoriality) in international law by affirming that states are not the only subjects that can exercise jurisdiction in international law. It is argued, in this thesis, that territorial non-state entities (TNSEs) may also exercise jurisdiction in international law.

Accordingly, the general aim of this research is to analyse international law of jurisdiction and extraterritoriality as applied to TNSEs by looking into *whether* and *how* these entities may exercise jurisdiction in international law. Under the umbrella of these general inquiries, other relevant issues to address are: what justifies TNSEs jurisdictional claims, what are the main characteristics of TNSEs jurisdiction and to which extent it could have an extraterritorial reach. Finding answers to these inquiries may help to clarify whether TNSEs' jurisdiction represents a valid challenge to the state uniqueness of international law of jurisdiction. In a broader picture, it may help to understand the operability of the concepts of jurisdiction and extraterritoriality in international law if decoupled from statehood.

Constructed as a three-layered analysis, this thesis discusses in the first part the theoretical framework. It analyses the commonalities and specificities of jurisdiction and extraterritoriality under public international law and private international law. The use of this methodological approach is explained by the fact that the application of different rules shapes differently how TNSEs are seen, namely subjects or objects of jurisdiction/extraterritoriality. Hence, under public international law, it is presumed that TNSEs are objects of jurisdiction and extraterritoriality in the sense that one or more sovereign states exercise jurisdiction over TNSEs' territories and populations. Under the private international law rules, it is presumed that TNSEs are subjects of jurisdiction and extraterritoriality in the sense that TNSEs exercise their jurisdiction over governed territories and populations.

The commonalities and differences between jurisdiction in public international law and private international law are analysed in Chapter II. In doing so, the discussion initially revolves around the legal nature of the holder(s) of jurisdictional authority under public international law and private international law regulations. It first reflects on states' jurisdictional authority as an expression of its sovereign authority over territory and population. This strong connection between jurisdiction and statehood is crucial when discussing TNSEs as objects of jurisdiction. For its part, jurisdictional authority under the rules of private international law belongs to national courts. These judicial bodies have the authority to exercise their jurisdiction in assessing a concrete case with a foreign element present. Courts are usually guided by the interests of justice and individuals' interests in assessing a case, without necessarily reflecting on the legal nature of a non-state territorial entity. This characteristic is of much relevance when discussing TNSEs as subjects of jurisdiction.

Chapter III continues the theoretical framework of the thesis by analysing extraterritorial jurisdiction in public international law and private international law. The first part of the chapter attempts to unpack the unlawful and lawful grounds of extraterritorial jurisdiction. It argues that the lawfulness of a state's exercise of its extraterritorial jurisdiction is strictly related to the state's obedience to the international law rules on jurisdiction and its limits. If a state exercises its jurisdiction in the extraterritorial domain in violation of international law, state responsibility may be engaged due to the unlawfulness of its actions. Extraterritoriality is also analysed from a private international law perspective. Although not common for private international law, it is argued that extraterritoriality is an inherent feature and can be traced in all three domains regulated by the rules of private international law, namely recognition of judgments, choice of law and jurisdictional assertion. The chapter concludes by proposing a working definition of extraterritoriality for the purposes of this thesis. Accordingly, extraterritoriality is defined as the factual authority of a non-state territorial entity to exercise its jurisdiction extraterritorially in a given context and specific circumstances, including through intra-territorial actions with cross-border effects.

Part II of the thesis analyses TNSEs as objects of jurisdiction and extraterritoriality in international law. The discussion revolves around the statehood status of TNSEs and the jurisdictional patterns attested over these territorial non-states entities. Chapter IV discusses the legal criteria that designate TNSEs as objects of jurisdiction in international law. It examines their lack of statehood status and argues that the creation of an entity in violation of

international law is the catalyst for the existing state of the art. This chapter also reflects on *what* actors exercise jurisdiction and extraterritoriality over TNSEs and *how*. Two main scenarios are presented. First, jurisdiction is exercised by the territorial state from which a TNSE seceded. Even if it has no effective control over the TNSE territory, the territorial state maintains its jurisdiction over its whole territory. Second, in certain cases, the extraterritorial jurisdiction of the patron state is exercised, i.e. a state which supports (some of) the TNSEs' claims. The patron state's jurisdiction in the extraterritorial domain is due to its 'effective' and 'overall' control over the territory of the TNSE.

Chapter V further challenges the equivalence that international law establishes between statehood and jurisdiction. It tries to deconstruct jurisdiction from *within* and *outside* the statehood framework. Deconstructing state jurisdiction from *within* the statehood framework implies challenging the territorial basis of jurisdiction in international law. Accordingly, the chapter discusses the connection between statehood and territory on the one hand, and territorial control and jurisdiction on the other hand. It concludes that, despite the existing challenges to the territoriality of jurisdiction, international law struggles to imagine a state without territory as well as a jurisdiction without territory. Deconstructing state jurisdiction from *outside* the statehood framework means searching for alternative jurisdictional links. These alternatives might well be a different jurisdictional nexus, or a change in subject, meaning allocating jurisdiction to specific non-state actors. As alternative jurisdictional nexuses, the community and justice linchpins are analysed in this chapter. Then, allocating a functional legal personality to TNSEs, it is argued that non-state entities have a limited international personality resulting from their conduct and obligations. This chapter analysis shows that there are premises for thinking of jurisdiction outside the statehood framework. These premises are discussed in the following chapters of this thesis.

Part III of the thesis analyses TNSEs as subjects of jurisdiction and extraterritoriality in international law. It does so by first analysing effectiveness as a foundation for TNSEs' prospective jurisdictional entitlement. Second, it looks into the existing practice regarding TNSEs' jurisdiction and extraterritoriality. In this order of ideas, Chapter VI analyses effectiveness as the main basis for TNSEs as subjects of jurisdiction and extraterritoriality in international law. It argues that effectiveness has the capacity to build new legal realities created from an illegal situation. It also highlights the value of the 'factual' jurisdiction in assessing the jurisdictional and extraterritorial entitlement of TNSEs. It considers the existence of effectiveness as effective

control over the territory and population as the foundation of TNSEs' 'factual' jurisdiction. This chapter also analyses the institutional capacities and normative characteristics that these entities have or should have to potentially be jurisdictionally entitled. The findings of this chapter suggest that TNSEs' jurisdiction should be endorsed for three reasons. It is first submitted that accepting TNSEs jurisdiction is not only effectively, but also normatively, justified. Second, TNSEs regulate social life through established governance structures which contribute to their legitimacy. Third, TNSEs' factual jurisdiction does manifest itself in the extraterritorial domain, but this, of course, depends on the sovereign state's acknowledgement and recognition.

Chapter VII reinforces the previous chapter's arguments by delving into the extraterritorial effects of TNSEs' exercise of factual jurisdiction. By analysing the existing practice and case-law of municipal courts of states belonging to common and civil law systems regarding the recognition of TNSEs' authority, the thesis argues that TNSEs can be perceived under certain circumstances as subjects of jurisdiction and extraterritoriality in international law. The discussion in the third part of the thesis shows that jurisdiction and extraterritoriality are not exclusive state features; for specific purposes and under specific circumstances, they can also be exercised by TNSEs. In other words, jurisdiction is not a completely statehood-related matter as an orthodox reading of the international law of jurisdiction pictures it. The application by municipal courts of foreign law, including that of a territorial non-state entity, helps to solve cases and to avoid gross inconvenience and injustice to litigants, native or foreign. Thus, the practical utility of recognising jurisdiction/extraterritoriality with respect to these entities cannot be denied or ignored, and there is enough case-law to confirm this statement.

This thesis concludes with an open invitation to think of jurisdiction (and extraterritoriality) in international law as a concept de-coupled from theories of statehood and sovereignty. It argues that TNSEs can exercise jurisdiction in international law. The implications of this proposition are considerable for the orthodoxy of the international law of jurisdiction. It opens the gates of the statehood-related concepts of jurisdiction and extraterritoriality in international law to such non-state entities as TNSEs. It means that jurisdiction (and extraterritoriality) in international law are not concepts strictly related to statehood. Jurisdiction can be exercised outside the statehood framework, and this invites a more substantial reconsideration of the concepts of jurisdiction and extraterritoriality in international law.