THE ABANDONMENT OF *RATIONE LOCI* IN INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE

John Cerone*

ABSTRACT

This article examines and critiques the evolution of international human rights jurisprudence away from a delimiting conception of jurisdiction ratione loci*, and formulates two related but distinct recommendations to maintain the coherence of international human rights law while contending with the expanding employment of state power beyond national borders. First, the direct linkage of human rights obligations to territory should be abandoned. Human rights treaty bodies, in determining whether an individual is subject to the 'jurisdiction' of a state party within the meaning of scope of application provisions, should instead center their inquiry on the relationship between the state and the individual. In extraterritorial contexts, the necessary relationship arises when a state party has authority or control over a situation entailing violation of an individual's human rights, irrespective of the particular mode of control, and human rights bodies should explicitly tie the degree of positive obligation to the degree of control authorized or exercised over the situation. Rather than delimiting obligations on the basis of territory, treaty bodies should use reasonableness as the rubric for determining what should be expected of states in light of the control they enjoy over a situation. Second, human rights treaty bodies should reject any notion of a ratione loci delimitation of their competence to receive and consider individual complaints. As international bodies, their competence is not territorially bound. These measures would help to consolidate and formalize an important paradigm shift in the conception of the nature and scope of international human rights law.*

* Visiting Professor of International Law, The Fletcher School of Law & Diplomacy (Tufts University). The author would like to thank Adam Greenfield, Caroline Armstrong Hall, Andrea Carcano, Stephanie Farrior, Hurst Hannum, Mitchell Collins, and Zachary Reid for their assistance in bringing this article to fruition.

CONTENTS

INTRODUCTION

Over the past twenty years, international and regional human rights bodies have chipped away at the notion of jurisdiction *ratione loci*, or jurisdiction by reason of place, in assessing their competence to receive petitions[1] alleging human rights violations. And this is a good thing, as it never should have been there in the first place.

International human rights law imposes a degree of regulation on the way states treat individual human beings, and creates institutions to monitor this treatment. The traditional, paradigm human rights cases focused on the way states treated their own people within their own territory. However, in recent years, developments across a range of fields – such as telecommunications, migration, trade, warfare, industry, law enforcement – have entailed an ever-expanding projection of the power of the state beyond national borders. In tandem with these developments, human rights bodies have increasingly scrutinized the way states treat individuals abroad – from the interception of migrants on the high seas to the treatment of individuals in situations of transnational armed conflict to the impact of a state's contributions to climate change on populations across the globe.[2]

---

[1] Different treaty regimes use different terminology, such as "communication" or "application," to refer to individual and inter-state complaints submitted to the respective institution. The terms "petition" or "complaint" will be used in this article as general terms to refer to all such formal complaints.

[2] *See, e.g.*, *UN Rights Office Concerned Over Migrant Boat Pushbacks in the Mediterranean*, UN NEWS (May 8, 2020), https://news.un.org/en/story/2020/05/1063592; Off.

This article first examines the evolution away from a territorial requirement, as reflected primarily in the jurisprudence[3] of international courts and quasi-judicial bodies interpreting and applying human rights treaties. It then presents a framework for analyzing these developments, and makes two related, but analytically distinct recommendations. The first is that for the purpose of determining the scope of application of substantive rules of human rights treaty law, human rights bodies should abandon the notion that the term 'jurisdiction,' as used within scope of application provisions, is primarily territorial. The second is that human rights bodies, in assessing their competence to receive, examine, and render a decision on individual complaints, should formally abandon a *ratione loci* criterion, even where the underlying human rights obligation has an explicit territorial requirement. This would better comport with the conception of international human rights, the text of the relevant treaties, and the purpose of international human rights law. Dropping the pretense of an inquiry into jurisdiction *ratione loci* would bring coherence to the jurisprudence of international and regional human rights bodies and would complete the paradigm shift that began with the advent of international human rights law.

I. THE NATURE AND SCOPE OF HUMAN RIGHTS OBLIGATIONS

The term "international human rights law" (IHRL) is used herein to refer to rules of international law that confer legal rights on individual human beings, with those rights conceived of or formulated as human rights. It consists of rules of treaty law and customary international law, as well as certain general principles of law.

This category of international legal norms is neither hermetically sealed

---

of the High Comm'r for Hum. Rts., Expert Consultation on Human Rights at International Borders: Exploring Gaps in Policy and Practice: Background Paper, 17-19 (Mar. 22-23, 2012), https://www.ohchr.org/Documents/Issues/Migration/Events/HumanRightsatInternationalBorders_backgroundpaper2012.pdf; *Armed Conflict*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-d/armed-conflict/ (last visited May 11, 2021); OHCHR, Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Right to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 1-5 (2015), https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf; Joint Statement on "Human Rights and Climate Change", Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, Sep. 16, 2019.

[3] The term 'jurisprudence' is used in the sense of decisions of judicial and quasi-judicial bodies. In particular, it refers herein to decisions in the context of human rights bodies' complaints procedures. The term 'caselaw' is not used as some of these decisions are not legally binding, and because international judicial and quasi-judicial institutions are generally not bound by the principle of *stare decisis*.

nor homogeneous. Indeed, there is no universally accepted delineation of the category. While the analysis set forth in this article focuses on human rights treaties, even this narrower category is difficult to clearly define. Some of the treaties regarded as "core" human rights treaties by the UN Office of the High Commissioner for Human Rights would seem to fit just as easily (if not more so) in the category of international criminal law (e.g., the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)) or international humanitarian law (e.g., the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict).[4]

When it comes to customary international law, it is even more difficult to differentiate between rules that operate for the benefit of individuals and rules that confer legal rights on those individuals, as well as whether those rights may be regarded as human rights.

It is also important to bear in mind that there are significant variations in the general scope of application provisions in each of the treaties as well as in several specific clauses.[5] As such, descriptions of the nature and purpose of international human rights law will often be subject to caveats to account for these variations. Nonetheless, there are a few key, cross-cutting traits that are relevant to the analysis set forth below.

The first key trait is universality. The individual rights protected by these treaties are conceived of as universal. This is reflected not only in the phrase "human rights," but it is also expressly formulated in the preambular text of each of the treaties, including express references to the concepts of human dignity and inalienability and the recognition that "these rights derive from the inherent dignity of the human person."[6]

The second key trait is the conception of the individual as rights holder. While earlier rules of international law provided a degree of protection for individuals, this protection was generally contingent upon the nationality of the victim and predicated on the notion that an injury to the individual was an injury to their state of nationality.[7] This modality is exemplified in the

---

[4] U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT]; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Feb. 12, 2002, T.I.A.S. No. 13094, 2173 U.N.T.S. 222. *See* OFF. OF THE U. N. HIGH COMM'R FOR HUM. RIGHTS, THE CORE INTERNATIONAL HUMAN RIGHTS TREATIES 135, 143, U.N. Doc. ST/HR/3, U.N. Sales No. E.06.XIV.2 (2006).

[5] *See infra* note 34.

[6] *See, e.g.*, International Covenant on Civil and Political Rights, preamble, *adopted* Dec. 16, 1966, T.I.A.S 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, preamble, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 999 U.N.T.S. 3 [hereinafter ICESCR]; CAT, *supra* note 4, preamble.

[7] *See* F.V. Garcia-Amador (Special Rapporteur on the International Responsibility), *First Rep. on Int'l Responsibility*, ¶¶ 98-100, 121, U.N. Doc. A/CN.4/96 (Jan. 20, 1956); S. N. Guha

Law of State Responsibility for Injury to Aliens and the exercise of so-called diplomatic protection (i.e. the espousal of claims by the state of nationality).[8] This of course meant that there was no recourse for harm inflicted upon individuals by their own government. International human rights law filled this critical gap by making clear that states had obligations in relation to the human rights of all, including their own nationals.[9] It also filled the gap in protection in those situations where states chose not to espouse the claims of their own nationals who were injured by other states. However, IHRL was not simply a gap-filler. Within this new body of law, the relationship between the state and the individual was fundamentally changed. These rules would apply to individuals in their own right, and not as extensions of the state.

The third key trait is the entailment of both negative and positive obligations to secure these rights. It is now well-established that international human rights law entails both negative and positive obligations. Negative obligations are obligations of abstention, requiring the duty-bearer to refrain from engaging in prohibited action. Conversely, positive obligations prohibit inaction, requiring the duty-bearer to affirmatively engage in a prescribed course of action, or to achieve a prescribed result. Most positive obligations under IHRL are obligations of "best efforts" rather than obligations of result.[10]

The fourth key trait is that these are rules of international law. By definition, the subject matter of these rules is not an internal matter. IHRL, as a body of rules of international law, has an inherently transnational character.[11] This must be taken into account when drawing analogies between

---

Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863, 863-64 (1961); Maximillian Koessler, *Government Espousal of Private Claims Before International Tribunals*, U. CHI. L. REV. 180, 182-83 (1946).

[8] *See* Garcia-Amador, *supra* note 7, ¶¶ 136-150; F.V. Garcia-Amador (Special Rapporteur on the International Responsibility), *Second Rep. of the Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens*, ¶¶ 112-14, U.N. Doc. A/CN.4/106 (Feb. 15, 1957); Thomas E. Carbonneau, *The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement*, 25 VA. J. INT'L L. 99, 106-110 (1984); Guha Roy, *supra* note 7, at 863-64.

[9] *See, e.g.*, ICCPR, *supra* note 6, art. 2; American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 1, Nov. 22, 1969, 1144 U.N.T.S. 123; *International Standards*, OHCHR, https://www.ohchr.org/EN/Issues/Executions/Pages/InternationalStandards.aspx (last visited May 14, 2021).

[10] The phrase "obligation of result" has been used variously in international practice to mean different, sometimes inconsistent, things. It is used here to refer to obligations that require that a particular result be achieved, whether that result be a particular target, or simply the completion of certain specified conduct, whether that conduct be an act or an omission. As such, the phrase is not used in contrast to "obligations of conduct," but in contrast to "obligations of best efforts."

[11] It is for this reason that the present author eschews the term "extraterritorial

the competence of domestic and international bodies.

All of these traits are common to the human rights treaties discussed herein. The present article focuses on the bill of rights type treaties, including the International Covenant on Civil and Political Rights (ICCPR),[12] the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[13] and the Convention on the Rights of the Child (CRC),[14] and, to a lesser extent, the non-discrimination treaties, including the Convention on the Elimination of all forms of Racial Discrimination (CERD)[15] and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).[16]

II. COMPETENCE OR JURISDICTION *RATIONE LOCI* AND EXTRATERRITORIALITY

Jurisdiction *ratione loci* is jurisdiction by reason of place or location. It is the territorial or spatial dimension of jurisdiction. Other jurisdictional parameters are *ratione personae* (personal jurisdiction), *ratione materiae* (subject matter jurisdiction), and *ratione temporis* (temporal jurisdiction). These are typical parameters for the exercise of jurisdiction by domestic courts. The jurisdiction of all judicial and quasi-judicial bodies is limited in terms of one or more of these parameters. International bodies, including international courts and human rights treaty bodies, have adopted these terms in analyzing and formulating the scope of their respective competences.[17]

---

obligation," a term that has been adopted by some scholars in this context. *See, e.g.,* Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights (Jan. 2013) (available at https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23). The term seems to suggest that there is a discrete sub-set of international legal obligations that are extraterritorial in character. It must be recalled that rules of international law are by their very nature extraterritorial. They entail obligations that run, first and foremost, to other states. Restricting the conception of these rules as primarily applicable internally is anomalous and exceptional, and should be construed as such.

[12] ICCPR, *supra* note 6.

[13] ICESCR, *supra* note 6.

[14] U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S 3 [hereinafter CRC].

[15] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, T.I.A.S 94-1120, 660 U.N.T.S 195 [hereinafter CERD].

[16] U.N. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S 13 [hereinafter CEDAW]. This article also draws upon analogous instruments and jurisprudence of the regional human rights systems.

[17] *See, e.g.*, *Human Rights Treaty Bodies – Individual Communications: Procedure for Complaints by Individuals Under the Human Rights Treaties*, OHCHR, https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx, (last visited May 14, 2021); DD v. Spain, Views of the CRC, CRC/C/80/D/4/2016, 15 May

In human rights jurisprudence, the inquiry into jurisdiction *ratione personae* usually entails the question of whether the respondent state (i.e., the state against which the complaint is brought) is subject to the particular body's complaints procedure, usually reflected in some manifestation of consent by that state (e.g. being a party to a particular treaty, or lodging a declaration of consent to the procedure with a designated depositary), but it may also entail the question of whether a particular individual qualifies for protection under a given treaty.[18] Jurisdiction *ratione materiae* is delimited by the substantive scope of the respective treaty obligations.[19] Jurisdiction *ratione temporis* concerns the question of whether the impugned conduct falls within a designated time-frame, which is generally any time after the relevant treaty obligations have come into force for the respondent state.[20]

The inquiry into jurisdiction *ratione loci* generally arises when a complaint alleges violation of the human rights of someone outside of the respondent state's territory, which raises the issue of so-called extraterritorial application.[21] International courts and treaty bodies claim to view human rights obligations as extending primarily to those within a state's territory, and only exceptionally to individuals situated abroad.[22]

The phrase "extraterritorial application of human rights law," as used in this article, refers to the issue of whether and to what extent a state's human rights obligations apply to that state in relation to individuals situated outside of that state's territory.[23]

2019; M.L.B. v. Luxembourg, Decision of the CESCR, E/C.12/66/D/20/2017, 1 Nov. 2019; David Hicks v. Australia, Views of the Human Rights Committee, CCPR/C/115/D/2005/2010, 19 Feb. 2016. *See also* Prosecutor v. Ruto, ICC-01/09-01/11, Corrigendum to "Prosecution's Response to the Defence Challenges to Jurisdiction" filed 16 September 2011, ¶ 10 (Sep. 19, 2011).

[18] *See, e.g.*, Drozd & Janousek v. France & Spain, 240 Eur. Ct. H.R. (ser. A) ¶ 91 (1992). *See also* Valsamis Mitsilegas, *Surveillance and Digital Privacy in the Transatlantic "War on Terror": The Case for a Global Privacy Regime*, 47 COLUM. HUM. RTS. L. REV. 1, 19 (2016). As for treaty body competence *ratione personae* to receive petitions, there are typically two requirements. The Respondent State must have formally accepted this competence (e.g., by becoming a party to the treaty setting forth the procedure), and the individual claiming to be a victim must be subject to the jurisdiction of that state.

[19] XUE HANQIN, *Subject-matter Jurisdiction and Temporal Jurisdiction*, *in* JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 180-81 (2017).

[20] *Id*. at 197-98.

[21] *See, e.g.*, *Drozd*, 240 Eur. Ct. H.R. ¶ 87. *See also* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 80 (1995).

[22] *See* Banković v. Belgium, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333, 336. *See generally* Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 23 ARIZ. ST. L.J. 389 (2011).

[23] This question may be broken down into at least three parameters: the scope of beneficiaries, the range of rights applicable, and the level of obligation. The scope of beneficiaries refers to those individuals whose rights must be respected and ensured by the

For decades, the issue of extraterritorial application of human rights law has been mired in controversy.[24] However, in recent years a consensus has been achieved among international human rights bodies, as well as among an increasing number of states, that at least some rules of international human rights law bind a state in relation to individuals situated outside of that state's territory.[25] Nonetheless, there remains a lack of universal agreement on: (1) which rules of human rights law apply extraterritorially, (2) in what circumstances, (3) and how those rules apply in an extraterritorial context.[26]

As will be elaborated in greater detail below, there is an increasing consensus among international human rights bodies that, in general and subject to variations in the language of certain provisions, obligations under human rights treaties apply to a state in relation to individuals outside that state's territory to the extent those individuals fall within its jurisdiction.[27] The notion of jurisdiction in this context is equated with control, such that obligations under human rights treaties will bind a state in relation to individuals who are under the control of the state, either because they are present in a territory under the control of that state, or because the individuals themselves are otherwise under the control of the state (e.g. in the custody of agents of the state).[28] Notwithstanding this consensus, human rights bodies have reached varying conclusions on the standards for establishing the

---

relevant state (or other subject of obligation under human rights law). The range of rights applicable refers to the question of which rights apply in situations where the state may not be bound to recognize the full range of rights provided under treaty or customary law. The level of obligation refers to the degree of positive action a state must undertake to meet its obligations under human rights law. It should be noted that the scope of obligation may vary depending upon whether the relevant source of law is treaty or custom as well as the context in which the state is operating. John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations,* 39 VAND. J. TRANSNAT'L L. 1447, 1471 (2006). While human rights bodies have found application of human rights obligations to vary along all three parameters, ultimately their collective jurisprudence may be viewed, and is best understood, as reflecting variation in only the third parameter, as will be elaborated below.

[24] *See* Smadar Ben-Natan, *Constitutional Mindset: The Interrelations between Constitutional Law and International Law in the Extraterritorial Application of Human Rights*, 50 ISR. L. REV. 139, 140-41 (2017); Charlie Savage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES (Mar. 6, 2014), https://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html.

[25] *See* Sarah Joseph & Sam Dipnall, *Scope of Application*, *in* INTERNATIONAL HUMAN RIGHTS LAW 110, 128-29 (Daniel Moeckli et al. eds., 3d ed. 2018). *See generally* Hathaway et al., *supra* note 22.

[26] *See* Joseph & Dipnall, *supra* note 25, at 129. *See also* Ibrahim Kanalan, Extraterritorial State Obligations beyond the Concept of Jurisdiction, 19 GERMAN L.J. 43, 44, n.4 (2018).

[27] *See infra* Parts III-IV.

[28] *See id.*

necessary degree of control and also with respect to the extent to which the obligations under the respective treaties apply in different extraterritorial contexts.

At a minimum, all human rights bodies agree that a state's human rights obligations are not limited to the rights of individuals within its territory.[29] At the same time, it should be noted that some human rights bodies have also stated that extraterritorial application is exceptional, and therefore should be interpreted restrictively.[30]

As for states, practice is mixed. A handful of states forcefully reject the extraterritorial application of certain of the principal human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR).[31] A handful of other states explicitly accept the extraterritorial application of these treaties.[32] As one might expect, most states are silent on the issue. However, there are a number of widely supported resolutions of the UN General Assembly that invoke international human rights law in an extraterritorial context, which would seem to indicate widespread support for the proposition that at least some rules of international human rights law apply extraterritorially.[33]

---

[29] Joseph & Dipnall, *supra* note 25, at 128.

[30] *See, e.g.,* The Environment and Human Rights (States Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R (ser. A) No. 23, ¶ 81 (Nov. 15, 2017) [hereinafter Advisory Opinion on the Environment and Human Rights].

[31] The United States, e.g., has explicitly and consistently rejected the extraterritorial application of the ICCPR, to which it is a party. *See* U.N. Human Rights Comm., Consideration of Reports Submitted by Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Fourth Periodic Report: United States of America, ¶ 505, U.N. Doc. CCPR/C/USA/4 (May 22, 2012). *See also* United States, Observations on Human Rights Committee General Comment 31: Nature of the General Legal Obligations Imposed on State Parties to the Covenant/by the United States of America, U.N. Doc. CCPR/C/93/CRP.3 (June 3, 2008).

[32] *See* Joseph & Dipnall, *supra* note 25, at 128. Sweden, "Objection to the declarations and reservation made by Turkey upon ratification," U.N.T.S. Vol. 2265, A-14668, 222. (June 30, 2004); International Covenant on Civil and Political Rights, Greece objection to the declarations and reservation made by Turkey upon ratification, Objections, U.N.T.C. IV-4, 23 (Oct. 13, 2004).

[33] *See, e.g.,* G.A. Res. 75/236, preamble, (Dec. 30, 2020); G.A. Res. 75/192, ¶ 6b, (Dec. 28, 2020); G.A. Res. 46/135, preamble, (Dec. 17, 1991); G.A. Res. 74/175, ¶24, (Jan. 7, 2020). The nature and imprecision of General Assembly resolutions make it difficult to assess their legal weight in this context. Similarly, although the practice of states in the Universal Periodic Review process seems to support the conception of human rights as extending beyond national borders, the fact that this process is not limited to legal obligations makes it difficult to draw

The different standards for extraterritorial application result not only from differing interpretations of the same or similar treaty provisions, but also from the fact that the text of each treaty is different.[34] Thus, in analyzing the

---

definitive conclusions. *See generally* Monika Heupel, *How Do States Perceive Extraterritorial Human Rights Obligations: Insights from the Universal Periodic Review*, 40 HUMAN RTS. Q. 521 (2018).

[34] The scope of application of the International Covenant on Civil and Political Rights is explicitly bounded by parameters of territory and jurisdiction. Article 2(1) of the ICCPR states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind . . . .

ICCPR, *supra* note 6, art. 2(1) (emphasis added). In contrast, article 2(1) of the International Covenant on Economic, Social, and Cultural Rights mentions neither territory nor jurisdiction. It states:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

ICESCR, *supra* note 6, art. 2(1). It refers to the "full realization of the rights recognized" but without specifying for whom. The absence of limiting language could support the notion that states parties must work toward the full realization of these rights by all people everywhere, an interpretation which may be bolstered by the reference to "international assistance and co-operation." Certain specific provisions of the ICESCR do, however, contain limitations. Consider the obligation in article 14 "to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education." ICESCR, *supra* note 6, art. 14. Article 2(3) provides for a possible partial limitation with respect to non-nationals in certain circumstances. It states, "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." ICESCR, *supra* note 6, art. 2(3). This provision would seem to contemplate non-nationals who are within the territory, or at least the purview, of the state party.

Neither the Convention on the Elimination of all forms of Racial Discrimination (CERD) nor the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) contains a general scope of application provision. The one territorial limit found in CERD is set forth in article 3, in which the "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." CERD, *supra* note 15, art. 3. The words 'territory' and 'jurisdiction' are entirely absent from CEDAW. *See generally* CEDAW, *supra* note 16.

The Convention on the Rights of the Child (CRC) contains a scope of application provision similar to that of the ICCPR; however, it omits the word territory. Article 2(1) of the CRC states: "States Parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction* without discrimination of any kind. . . ." CRC, *supra* note 14, art. 2(1). Another difference is the use of the plural "States Parties" and the reference to "their jurisdiction," which could perhaps be read as referring to the collective jurisdiction of all of the state parties.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

question of extraterritorial application of international human rights law, one must recall that each treaty has its own provisions regulating its scope of application, and some of them contain multiple provisions each with its own scope of application. Nonetheless, a consistent jurisprudence has evolved that has minimized the significance of these textual variations, and there has been a clear trend across human rights bodies in favor of extraterritorial application.[35]

Punishment (CAT) has no general scope of application provision. Specific provisions in the Convention entail differing scopes of application. Article 2 requires each state party to "take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*." CAT, *supra* note 4, art. 2 (emphasis added). Similar language is used in a number of other provisions. *See, e.g.*, CAT, *supra* note 4, arts. 5,7,11-13,16. Article 20, however, provides for an inquiry procedure when there are "well-founded indications that torture is being systematically practised *in the territory of* a State Party. . . ." CAT, *supra* note 4, art. 20 (emphasis added). Article 3, on the other hand, specifies no such scope limitation. It states, "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT, *supra* note 4, art. 3.

Given the variation in the text of these treaties, one cannot take for granted that the interpretations of each would necessarily apply to the others. Nonetheless, as will also be demonstrated below, human rights bodies have developed a consistency in their jurisprudential approach to extraterritorial application, which has lessened the significance of these textual variations.

It should also be noted that none of the individual communications procedures for these treaty regimes make any reference to territory.

[35] Views of the Human Rights Committee, A.S. v. Italy, adopted November 4, 2020, at ¶ 7.4; Views of the Human Rights Committee, Communication No. 1539/2006 (Munaf v. Rom.), adopted 30 July 2009, U.N. GAOR, Hum. Rts. Comm., 96th Sess., Annex ¶ 14.2, U.N. Doc. CCPR/C/96/D/1539/2006 (2009); Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 31, U.N. doc. CCPR/C/Rev.1/Add/13 ¶ 10 (May 26, 2004); Committee on Economic, Social, and Cultural Rights, International Covenant on Economic, Social and Cultural Rights: General Comment No. 24, U.N. doc. E/C.12/GC/24, ¶ 28 (Aug. 10, 2017); Committee on the Elimination of Discrimination Against Women, Convention on the Elimination of All Forms of Discrimination Against Women: General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, U.N. doc. CEDAW/C/CG/30, ¶ 8 (Oct. 18, 2013); Committee Against Torture, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 4, U.N. doc. CAT/C/GC/4, ¶ 10 (Sept. 4, 2018); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention on the Rights of the Child, General Comment No. 3, U.N. doc. CMW/C/GC/3-CRC/C/GC/22, ¶ 12, (Nov. 16, 2017). This trend is also apparent at the regional level. *See, e.g.,* Hanan v. Germany, Grand Chamber judgment, European Court of Human Rights, Application no. 4871/16, Feb. 16, 2021; Aisalla Molina v. Ecuador, Case IP-02, Report No. 112/10, Inter-Am.C.H.R., OEA/Ser.L/V/II.140, ¶ 99 (Oct. 21, 2010); African Commission on Human and Peoples' Rights General Comment No.3 on the Right to Life, ¶ 18.

III. THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE ON THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS LAW

The range of situations in which international courts and human rights bodies have found human rights treaties to apply extraterritorially has broadened over time.[36] The practice of these bodies has consistently focused on interpretation of the scope of a state's 'jurisdiction,' notwithstanding the textual differences noted above. While the present opinion is limited to an analysis of certain human rights treaties adopted under UN auspices, it will refer to the practice of regional human rights bodies as well, given that they interpret similar rules and in light of the high degree of jurisprudential cross-fertilization that occurs among human rights bodies within and across the UN and regional levels.

The jurisprudence of the European Court of Human Rights, in particular, has demonstrated a dramatic shift away from a strictly territorial notion of jurisdiction. In *Loizidou v. Turkey*, one of its earliest cases concerning extraterritorial application, the Court found that Turkey was responsible for complying with the European Convention on Human Rights (ECHR) in northern Cyprus, where it exercised territorial control as an occupying power.[37] While the language in its *Loizidou* decisions, as well as in the subsequent case of *Cyprus v. Turkey*, did not restrict application of the ECHR to situations where a state exercised territorial control, the European Court

---

[36] *See* Barbara Miltner, *Revisiting Extraterritorial after Al-Skeini: The ECHR and Its Lessons*, 33 MICH. J. INT'L L. 693, 729 (2012).

[37] The Court stated:

> It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC." It is obvious from the large number of troops engaged in active duties in Northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC." Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.

Loizidou v. Turkey, App. No. 15318/89, ¶ 56 (Dec. 18, 1996). The Loizidou Court conflates the issue of attribution with the scope of beneficiaries, making it difficult to pin down the precise relevance of territorial control. *Id.* It appears that the finding of territorial control concerned attribution of the conduct of the local administration to Turkey, rather than establishing that those individuals within the controlled territory were within the 'jurisdiction' of Turkey. *Id.* Interestingly, the language employed by the Court in outlining the scope of beneficiaries seems to foreshadow the subsequent development of an effects-based standard. *Id.* Nonetheless, this judgement has been understood as supporting the proposition that territorial control is sufficient to establish 'jurisdiction' within the meaning of article 1 of the ECHR. *Id.*

doubled-down on territoriality in the subsequent case of *Banković v. Belgium*.[38]

In *Banković,* the Applicants sought redress for the killing of individuals during the 1999 NATO bombing of Belgrade.[39] The Court found that the victims were not within the 'jurisdiction' of the Respondent States for the purposes of the European Convention.[40] In so doing, the Court limited the application of the Convention to situations of territorial control, and certain "other recognised instances of the extra-territorial exercise of jurisdiction by a State," including "cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State."[41]

The European Court expressly rejected the possibility that a Contracting State's "jurisdiction" would follow the State's conduct, such that an infringement of rights committed against anyone anywhere in the world would be sufficient to bring that individual within the state's "jurisdiction" for the purposes of applying its human rights obligations.[42] The Court noted that such an approach would render "superfluous and devoid of any purpose" the Article 1 language "within their jurisdiction."[43] It also seemed to reject the possibility that the Convention could ever be applicable beyond the geographic area (or *espace juridique*) of the Council of Europe.[44]

It did not take long for the European Court to retreat from its insistence on territorial control. *Banković* was seen as a highly politically charged case, and ripe for being discarded as anomalous.[45] Through a gradual progression of admissibility decisions[46] and judgments on the merits,[47] the Court chipped

---

[38] Cyprus v. Turkey, App. No. 25781/94, ¶ 23 (May 12, 2014); *Banković*, App. No. 52207/99, ¶ 66 (Dec. 12, 2001).

[39] *Banković*, App. No. 52207/99, ¶¶ 9-11.

[40] *Id.* ¶ 66.

[41] *Id.* ¶ 73.

[42] *Id.* ¶ 80.

[43] *Id.* ¶ 75.

[44] The Court noted that "the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States." *Id*. ¶ 80. It found that "the Convention is a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States." *Id*. As the Federal Republic of Yugoslavia was not a party to the Convention, it did not comprise part of this legal space. Essentially, the Court found that the European human rights system was designed within and for a particular region, and was not intended to make Council of Europe states responsible for securing the rights of individuals throughout the world. *Id.* ¶ 42.

[45] *Id.* ¶ 79.

[46] *See, e.g.*, Issa v. Turkey, App. No. 31821/96, Eur. Ct. H.R. ¶¶ 52-53 (Nov. 16, 2004).

[47] *See, e.g.*, Ilascu v. Moldova & Russia, App. No. 48787/99, Eur. Ct. H.R. ¶ 317 (July 8, 2004); *Issa*, App. No. 31821/96, ¶¶ 52-53.While the Court ultimately found that the complainants were not within the jurisdiction of Turkey within the meaning of article 1 of the

away at the line drawn at territorial control, and abandoned its dictum based on the *espace juridique* of the Council of Europe. Its most recent judgments implicitly repudiate *Banković* and expressly affirm that territorial control is not required for extraterritorial application of the Convention.[48]

A similar shift away from a requirement of territorial control is evident in the human rights jurisprudence of other regional systems and at the UN level.

The International Court of Justice (ICJ) affirmed the centrality of the notion of a state's jurisdiction in this context in its Advisory Opinion on Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory (the "*Wall* Opinion").[49] In the *Wall* opinion, the Court found that "the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[50] While it also found the ICESCR and the Convention on the Rights of the Child (CRC) applicable in that Opinion, it seemed to adopt a slightly higher standard for the ICESCR, and possibly also for the CRC.[51] However, in restating this rule in *DRC v. Uganda*, the Court does not refer specifically to the ICCPR and states instead that "*international human rights instruments* are applicable 'in respect of acts done by a State in the exercise of its jurisdiction . . . .'"[52] The ICJ provides little explicit guidance as to what constitutes 'jurisdiction' for the purpose of applying this standard.

Significantly, the Wall Opinion concerned the application of human rights treaties in territory that the Court determined to be occupied, within the meaning of the international law of armed conflict.[53] As such, it had

---

European Convention, it explicitly adopted the control over individuals standard and drew upon the reasoning of the Human Rights Committee that "Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory." *Issa*, App. No. 31821/96, ¶ 71.

[48] *See, e.g.,* Al-Skeini v. United Kingdom, App. no. 55721/07, Eur. Ct. H.R. ¶ 133; Jaloud v. Netherlands, App. no. 47708/08, Eur. Ct. H.R. ¶ 133. In its earlier cases, the European Court repeatedly held that the "the concept of 'jurisdiction' for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law" and that jurisdiction is primarily territorial. *Banković*, App. No. 52207/99 ¶¶ 59-61. Despite the shift toward a broader understanding of jurisdiction, the European Court continues to insist that the term 'jurisdiction' is "primarily territorial." *Jaloud*, App. no. 47708/08, ¶139. In light of the evolution in interpreting the term 'jurisdiction' in this context, it would perhaps be preferable to acknowledge that the term has developed a specialized meaning in the context of scope of application provisions in human rights treaties.

[49] *See generally* Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *The Wall*].

[50] *Id.* ¶ 111.

[51] *Id.* ¶¶ 106-07.

[52] Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19) (emphasis added).

[53] *The Wall*, 2004 I.C.J. 136, ¶ 78.

necessarily determined that Israel exercised effective control over the territory.[54] However, in the subsequent case of *DRC v. Uganda*, the Court expanded the application of IHRL to cover the conduct of Uganda's forces in areas of the DRC that were not within occupied territory.[55]

The human rights treaty bodies at the UN level and regional human rights bodies have provided further guidance in their jurisprudence, and have largely equated jurisdiction with control.[56] There is a growing consensus among them that 'jurisdiction,' at least for the purpose of applying 'bill of rights' type treaties such as the ICCPR, ICESCR, and CRC, would include situations where a state controls territory abroad and also where a state has control over one or more individuals abroad.[57] Either type of control suffices to bring the relevant individuals – either those in the controlled territory or those otherwise under the control of the state (e.g. in the custody of state agents) – within the scope of beneficiaries[58] under the respective human rights treaty.

Paradigm cases involve control through the affirmative conduct by state agents abroad – e.g., an occupying army or other state agents that are present in the relevant territory and are exerting control over that territory or of an

---

[54] *Id.*

[55] *Dem. Rep. Congo*, 2005 I.C.J. 116, ¶ 220.

[56] The jurisprudence refers variously to "control" or "effective control" in relation to both territory and individuals. It is unclear whether the term "effective" adds anything. If used in its ordinary sense control implies effective control. If not effective, then is it control? While "effective control" is a legal term of art in certain fields of international law, it does not appear to have acquired a special meaning in IHRL, particularly in light of the very broad range of situations to which it is applied by human rights bodies. Human rights bodies have made clear that effective control for the purposes of 'jurisdiction' certainly does not require a level of control comparable to that required to establish situations of occupation. On the other hand, the effective control standard used for the acquisition of territorial sovereignty is notoriously elastic. As such, it is appropriate to regard the terms 'control' and 'effective control' as synonymous in the present context. The Human Rights Committee also refers to individuals "within the power" of a state party as being within its 'jurisdiction' for the purposes of article 2 of the ICCPR. Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 31, U.N. doc. CCPR/C/Rev.1/Add/13, ¶ 10 (May 26, 2004). The Inter-American Commission has also referred to "the exercise of authority over persons." Aisalla Molina v. Ecuador, Admissibility, Inter-Am. Ct. H.R. (ser. L) No. 112/10, ¶ 99 (Oct. 21, 2020). These phrases would appear to be comparable for the purpose of establishing 'jurisdiction'.

[57] As noted above, CAT employs different language in various provisions. Those provisions that apply to 'territories under' the state party's jurisdiction would be unlikely to apply in situations where a state has control over individuals abroad in the absence of territorial control. *See* CAT, *supra* note 4, art. 2.

[58] As noted above, the term 'scope of beneficiaries' refers to those individuals whose rights must be respected and/or ensured by the relevant state (or other subject of obligation under human rights law). *See Loizidou*, App. No. 15318/89, ¶ 56.

individual there.[59] Various degrees of control by these agents have been found sufficient to bring the relevant individuals within the 'jurisdiction' of the state party.[60]

A. Territorial Control

The cases in which jurisdiction has been established on the basis of territorial control have generally required a high degree of such control.[61] As noted above, the paradigm case is a situation of occupation. As such, all human rights bodies agree that a situation of occupation is sufficient to bring all those within the occupied territory within the scope of beneficiaries of the occupying state's human rights obligations.[62] Some human rights bodies have found lesser degrees of control over territory sufficient, but there is no consensus on the minimum degree of territorial control necessary.[63]

B. Control Over Individuals[64]

While some early human rights jurisprudence focused on cases of territorial control, it is now established that control over the individual is sufficient to establish the requisite jurisdictional link.[65] For control over individuals, all human rights bodies agree that individuals in the custody of state agents abroad would meet the threshold for 'jurisdiction.'[66] However, there is no consensus on the minimum degree of control of individuals that would be sufficient. Some human rights bodies have found a sufficient degree of control in the conduct constituting the violation itself, be it cross-border

---

[59] *See*, *e.g.*, *Aisalla Molina*, Inter-Am. Ct. H.R. ¶ 107.

[60] *Compare Aisalla Molina*, Inter-Am. Ct. H.R. ¶ 107, *with Dem. Rep. Congo*, 2005 I.C.J. 116, ¶ 179.

[61] *See* Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 LEIDEN J. INT'L L. 857, 872 (2012).

[62] *See* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories,* 37 ISR. L. REV. 17, 100 (2003).

[63] *See* Besson, *supra* note 61, at 872.

[64] This type of control is sometimes referred to as "state agent authority and control." *See, e.g.*, *Jaloud*, App. No. 47708/08 ¶¶ 133-36 (citing Al-Skeini v. United Kingdom, IV Eur. Ct. H.R. 99, 167-170 (2011)). This phrase it not used by the present author in this context as it does not adequately distinguish this test from that of territorial control. Territorial control is of course also a form of state agent control. What distinguishes them is whether the control is over territory or over particular individuals.

[65] *See* Besson, *supra* note 61, at 877.

[66] *Id.* at 875, n. 89.

shootings,[67] pushbacks of asylum-seekers on land or at sea,[68] or the shooting down an aircraft over the high seas.[69] This has led to the development of a third approach.

C. Effects-Based Jurisdiction

There has been a jurisprudential trend in recent years toward recognizing a third modality for the establishment of 'jurisdiction' abroad – effects-based jurisdiction.[70] Human rights bodies have opined in a number of recent instruments that the human rights obligations of a state extend to all those whose enjoyment of human rights is affected by the conduct of that state, irrespective of where the relevant individuals are located.[71] In some instances, this is formulated as a form of control – i.e., that the necessary degree of control is found in the harmful effects suffered by the individual.[72] As such, this may be seen as an extension of the two control-based approaches (i.e., over territory or over individuals) noted above.

The effects-based approach is controversial, particularly in situations where the conduct was not directed toward the particular individual, and, a fortiori, where the human rights consequences were not reasonably foreseeable.

This standard has not been universally endorsed by human rights bodies, and several issues in applying the standard remain unclear, including questions of intentionality, the necessary degree of causation, and whether

---

[67] *See, e.g.,* Andreou v. Turkey, 4 Eur. Ct. H.R. 7, 13 (2010) (admissibility decision). *See also* Bastidas Meneses v. Ecuador, Petition 189-03, Inter-Am. Comm'n H.R., Report No. 153/11, ¶¶ 18-21 (2011).

[68] *See, e.g.*, N.D. & N.T. v. Spain, App. No. 8675/15, 8697/15, 99-100 (2020). The Grand Chamber of the ECHR affirmed the decision on other grounds.

[69] *See, e.g.,* Alejandre v. Cuba*,* Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 doc. 3 rev., ¶ 25 (1999).

[70] This could also be viewed as an extension of the first two types, where control over the territory or individuals arises as a more attenuated result of the conduct, whether act or omission, of the state party.

[71] *See, e.g.,* Comm. on the Elimination of Discrimination Against Women, Convention on the Elimination of All Forms of Discrimination Against Women: Gen. Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, U.N. Doc. CEDAW/C/CG/30, ¶ 8 (Oct. 18, 2013) (state parties are responsible for "all their actions affecting human rights, regardless of whether the affected persons are in their territory"); The Environment and Human Rights (Arts. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC 23-17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 17, 81, 102-104 (Nov. 15, 2017) (opining that the jurisdiction of a state may be established on the basis of the effects of its conduct); U.N. Hum. Rts. Comm., Gen. Comment No. 36 on Article 6 of the Int'l Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc. CCPR/C/GC/36, ¶¶ 22, 63 (2019).

[72] U.N. Hum. Rts. Comm., Gen. Comment No. 36, *supra* note 71, ¶ 63.

and to what extent the effects or their impacts on the enjoyment of human rights are foreseeable.[73] Nonetheless, there is a trend in the jurisprudence that shows acceptance of this approach to varying degrees.[74]

An early example of the effects-based approach is found in the jurisprudence of the Inter-American Commission on Human Rights. In *Alejandre v. Cuba*, the Commission determined that Cuba had violated its human rights obligations when one of its military aircraft shot down two unarmed civilian light airplanes resulting in the deaths of the four occupants of those airplanes.[75] In this case, there were no indicia of control other than the simple fact that the Cuban military aircraft had the victims in their crosshairs.[76] As noted by the Commission, the Cuban forces' "first and only response was the intentional destruction of the civilian airplanes and their four occupants."[77] Nonetheless, the Commission found this to constitute "conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots . . . under their authority"[78] and held

---

[73] *See, e.g.,* A.S. v Italy, *supra* note 35, at ¶ 7.8.

[74] The broadest support for this standard seems to be in situations where the effects were intended and where they emanate from conduct of the state party that originated in the state party's territory. The notion that jurisdiction encompasses effects abroad as a result of conduct at home may be understood as an extension of territorial jurisdiction, or the so-called 'subjective' territorial principle. Those affected by the conduct are brought within the jurisdiction of the state to the extent that they are affected by the conduct. However, the jurisprudence has not been limited to acts originating in the state's metropolitan territory.

[75] Alejandre v. Cuba, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99 ¶ 8.

[76] *See id.*

[77] *Id.* ¶ 8.

[78] It may be worth noting that the Commission used only the term "authority" in this context, and did not expressly find the victims to be under the "control" of Cuba. This may be interpreted to permit extraterritorial application in situations where individuals are subject to a state's authority, but are not necessarily within its control. *Id.* ¶ 25. Further, in the immediately preceding sentence, when restating the standard for extraterritorial application, the Commission stated, "[t]he fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise *power and authority* over persons outside national territory, the state's obligation to respect human rights continues. . ." (emphasis added). *Id.* Again, the Commission makes no mention of control. This leaves open the question of what constitutes placing individuals "under their authority." It seems in this case that the agents of the Cuban State placed the victims under their authority by intentionally shooting down their plane. In other words, the human rights violative act itself constituted the relationship necessary to establish that the victims were within Cuban "jurisdiction" for the purposes of applying Cuba's human rights obligations. Following this line of reasoning, any intentional infringement by a state of the rights of individuals anywhere would be sufficient to bring those individuals within the jurisdiction of that state for the purpose of applying that its human rights obligations. As noted below, the European Court has considered such a conclusion to render "superfluous and devoid of any purpose" the requirement that individuals be "within the jurisdiction" of States parties. The flaw in the Court's reasoning is its failure to

therefore that the victims were within the jurisdiction of Cuba for the purpose of applying its human rights obligations to the instant case.[79] It is hard to imagine a situation where human rights violations intentionally perpetrated by a state agent would fail to meet this threshold.[80]

Applications of this approach may also be found in the jurisprudence of the European Court of Human Rights, which has recognized that a state's 'jurisdiction' extends to individuals abroad who are foreseeably injured by a state's actions. In *Andreou v. Turkey*, Turkish forces shot a Cypriot national on territory beyond Turkey's control.[81] The Court held that the victim was within Turkey's jurisdiction because the shooting was "the direct and immediate cause" of his injuries: "acts . . . which produce effects outside [a State's] territory . . . may amount to the exercise by them of jurisdiction."[82] The Court applied a similar principle in *Ilascu v. Moldova and Russia*, stating: "[a] State's responsibility may [. . .] be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its [territorial] jurisdiction."[83]

A more expansive iteration of this approach would extend the standard beyond intentional effects to foreseen or foreseeable effects. Another expansive iteration would include effects of a state's conduct irrespective of where the conduct originated (i.e. even if the effects emanated from a state agent acting outside the territory of the state party). Yet another expansive iteration would include the effects of omissions (essentially, the effects of actions by third parties that the state has failed to restrain). And a further expansion of this last iteration would include failure to restrain the conduct of third parties operating abroad.

---

distinguish between negative and positive obligations. *See Banković*, App. No. 52207/99, ¶ 75.

[79] *Alejandre*, Case 11.589, ¶ 25.

[80] However, the Inter-American Commission on Human Rights recently declined to communicate a petition alleging that conduct of US forces in Iraq violated Inter-American human rights law. The Commission did not provide reasons for rejecting the position, but it may have been due to the fact that the alleged violations occurred outside of the region. *See* John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, 9 AM. SOC'Y INT'L L. INSIGHT 32 (Oct. 25, 2005), https://www.asil.org/insights/volume/9/issue/32/application-regional-human-rights-law-beyond-regional-frontiers-inter. The European Court has also grappled with the issue of regionality. *See* John Cerone, *Out of Bounds? Considering the Reach of International Human Rights Law,* 19 (N.Y.U. Center for Human Rights and Global Justice, Working Paper No. 5, 2006).

[81] *Andreou*, 4 Eu. Ct. H.R. at 13 (admissibility decision). *See also* Bastidas Meneses v. Ecuador, Case 189-03, Inter-Am. Comm'n H.R., Report No. 153/11, ¶¶ 18-21.

[82] *Andreou*, 4 Eu. Ct. H.R. at 10-11.

[83] *Ilascu*, App. No. 48787/99, ¶ 317.

An example of one of the more expansive 'effects-based' approaches is found in the Inter-American Court of Human Rights' 2017 Advisory Opinion on the Environment and Human Rights.[84] This opinion is expansive in two ways. It does not require that the conduct be directed at the particular individuals, and instead requires only foreseeability.[85] In addition, it includes the effects of a failure to act by states, in particular, the failure to restrain third parties over which they have control.[86] At issue was whether a state party to the American Convention on Human Rights had jurisdiction over a person situated outside that state's territory whose rights were violated, or at risk of violation, as a result of cross-border environmental pollution caused or permitted by that state party.[87] The American Convention on Human Rights, like many of the human rights treaties adopted under UN auspices, contains language that limits a state party's human rights obligations to people subject to its "jurisdiction."[88] Reaffirming that the enjoyment of virtually all human rights depends on a healthy environment, the Court concluded that states have jurisdiction, for this purpose, over individuals outside their territory who are harmed or at risk of harm from foreseeable transboundary environmental damage:

> When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation.[89]
>
> . . .
>
> In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary

---

[84] *See generally* Advisory Opinion on the Environment and Human Rights, *supra* note 30.

[85] *Id.* ¶ 136.

[86] *Id.* ¶ 151.

[87] *Id*. ¶ 37.

[88] American Convention on Human Rights art. 1, Nov. 22, 1969, 1144 U.N.T.S. 143.

[89] Advisory Opinion on the Environment and Human Rights, *supra* note 30, ¶ 104(h).

damage.[90]

At the same time, the Court noted that "not every negative impact gives rise to this responsibility," and referred to the "limits and characteristics" of this obligation that are explained in the section of the Opinion that applies these standards in the specific context of environmental protection.[91]

A similar approach was adopted by the Human Rights Committee In its General Comment 36 on the right to life. The HRC observed that states are under a duty:

> to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with [the right to life].[92]

As noted above, the 'effects-based' approach, particularly in its more expansive iterations, remains controversial. Nonetheless, it is enjoying increasingly broad support among human rights bodies in situations where causation has been clearly established.[93] Where a state directly interferes

---

[90] *Id.* ¶ 102.

[91] *Id.*

[92] U.N. Hum. Rts. Comm., Gen. Comment No. 36, *supra* note 71, ¶ 63 ("This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner."); U.N. Comm. on Econ., Cultural, and Soc. Rights, Gen. Comment No. 15: The Right to Water (Arts. 11 and 12 of the Int'l Covenant on Econ., Soc. and Cultural Rights), ¶ 31, U.N. Doc. E/C.12/2002/11 (2002) (recognizing that "international cooperation requires States parties to refrain from" interfering directly or indirectly with access to water in other countries).

[93] *See* Galindo v. United States, Case 10.573, Inter-Am. Comm'n H.R., Report No. 121/18, OEA/Ser.L./V/II.169, doc. 138 ¶ 314 (2018). While in General Comment 36, the Committee seems to require direct causation, the Human Rights Committee has elsewhere formulated varying tests for causation. In *Munaf v. Romania*, the Committee seemed to express a fairly loose causation requirement, "recall[ing] its jurisprudence that [a state party] may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction." U.N. Hum. Rts. Comm., Commc'n No. 1539/2006 (Munaf v. Romania), ¶ 14(2), U.N. Doc. CCPR/C/96/D/1539/2006 (2009). It should be noted, however, that the petitioner in this case had been in the Romanian Embassy, providing a solid basis for establishing Romania's 'jurisdiction' over him. In its General Comment 16, the CRC addressed the issue of causation to some degree. With respect to corporate actors, the Committee noted that "Home States also 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." U.N. Comm. on the Rights of the Child, Gen. Comment No. 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights ¶ 43, U.N. Doc.

with the human rights of an individual, wherever the individual is situated, that interference is deemed sufficient to bring the individual within the scope of the state's jurisdiction under IHRL, and thus within the scope of beneficiaries vis-à-vis that state.

The approaches listed above are used to determine whether an individual is within the scope of application of a human rights treaty vis-à-vis a particular state party. As such, they tend to entail a binary inquiry – either the individual is or is not within that scope. A separate question is whether there is variability in the degree to which the obligations set forth in the treaty apply to such individuals. As noted above, this might be viewed in terms of the range of applicable rights and other substantive provisions[94] set forth in the treaty, or it may be viewed in terms of the level of obligation imposed on the state in fulfillment of those rights and provisions.

D. Application to Varying Degrees

Some human rights bodies initially resisted the possibility of a sliding scale of obligations in an extraterritorial context. One possible basis for rejecting a variable level of obligation is concern about preserving the integrity of international human rights law and the notion of universality upon which it is based (and to which it aspires).

In the *Banković* case, the applicants argued that "the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation."[95] The European Court of Human Rights rejected this approach, stating:

> The Court is inclined to agree with the Governments' submission that the text of Article 1 doesnot accommodate such an approach to 'jurisdiction.' Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure 'the rights and freedoms defined in Section I of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question . . . .[96]

CRC/C/GC/16 (2013).

[94] Not all substantive rules set forth in human rights treaties are formulated as rights. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, E.T.S. No. 5.

[95] *Banković*, App. No. 52207/99, ¶ 75.

[96] *Id.*

However, this rejection of a sliding scale approach has come under pressure as human rights bodies have lowered the threshold for extraterritorial application of human rights treaties, thus expanding the scope of situations to which they are applicable. As the required degree of control decreases, so does the reasonableness of requiring full application of the human rights treaty (e.g. as it would apply in the state party's metropolitan territory).

In more recent years, the European Court of Human Rights appears to have made a U-turn on this issue. In the *Al-Skeini* case, the Court stated:

> It is clear that, whenever 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 under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored.'[97]

The sliding scale approach has also been endorsed by the Inter-American Commission on Human Rights. In the *Aisalla Molina* case, after finding that the American Convention applied to the conduct of Colombian agents on the territory of Ecuador, the Commission stated:

> What has been stated above does not necessarily mean that a duty to guarantee the catalogue of substantive rights established in the American Convention may necessarily be derived from a State's territorial activities, including all the range of obligations with respect to persons who are under its jurisdiction for the (entire) time the control by its agents lasted. Instead, the obligation does arise in the period of time that agents of a State interfere in the lives of persons who are on the territory of the other State, for those agents to respect their rights, in particular, their right to life and humane treatment.[98]

While this approach has not been explicitly endorsed by the ICJ or the human rights treaty bodies at the UN level, it is implicit in their jurisprudence. In the Wall Opinion the ICJ stated, "In the exercise of the powers available to it on this basis [i.e., as the occupying Power], Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural

---

[97] Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589, ¶ 137 (2011); *see also* Hanan v. Germany, *supra* note 35, ¶¶ 132, 143, Grand Chamber Judgment, European Court of Human Rights, Application no. 4871/16, 16 February 2021. This dividing up the Convention may be understood as applying to the range of rights applicable or to the level of obligation imposed in relation to the rights. As explained below, the better view is to understand it in terms of the level of obligation, which to a certain extent, subsumes the question of the range of rights.

[98] Aisalla Molina v. Ecuador, IP-02, Inter Am. Comm'n H.R., Report No. 112/10, OEA/Ser.L/V/II.140, doc. 10 ¶ 100 (2010).

Rights."[99] The Court suggests that the scope of Israel's obligation under the ICESCR may be co-extensive with the exercise of its authority as an occupying Power.[100] The Court noted further that Israel "is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities."[101] Thus, with respect to matters within the scope of Palestinian authority, the Court implies that Israel is bound only by negative obligations. This would seem to imply, *a contrario*, that the scope of Israel's obligation in matters within its authority, and beyond the authority of the Palestinians, encompasses positive obligations, at least to the extent that it exercises such authority. This would seem to indicate that as Israel cedes control, the scope of its obligation is decreased from one encompassing positive and negative obligations to one entailing only negative obligations.

The Human Rights Committee has taken this approach even further. In its recent General Comment on the Right to Life, the Committee opined:

> In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner.
>
> . . .
>
> Furthermore, States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.[102]

In this passage, the Committee endorses all three approaches to delineating

---

[99] *The Wall*, 2004 I.C.J. 136, ¶ 112.

[100] *Id.*

[101] *Id.*

[102] U.N. Hum. Rts. Comm., Gen. Comment No. 36, *supra* note 71, ¶ 63.

the scope of beneficiaries described above: territorial control, control over individuals, and the 'effects-based' approach. It is noteworthy that the 'control over individuals' standard is expressed not as requiring control over the individual as such, but over the individual's "enjoyment of the right to life." This seems to imply adoption of a sliding scale approach – that obligations are commensurate with the degree or type of control exercised.[103]

This approach also aligns with the framework consistently advocated by the present author,[104] which is to tie the level of obligation to the level of control exercised, with negative obligations applicable vis-à-vis everyone, everywhere, and positive obligations applicable in proportion to the level of control or authority or power exercised or mandated.

IV. FORMAL ABANDONMENT OF THE TERRITORIAL APPROACH

In light of these developments, the direct linkage of human rights obligations to territory should be altogether abandoned. Such a linkage is not generally compelled by the text of the treaties. Indeed, most of the human rights treaties surveyed do not have any express territorial limitation as a threshold condition for their application.[105] As for the limitation in some

---

[103] The Human Rights Committee adopted this approach in the recent case of A.S. v. Italy, *supra* note 35, ¶ 7.5.

[104] The present author first formulated this position in a paper delivered at the University of Nottingham in September 2002. John Cerone, *Reasonable Measures in Unreasonable Circumstances: a Legal Responsibility Framework for Human Rights Violation in Post-Conflict Territories under UN Administration*, in THE U.N., HUMAN RIGHTS AND POST-CONFLICT SITUATIONS 42, 42 (Nigel White & Dirk Klaasen eds., 2005) ("The application of human rights and humanitarian law in territories under UN administration where the bulk of human rights violative activity is perpetrated by non-state actors"); John Cerone, *Out of Bounds? Considering the Reach of International Human Rights Law*, 19 (N.Y.U. Center for Human Rights and Global Justice, Working Paper No. 5, 2006); John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations,* 39 VAND. J. TRANSNAT'L L. 1447, 1448 (2006); John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in a Transnational Context*, 40 ISR. L. REV., 396, 397 (2007); John Cerone, *Peace Operations and the Complementarity of Human Rights Law and International Humanitarian Law*, address in the 31st Round Table on Current Problems of International Humanitarian Law (Sept. 4-6, 2008), in Int'l Inst. of Humanitarian L. at 115, 123. The position has since been endorsed by a number of scholars. *See, e.g.*, U.S. Dep't of State, Memorandum Op. on the Geographic Scope of the Int'l Covenant on Civil and Political Right (2010) (position endorsed by Harold Koh); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties*, OXFORD UNIV. PRESS (2011); Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20 (2014).

[105] Article 2 of the ICCPR is consistent with this approach, notwithstanding the express reference to territory. Indeed, the structure of Article 2(1) of the ICCPR supports the notion that negative obligations apply *vis-à-vis* all individuals everywhere, whereas positive

treaties that the individual be subject to the 'jurisdiction' of the state party, the discussion in the previous section makes clear that that term is no longer understood as requiring a territorial link. This is also supported by the immediate context in which the word "jurisdiction" appears. The various prepositions employed – "in," "under," and "subject to" – signify a relationship, but they do not signify a specifically geographical relationship.[106] They support the idea that the word jurisdiction in this context is fundamentally about the relationship between the state and the individual. It is not fundamentally about the location of the individual relative to the state.

The central issue is the relationship between a state and an individual. Where this relationship rises to the level of control, it brings to bear the state's IHRL obligations. This control need not have a territorial dimension. IHRL obligations normally apply to all those within a state's territory not because of the state's sovereignty over the territory as such, but because it is presumed that the state has a high degree of control over its territory, and also because the state is required by international law to exercise some degree of control

---

obligations may have a more limited scope. *See* ICCPR, *supra* note 6, art. 2.

As noted above, Article 2 of the ICCPR reads, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . ." *Id.* It does no violence to this language to read "to all individuals within its territory and subject to its jurisdiction" to modify only the obligation "to ensure" rights, and not the obligation to respect them. Indeed, the absence of transitive language between "to respect" and "all individuals" would seem to support this interpretation. *See id*. Thus, the provision may reasonably be read to oblige states to respect all of the rights in the Covenant *vis-à-vis* all persons, but to ensure them only to those within the state's territory and subject to its jurisdiction, with both of these obligations subject to the proviso "without distinction of any kind." As for the proper interpretation of the word "and" in the phrase "within its territory and subject to its jurisdiction," both the ICJ and the Human Rights Committee have interpreted this "and" to serve as an aggregator – that States Parties must ensure the rights of all those within their territory and also the rights of all those within their jurisdiction. *See id.; Jaloud*, App. No. 47708/08, ¶ 139.

Thus, in the context of the ICCPR, there should be no threshold 'jurisdiction' requirement for the application of negative obligations. The analysis of whether there has been a violation would focus only on the issues of attribution and causation. The 'jurisdiction' requirement would apply to positive obligations, and the question of which positive obligations and of the degree of obligation would depend on the level of control. As noted above, the "effects-based" standard should be abandoned in assessing the application of positive obligations, as it confuses the connection between the state and third-party perpetrators with the connection between the state and the individual rights holders.

For a discussion of arguments based on the *travaux* of this provision, *see* Cerone, *supra* note 104, at 448.

[106] *See, e.g.,* A.S. v. Italy, *supra* note 35, ¶ 7.8.

over all those within its territory.[107] Territorial control may be sufficient to establish "jurisdiction," but it is not necessary.[108]

Where states directly interfere with the enjoyment of human rights, this interference should be deemed a sufficient instance of control to satisfy any threshold requirement of falling within that state's "jurisdiction" for the purpose of applying IHRL.[109] Negative obligations would thus apply in relation to all individuals, without any limitation as to scope (of course, in order to constitute a violation of a negative obligation, causation would still have to be established). Positive obligations, on the other hand, should be understood to be tied to the degree of control exercised or otherwise enjoyed by the state acting extraterritorially.[110]

Rather than create a distinction between control over individuals and control over territory, a more coherent approach would be to examine control over a situation.[111] Those positive obligations that are relevant to the situation would apply to the degree that the state had control over the situation. While a highly relativistic standard, it is also grounded in reasonableness and proportionality and corresponds directly to the control actually exercised by

---

[107] *See* Samantha Besson, *Sovereignty*, OXFORD PUB. INT'L L. ¶¶ 69-70 (2011).

[108] The European Court of Human Rights has gone to great lengths to try to appear that it has not abandoned its former territorial approach by speaking of "special jurisdictional links." *See, e.g.,* Hanan v. Germany, *supra* note 35. However, this tends instead to create erratic jurisprudence, to demonstrate the unsustainability of the territorial approach, and to underscore the centrality of the issue of relationship in the concept of jurisdiction.

[109] For those treaties that require that an individual be within the 'jurisdiction' of a state party, jurisdiction should be interpreted as control, and such control may be found in the violative act itself. *See* Benson, *supra* note 107, ¶¶ 69-70.

[110] It is possible that a negative obligation can flip into a positive obligation, but this again will depend on an assertion of authority by the state. For example, the state generally has an obligation not to arbitrarily detain. Once it begins detaining people, this converts to a positive obligation to create a regulatory procedure, to ensure humane treatment of the detainee, to provide compensation if the detention is wrongful, etc. Another example is the negative obligation not to subject someone to an unfair trial. Again, this would not be implicated unless the state is trying people.

[111] The different control tests are an artefact of the incremental approach of human rights bodies toward a more expansive application of human rights law. They have been preserved primarily to reconcile with more conservative prior decisions and to capture the possibility of positive, or otherwise more expansive, obligations in situations of occupation. The latter objective would be met by the approach recommended herein. The formulation "control of a situation" is endorsed in Principle 9 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights (Jan. 2013). While the Maastricht Principles have no formal legal status, they constitute a reflection of scholarly opinion. *See also* Stephanie Farrior & Marcos Orellana, Brief Amicus Curiae on the Issues in the Request for an Advisory Opinion Submitted by the Republic of Colombia, Inter-American Court of Human Rights, Jan. 18, 2017 (available at https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/24_ciel.pdf), at 5.

the state. While it is true that the state can limit the extent of its positive obligations by limiting its degree of control, the inverse is also true. The state cannot justify extending its control on the basis that positive obligations under IHRL require it.

The level of effort required would be governed by the principle of due diligence as applied within the scope of the control exercised by the state. The principle of due diligence, which generally governs liability for the fulfillment of positive obligations under IHRL, entails taking effective steps, in good faith and which are reasonable in the circumstances.[112]

The above framework should be adopted as the general framework for assessing the extraterritorial applicability of obligations under international human rights law. Where a particular human rights treaty provision has a specifically delineated standard to determine its scope of application, or a specified positive obligation of result, those standards would govern the application of that provision as a *lex specialis*.

While this framework has not been explicitly adopted by international and regional human rights bodies, it is derived from the broad outlines of their collective jurisprudence. As noted above, such an approach is warranted. While the express formulations of the standards they apply tend to be erratic or inconsistent,[113] the overall trend is a coherent one and this trend is captured by the proposed framework.

Not only is this approach consistent with the ultimate holdings of these bodies in cases where they apply IHRL extraterritorially, it is also consistent with their jurisprudence on positive obligations in general. Such obligations are limited by a scope of reasonableness even when applied to a state's conduct within its territory; there is no reason why application to a state's extraterritorial conduct would not similarly be bounded by a scope of

---

[112] *See* John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Develop* (Framework Report), ¶¶ 56-64, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

[113] *See, e.g.,* U.N. Comm. on the Elimination of Discrimination Against Women, Convention on the Elimination of All Forms of Discrimination against Women: General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, ¶ 63, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013).

The Committee opines that the Convention applies to all those under the "jurisdiction or effective control" of a state party. *Id*. The Committee's reference to "jurisdiction or effective control" should not be understood as proposing two different standards, but instead should be seen as an indication of the lack of consistent terminology used by human rights bodies in formulating the standards for extraterritorial application. The jurisprudence of the regional human rights bodies is replete with similar terminological inconsistencies. This suggests the need to examine the broader outlines of their jurisprudence, rather than their explicit formulations of standards.

reasonableness,[114] such that the adoption of affirmative measures is only required when and to the extent that the relevant party enjoys a position of control that would make the adoption of such measures reasonable. Ultimately, any such inquiry would be highly fact sensitive.

This approach would preserve the integrity of the respective treaties[115] and would vindicate the universal nature of human rights, an objective proclaimed in the preambles of all of the human rights treaties considered in this analysis.[116] At the same time, it would not place unreasonable burdens on states parties. Due to the very nature of negative obligations, states would be bound by those obligations only to the extent they affirmatively acted within the relevant sphere. Similarly, positive obligations would apply only in circumstances in which it would be reasonable for the state to take affirmative steps in light of its level of authority, control, and resources. Thus, where there is only a limited connection between a state and an individual, the state would not be required to undertake the same degree of positive action, if any, to protect that individual's rights as it would if the individual were subject to a broader degree of control by the state, such as in situations of territorial occupation.[117]

Such an approach also preserves a clear differentiation among such concepts as attribution, responsibility, jurisdiction, and positive obligations – the recognition of which is essential to the development of a coherent jurisprudence. It can also be viewed through the parameters elaborated above. Returning to the question of the scope of rights holders, all individuals under the control of the state would be rights holders vis-à-vis that state under IHRL. Any direct interference with human rights by the state would bring the individual under the control of the state for the purpose of applying negative

---

[114] Similar reasoning is implicit in the jurisprudence of human rights mechanisms finding that the obligation to ensure rights against violations by private actors is bounded by a scope of reasonableness. For example, in the *Velasquez-Rodriguez* case, the Inter-American Court of Human Rights noted that this obligation was not absolute; the standard is one of "due diligence." *See Velásquez Rodríguez Case*, Inter-Am.Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988). The Court also recognized that "[i]t is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party." *Id*. ¶ 175. In essence, the inquiry under the American Convention is whether the State party acting in good faith undertook steps that were reasonable in the circumstances. *See generally Ilascu*, App. No. 48787/99.

[115] By not "dividing them up," in the words of the *Banković* Court. *Banković*, App. No. 52207/99, ¶ 75.

[116] *See, e.g.,* CRC, *supra* note 14, preamble; CAT, *supra* note 4, preamble; CEDAW, *supra* note 16, preamble; ICCPR, *supra* note 6, preamble; ICESCR, *supra* note 6, preamble; CERD, *supra* note 15, preamble.

[117] Conversely, where a state lacks control over its own territory, this would inform the best-efforts analysis for fulfillment of positive obligations *vis-à-vis* individuals therein. *See generally Ilascu*, App. No. 48787/99.

obligations. For positive obligations, individuals would be brought within the scope of rights holders to the extent the state otherwise exercises control over them. As for the range of rights, the negative obligation to respect rights would apply to all rights that are not otherwise expressly limited. The positive obligation to ensure rights would apply only to those rights that the state is in a position to ensure by virtue of the control it already exercises (i.e., without the state having do extend its level of control). The same is true for the level of obligation. Positive obligations under IHRL are generally subject to a best-efforts standard, which has an inherent sliding scale based on what would be reasonable in the circumstances.[118] On the other hand, negative obligations by definition require only abstention, and thus would be fully applicable vis-à-vis all persons.

This approach does of course contemplate that the scope of application of these human rights treaties is potentially world-wide, or in the words of the European Court, "wherever in the world [an] act may have been committed or its consequences felt."[119] Yet by expressly recognizing a variable scope of jurisdiction, with an attendant variable level of obligation, this approach would not render "superfluous and devoid of any purpose" the words "within their jurisdiction," as the Court had warned.[120] Thus, for example, all states parties would be obliged to refrain from torturing individuals anywhere. A state agent's act of torture would be sufficient to establish the "jurisdiction" of the state party for the purpose of applying that state's negative obligation to respect the right to be free from torture. However, the mere presence of a state agent in the same physical location as an individual would not be sufficient to bring that individual "within the jurisdiction" of that state party for the purpose of applying positive obligations, e.g., the duty to protect that individual from being tortured by a third party, at least in the absence of some other indication of control over the situation.[121]

---

[118] *See generally Velásquez Rodríguez Case*, Inter-Am.Ct. H.R. (ser. C) No. 4.

[119] *Banković*, App. No. 52207/99, ¶ 75.

[120] *Id.*

[121] This would be more logically consistent than the European Court's approach of variously referring to "matters," "persons," "property," and "acts" being "within their jurisdiction," the express language of Article 1 notwithstanding, and of conflating attribution, responsibility, and jurisdiction in an effort to achieve the same result. *See generally* Cerone, *Out of Bounds? Considering the Reach of International Human Rights Law,* supra note 80. These contortions are by no means limited to the European system. See, e.g., M.L.B. v. Luxembourg, Decision of the CESCR, E/C.12/66/D/20/2017, Nov. 1, 2019, where the Committee on ESC Rights conflates the issue of competence *ratione loci* with the issues of attribution and scope of beneficiaries.

V. THE ABANDONMENT OF A *RATIONE LOCI* CRITERION IN ASSESSING COMPETENCE TO RECEIVE INDIVIDUAL COMPLAINTS

A distinct issue from the scope of the substantive obligations imposed on the States Parties by the respective treaties is the scope of the competence of a human rights body to receive and examine a petition claiming a violation. While they are related issues, they are in some instances governed by different standards, and in any event, are analytically distinct. The distinction is at times difficult to discern as the term 'jurisdiction' is frequently used in the assessment of both issues, and human rights bodies tend to collapse these two distinct issues into a single inquiry.[122] With respect to this issue, the argument for abandoning a territorial link is even greater.

For petitions alleging human rights violations with an extraterritorial dimension, human rights treaty bodies have examined their competence under the heading of *ratione loci*.[123] Explicitly applying a *ratione loci* criterion in this context only serves to reinforce the notion that there is a territorial limitation on the competence of the treaty body to receive such complaints. In actuality, there is not.

The treaty text creating these procedures makes no reference to territory.[124] According to the first Optional Protocol to the ICCPR, each State Party recognizes the competence of the Committee to receive and consider communications from "individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth."[125] Similarly, the Optional Protocol to CEDAW states, "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party."[126]

---

[122] Indeed, the regional human rights mechanisms do not set forth a separate requirement that complainants be 'under the jurisdiction' of the respondent state, which further diminishes the distinction between these issues.

[123] *See, e.g.*, D.D. v. Spain, Views of the Comm. on the Rights of the Child, U.N. Doc. CRC/C/80/D/4/2016 (Feb. 1, 2019); Zentveld v. New Zealand, Views of the Comm. Against Torture, U.N. Doc. CAT/C/68/D/852/2017 (Dec. 4, 2019); C. v. Australia, Views of the Human Rights Comm., U.N. Doc. CCPR/C/119/D/2216/2012 (Mar. 28, 2017); Hicks v. Australia, Views of the Human Rights Comm., U.N. Doc. CCPR/C/115/D/2005/2010 (Nov. 5, 2015); N. v. the Netherlands, Decision Adopted by the Comm. at its Fifty-Seventh Session, U.N. Doc. CEDAW/C/57/D/39/2012 (Feb. 17, 2014).

[124] Note that this analysis is limited to complaints procedures, and does not include inquiry procedures, which have different parameters. The inquiry procedure under the Torture Convention, for example, appears to contain a territorial limitation. As noted above, Article 20 of CAT enables the Committee to conduct an inquiry where there are "well-founded indications that torture is being systematically practised *in the territory of* a State Party." CAT, *supra* note 4, art. 20, ¶ 1 (emphasis added).

[125] CAT, *supra* note 4, art. 20.

[126] G.A. Res. 54/4, Optional Protocol to the Convention on the Elimination of All

The boundaries on the recognized competence of the Committees to receive and consider complaints are that the individual must claim to be a victim of a rights violation by the respondent state party, and that the individual must be "subject to" or "under" the jurisdiction of that state party.[127] As noted above, the various prepositions employed signify a relationship, but not one that is specifically geographical.

As for the limitation that the individual be subject to the jurisdiction of the state party, the discussion in the previous section makes clear that that term is no longer understood as requiring a territorial link. This is also supported by the immediate context in which the word "jurisdiction" appears. The various prepositions employed – "in," "under," and "subject to" – signify a relationship, but they do not signify a specifically geographical relationship. They support the idea that the word jurisdiction in this context is fundamentally about the relationship between the state and the individual. It is not fundamentally about the location of the individual relative to the state.

This abandonment of a *ratione loci* criterion also finds support in the nature of IHRL as rules of international law. International law, by definition, does not regulate strictly internal matters. When states create or otherwise consent to international rules regulating a subject matter, the conduct can no longer be regarded as internal. Furthermore, as noted above in the first section, IHRL is not limited to regulating the relationship between a state and its people. Its creation was not simply an effort to fill a protection gap left by the Law of State Responsibility for Injury to Aliens. It fundamentally altered the relationship between individuals and states in the international legal system.

Similarly, the treaty bodies are not equivalent to domestic courts, and should be careful before transplanting jurisdictional concepts. Jurisdictional limitations drawn from domestic legal systems should not be seen as inherent aspects of the competence of any judicial or quasi-judicial body, but must each be examined to determine whether analogy is appropriate. It is commonplace for domestic courts to have territorial limits on their competence, as subdivisions of the governmental apparatus of a single state.[128] This rationale does not apply to international bodies. When states express consent to be bound by individual complaints procedures, the states are recognizing the competence of the Committee to pronounce upon the international legal responsibility of the state, which is a very different function from that of domestic courts.

Finally, to abandon a *ratione loci* parameter in this context is not to say

---

Forms of Discrimination against Women, U.N. Doc. No. A/RES/54/4, arts. 1-2 (Oct. 15, 1999).

[127] *Id.*

[128] M. Shah Alam, *Enforcement of International Human Rights by Domestic Courts in the United States*, 10 Ann. Surv. of Int'l & Comp. L. 27, 28-29 (2004).

that the location of the complainant is irrelevant. While it is not necessary for an individual to be in a territory controlled by the respondent state, it would certainly have some bearing on establishing the necessary jurisdictional link between the individual and the state to submit a petition. In addition, for certain claims, a territorial connection may be required by the terms of the underlying substantive obligation alleged to have been breached. However, this parameter would limit the scope of the substantive obligation, and not any territorial scope of the Committee's competence. As such, the nature of the limitation would be *ratione materiae* (delimiting substantive scope), or perhaps *ratione personae* (delimiting the scope of persons whose petitions the Committee is competent to receive in the context of a particular claim).[129]

CONCLUSION

The jurisprudence of human rights bodies has shifted away from territorial limits on the scope of human rights obligations. This welcome development should be consolidated and formalized.

With respect to the notion of "jurisdiction" as used in scope of application provisions, human rights bodies should simply equate jurisdiction with control, without creating distinct classifications for types of control. Human rights obligations should apply commensurate with the degree of control. For negative obligations, the requisite degree of control may be found in the violation itself, with the practical result that all negative obligations would apply vis-à-vis all individuals everywhere. For positive obligations, the level of obligation should be assessed in proportion to the degree of control the concerned state exercises over the situation in which the individual finds him or herself.

As for the competence of human rights bodies to receive and consider individual complaints, the treaty bodies should reject any notion of a *ratione loci* delimitation of their competence. It is not required by the treaty provisions that create and regulate these procedures, and it should not be applied by analogizing to domestic courts.

This is not to say that there are no limits to the substantive reach of a particular state party's IHRL obligations or that the treaty bodies have an unlimited competence to receive individual complaints. In terms of substantive obligations, the recommended approach makes clear that application abroad will not be identical to application in the state's metropolitan territory, and that the full range of obligations will not apply vis-à-vis everyone everywhere.

As for limits on the competence of human rights treaty bodies to receive and consider communications, treaty law provides limits *ratione personae*

---

[129] *See* A.S.M. v. Denmark, Views of the Human Rights Comm., U.N. Doc. CCPR/C/117/D/2378/2014 (July 7, 2016).

and *ratione materiae*. Where the underlying substantive obligation contains a territorial requirement, this will be reflected in the scope of the Committee's competence *ratione materiae*. This is not a distinction without a difference. Formally abandoning the notion of a *ratione loci* delimitation will not only serve to enhance the coherence of human rights jurisprudence, but it would also consolidate an important paradigm shift in thinking about the nature and scope of application of international human rights law.

One final note of caution is warranted. Adoption of this recommended approach must not distract attention away from the manner in which states treat their own people. While not the only purpose of the development of IHRL, filling this critical gap in international legal protection was certainly one of its most important achievements. It must not be overlooked. To do so would be the end of the meaningful protection of human rights throughout much of the world, where internal checks are lacking. Resource constraints limit the ability of human rights bodies to address the vast numbers of human rights violations that occur within and beyond the territories of the states' parties they monitor, but finding the right balance is essential to vindicating the universality of human rights.