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CONSIDERING THE REACH OF INTERNATIONAL HUMAN RIGHTS LAW**

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CONSIDERING THE REACH OF INTERNATIONAL HUMAN RIGHTS LAW

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The Center for Human Rights and Global Justice was established in 2002 to stimulate cutting edge scholarship and to make original and constructive contributions to on-going policy debates in the field of human rights. By emphasizing interdisciplinary analyses, the Center's programs seek to situate international human rights law in the broader context of the political, jurisprudential, economic, sociological, historical, anthropological and other influences that shape it and determine its impact. Philip Alston is the Center's Faculty Chair; Smita Narula and Margaret Satterthwaite are Faculty Directors; and Jayne Huckerby is Research Director.

Abstract

The notion that international law took cognizance of and regulated a state's conduct on the territory of other states and toward foreign nationals was established long before the Universal Declaration of Human Rights was adopted. It is therefore somewhat ironic that a great controversy has erupted in recent years as to whether the norms of human rights law may be applied to a state's extraterritorial conduct.

This article critically examines existing jurisprudence on the extraterritorial application of human rights law, indicates obstacles to the development of a coherent jurisprudence, and proposes a framework for understanding the issue that would enable the development of such a jurisprudence.

The analysis will be structured around three parameters, corresponding to three dimensions of the scope of human rights obligations: the scope of beneficiaries, the range of rights applicable, and the level of obligation. Employing this framework brings a degree of order to existing jurisprudence and makes it easier to see how the piecemeal approach of human rights bodies has led to inconsistent standards.

The analysis ultimately demonstrates that international jurisprudence has yet to produce clear criteria for establishing when extraterritorial application is triggered or clear parameters for determining the scope of a state's human rights obligations when it acts abroad. This results in part from the fact that none of the institutions identified above have developed a coherent framework for analyzing the extraterritorial application of human rights treaties.

Common problems underlie the inadequacy of each institution's approach to this issue. A central problem is the failure to distinguish clearly between the issue of attribution, the scope of obligation (as defined by the three parameters above), and the responsibility of States Parties for breaches of the treaty.

While the question of attribution is in principle separate from the content of a state's obligations arising under primary rules (e.g. a human rights treaty), this distinction may become difficult to discern in the context of a failure of a state to fulfill positive obligations in relation to the acts of non-state actors. In these circumstances, the issue of attribution collapses into the content of the primary rule.

The distinction between attribution of the conduct of non-state actors and a state's responsibility for its omissions in relation to the conduct of non-state actors has special significance in the context of human rights law. Where human rights violative conduct is attributable to a state, the state will have breached an obligation of result and responsibility will arise immediately. Where such conduct is not attributable to a state, the question of whether human rights law has been violated will be determined by the quality of the state's response to this conduct, generally governed by a "best efforts" standard.

The issue of attribution is related to both jurisdiction and responsibility. The attribution of conduct can give rise to the international responsibility of a state where that conduct is not in conformity with what international law requires. The rules of attribution can also be relevant to determining the scope of a state's "jurisdiction". However, a finding of attribution alone establishes neither jurisdiction nor responsibility. Conversely, a finding that someone whose

rights have been infringed falls within a state's "jurisdiction" does not necessarily mean that that state is responsible for, or in relation to, any human rights infringement suffered by that individual.

The European Court's jurisprudential gymnastics evince an effort to simulate coherence in the absence of a coherent analytical framework. However, it is possible to pull together the strands of jurisprudence of the various institutions examined above to create a framework that is analytically coherent, consistent with the central holdings of almost all of the cases, and faithful to the texts of the treaties.

In disaggregating the scope of application of human rights treaties into the three dimensions identified above and analyzing the relevant jurisprudence accordingly, it becomes clear that the phrase "within their jurisdiction" has a variable scope. If this scope is understood to encompass the range of individuals in relation to whom the states parties' obligations are applicable, as the texts of the treaties seem to indicate, then the practice of human rights bodies makes clear that the specific content of what human rights law requires in an extraterritorial context will vary depending upon the relationship between a given state party and an individual situated outside of that state party's territory.

In particular, it may be that negative obligations apply whenever a state acts extraterritorially, but that the degree of positive obligations will be dependent upon the type and degree of control exercised by the state. This is not inconsistent with these institutions' general jurisprudence on positive obligations. 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 reasonableness, such that the adoption of affirmative measures is only required when and to the extent that the relevant party *de jure* or *de facto* 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 finds support in the text of the ICCPR.

Ultimately, the question of what interpretation to adopt is underpinned by the more general question of the nature and purpose of human rights law. If human rights have a universal character and if the purpose of human rights law is to impose upon states obligations that correspond to those rights, then the most appropriate interpretation is that which regulates the conduct of states with respect to all human beings.

Out of Bounds? Considering the Reach of International Human Rights Law

John Cerone¹

I. Introduction

On February 3, 2000, all hell broke loose in Mitrovica, Kosovo. Following the bombing of a local café, mass civil unrest erupted in the city. The UN Police and the Kosovo Force (KFOR), the NATO peacekeepers deployed in Kosovo, were completely unprepared as mobs rampaged through the streets.

A number of ethnically-motivated attacks were carried out in the course of the rioting. Unidentified perpetrators threw grenades into homes and gunned down individuals attempting to flee. Many other homes and vehicles were torched. At least eight people were killed that night and dozens more were severely injured. While there was a great deal of chaos, with several unruly mobs roaming the streets, the door-to-door killings were carried out systematically, evincing a planned attack.

Where was KFOR? When the fighting broke out, those soldiers who were present at the scene withdrew to their base and provided no assistance to the UN Police who were trying to extract the wounded and vulnerable. No KFOR reinforcements arrived.

As a human rights officer working under the auspices of the UN Interim Administration Mission in Kosovo, I was confronted with a number of legal issues relating to the violence. One particularly difficult question was whether KFOR had a duty to protect individuals from violent acts committed by third parties. Underlying this question were a number of complex legal issues, including the interaction of human rights law and humanitarian law in a peacekeeping context, as well as the accountability of intergovernmental organizations in such circumstances. I have written elsewhere on these issues.²

The present analysis focuses on the related issue of the extraterritorial application of human rights treaties. Were the human rights obligations of NATO member states applicable to the conduct of their troops deployed abroad? If so, to what extent do norms of human rights law entail positive obligations to protect individuals from violent acts by third parties in this context? In the aftermath of the February 2000 unrest, I attempted to find answers to these questions by researching relevant sources of international law. After conducting exhaustive research into existing jurisprudence, which was both scarce and inconsistent, it remained unclear whether member states' human rights obligations were applicable vis-à-vis the Kosovan victims, and whether those obligations, assuming they were applicable, entailed any positive obligation in these circumstances.

Up to that point, human rights institutions had not developed a comprehensive, coherent framework for understanding the extraterritorial application of human rights law, and this project remains unrealized. This article critically examines existing jurisprudence on the extraterritorial application of human rights

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² "Minding the Gap: Outlining KFOR Accountability under International Human Rights and Humanitarian Law in Post-Conflict Kosovo," *European Journal of International Law*, vol. 12, no. 3 (June 2001). "Reasonable measures in unreasonable circumstances: a legal responsibility framework for human rights violations in post-conflict territories under UN administration," paper presented at University of Nottingham in September 2002. Published in Nigel White and Dirk Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations*, Manchester University Press (2005).

law, indicates obstacles to the development of a coherent jurisprudence, and proposes a framework for understanding the issues that would enable the development of such a jurisprudence.

II. The Evolution of Human Rights Law

The great innovation of human rights law was that it regulated the way a state treated those exclusively within its jurisdiction. No longer could a state invoke the principle of non-intervention as an impermeable barrier to international scrutiny of its conduct vis-à-vis its own populace.

Conversely, the notion that international law took cognizance of and regulated a state's conduct on the territory of other states and toward foreign nationals was established long before the Universal Declaration of Human Rights was adopted. It is therefore somewhat ironic that a great controversy has erupted in recent years as to whether the norms of human rights law may be applied to a state's extraterritorial conduct.

Prior to the development of human rights law, international law was concerned almost exclusively with states' external conduct. Abuses committed within a state's territory were virtually invisible to international law unless the victim was a foreign national and the state of nationality was willing to espouse the claim on the inter-state level. Thus, human rights law filled a serious gap by regulating the way a state treated its own people. Under the International Covenant on Civil and Political Rights (ICCPR), each State Party undertakes to respect and to ensure "to all individuals within its territory and subject to its jurisdiction" the Covenant rights.³

Human rights law has developed tremendously over the past few decades, and individuals are receiving increasing levels of protection against abuses committed by their own governments – levels of protection exceeding that afforded under the traditional law of state responsibility for injury to aliens. But is this protection to be afforded only vis-à-vis the state's own citizenry?

Relatively early on, it was made clear that human rights law applied to all those within the state's territory, even to those who were not nationals of that state, underscoring the universality of the concept of human rights. Thus, the heightened protection of human rights law applies irrespective of the nationality of the victim. A separate question is whether this protection applies irrespective of the physical location of the victim vis-à-vis the state.

Most of the jurisprudence of human rights bodies, which have greatly elaborated on the content of states' obligations under the various human rights treaties, has been developed in the context of alleged violations committed on the territory of the respective state party. Can these same standards be transposed onto the state's conduct in relation to individuals outside of the state's territory?⁴

III. The Scope of Human Rights Obligations⁵

When I first began researching this issue, the relevant jurisprudence of the various human rights bodies was greatly underdeveloped. The Human Rights Committee had only addressed the issue in the context

³ Art. 2, ICCPR.

⁴ Although the present analysis at times refers to "extraterritorial conduct," the focus of the analysis is on a state's conduct in relation to individuals outside the state's territory. It may be that a state's conduct occurring on its own territory is alleged to infringe the rights of those situated outside of that territory. See *infra*.

⁵ It should be noted that the scope of obligation may vary depending upon whether the relevant source of law is treaty or custom. This analysis focuses primarily on human rights treaty law.

of cross-border abduction cases. The Inter-American Commission on Human Rights had recently adopted an overly simplistic standard that would seem unreasonable to apply in complex cases. The jurisprudence of the European Court of Human Rights was somewhat convoluted (and this was pre-*Bankovic*). And the International Court of Justice had not yet been confronted with the question.

Across the board, there appeared to be a great deal of confusion in the approach of these various bodies to the issue of extraterritorial application. The central problem seemed to be the tendency to treat the question of the scope of application of the relevant treaty as a single question, conflating such issues as whether conduct was attributable to a state, whether the victim of a human rights violation⁶ was within the jurisdiction of a state, and whether a state's responsibility under the convention had been engaged – all of which are analytically distinct questions. This problem was compounded by the failure to recognize the multiple dimensions of the scope of human rights obligations, and their relevance in this context.

Thus, my approach to understanding existing jurisprudence on the extraterritorial application of human rights law has been to structure my analysis around three parameters, corresponding to three dimensions of the scope of human rights obligations: 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 (at least to some degree) by the relevant state. 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 in order to meet its obligations under human rights law. Structuring the analysis around these three dimensions makes it easier to see how the piecemeal approach of human rights bodies has led to inconsistent standards.

A. *Scope of Beneficiaries*

States parties to the ICCPR are not bound to respect and ensure the rights of all individuals everywhere. For example, it is clear that, absent special circumstances, states parties are not required to protect the rights of individuals living in other countries from violations perpetrated by the governments of those countries or by non-state actors operating there. The scope of beneficiaries refers to the range of individuals in relation to whom the state has any obligation under the relevant human rights treaty.

As noted above, a common feature of the major human rights treaties is that the scope of beneficiaries is typically limited to those individuals who are subject to the state party's jurisdiction.⁷ While it was

⁶ By use of the terms "human rights violative conduct" or "human right violation", I do not refer to conduct that necessarily constitutes a violation of human rights law. I am using these terms to refer to conduct that would constitute an impermissible interference with one or more human rights if such conduct were attributed to the state. Thus, a human rights violation committed by a non-state actor whose conduct is not otherwise attributable to the state would not necessarily constitute a violation of human rights law.

⁷ ICCPR, art. 2 ('to respect and to ensure to all individuals within its territory and subject to its jurisdiction'); ECHR, art. 1, ('shall secure to everyone within their jurisdiction'); ACHR, art. 1, ('to ensure to all persons subject to their jurisdiction'). While Article 2 of the ICCPR refers to all individuals within a State's territory *and* subject to its jurisdiction, the Human Rights Committee has interpreted these to be independent grounds for application of the Covenant. See, e.g., *Burgos/Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 88 (1984). The International Court of Justice (ICJ) has adopted this interpretation as well. See, e.g., *Israeli Wall Opinion* *infra*. As noted above, the present analysis is limited to human rights treaty law. This limitation of scope may not apply with respect to those human rights norms that have evolved into customary international law. Thus, all states may be bound by these norms in their dealings with anyone anywhere. The US JAG Operational Law Handbook ("JAG OLH"), for example, provides that the customary law of human rights applies to US armed forces wherever they may act. Maj. Derek I. Grimes, ed., *Operational Law Handbook*, The

initially unclear whether this language could encompass individuals situated outside of a state's territory, the extraterritorial application of human rights treaties has now been clearly established in the jurisprudence of several international judicial and quasi-judicial bodies.

In determining whether an individual is subject to (ICCPR, ACHR) or within (ECHR) the jurisdiction of a state, human rights bodies have focused on the relationship between the individual whose rights have been infringed and the state in the particular circumstances of the case.

1. The Approach of UN and UN-Related Institutions

The Human Rights Committee has consistently held that the ICCPR can have extraterritorial application,⁸ clearly demonstrating its understanding that a state's jurisdiction extends beyond its territorial boundaries. In particular, it has found that the expressed scope of article 2(1) "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."⁹

In *Burgos / Lopez v. Uruguay*,¹⁰ the Committee held that Uruguay violated its obligations under the Covenant when its security forces abducted and tortured a Uruguayan citizen then living in Argentina. Following the command of Article 5(1) that "[n]othing in the present Covenant may be interpreted as implying ... any right to engage in any activity ... aimed at the destruction of any of the rights and freedoms recognized herein," the Committee reasoned that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."¹¹

Initially, it was unclear whether the Committee's holding in *Burgos / Lopez* was strictly limited to extraterritorial violations committed against a state's own national, that factor providing a solid basis for finding that the victim was subject to the perpetrating state's jurisdiction. However, the Committee's recent practice makes clear that the Covenant applies to a state's conduct abroad even with respect to its treatment of foreign nationals.

In its General Comment 31, the Committee asserted that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."¹² Similarly, after affirming that the "enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other

Judge Advocate General's Legal Center and School (2005) ("JAG OLH"), chapter 3 ('Human rights law established by treaty generally only binds the state in relation to its own residents; human rights law based on customary international law binds all states, in all circumstances'). It should be noted, however, that the US rejects extraterritorial application of the ICCPR.

⁸ See, e.g., Concluding observations of the Human Rights Committee : Israel. CCPR/CO/78/ISR. 21/08/2003. at para. 11; Human Rights Committee, Comments on United States of America, para. 19, U.N. Doc. CCPR/C/79/Add 50 (1995); Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Iran (Islamic Republic of Iran), para. 63, 30/07/93, CCPR/C/SR.1253.

⁹ *Burgos/Delia Saldias de Lopez v. Uruguay*, para. 12.3. See also J. Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* 469 (June 2001).

¹⁰ *Burgos/Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 88 (1984).

¹¹ *Id.*

¹² HRC General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : 26/05/2004, CCPR/C/21/Rev.1/Add.13, para. 10.

persons, who may find themselves in the territory or subject to the jurisdiction of the State Party,” the Committee noted that “[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”¹³

The Committee confirmed its position in the context of military occupation. In response to the Israeli government’s assertion that the ICCPR did not apply outside of a state’s territory, especially in the context of armed conflict or occupation, the Committee stated:

Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.¹⁴

The Committee’s position was endorsed in part by the International Court of Justice (ICJ) in its 2004 Advisory Opinion on *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*.¹⁵ In that case, the ICJ opined that the ICCPR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) applied to Israel’s conduct in the Occupied Territories.

In particular, after citing the position of the Human Rights Committee, the Court found “that the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”¹⁶ However, in contrast to the Human Rights Committee’s broad reference to conduct by authorities “that affect [sic] the enjoyment of rights,” the Court employs the more specific, and arguably circular, formulation “acts done . . . in the exercise of its jurisdiction.” It seems that the Court may have intended to establish a narrower standard in this respect. The Court did not cite General Comment 31 or its “power or effective control standard,” even though that Comment was adopted by the Human Rights Committee several months before the ICJ rendered its Opinion.

The Court does not provide specific guidance as to what constitutes “acts done by a State in the exercise of its jurisdiction.” While the Court clearly regarded this standard as having been met in the situation of occupation, the Court did not reject the Committee’s broader interpretation. Indeed the Court cited *Burgos / Lopez*, referring to the arrests in those cases as exercises of jurisdiction.¹⁷ Thus, it would appear that an exercise of jurisdiction for the purpose of applying the ICCPR does not require as a pre-condition territorial control.

In contrast, the Court seemed to require territorial control to trigger application of the ICESCR. After noting that article 2 of the ICESCR does not contain a provision circumscribing the scope of states

¹³ *Id.*

¹⁴ Para. 11.

¹⁵ *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of the International Court of Justice (2004).

¹⁶ *Id.*, at para. 111.

¹⁷ *Id.*, at para. 109.

parties' obligations,¹⁸ the ICJ acknowledged that the rights enumerated therein are "essentially territorial." Nonetheless, the court found that "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction."¹⁹ Here the Court appears to limit more narrowly the circumstances in which the ICESCR would apply extraterritorially. Rather than referring simply to the exercise of jurisdiction, the Court seems to require the exercise of territorial jurisdiction, which implies control over territory and not just over individuals.

As for the CRC, the Court simply noted Article 2 of the CRC, which provides that "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .," and found that the "Convention is therefore applicable within the Occupied Palestinian Territory."²⁰ Given the absence of any separate analysis of the CRC, it is unclear what standard the Court applied in finding that Convention applicable.²¹

The ICJ again addressed the issue of extraterritorial application of human rights law in its 2005 judgment in *Democratic Republic of Congo (DRC) v. Uganda*.²² This is the first time the issue has been addressed by the Court in a contentious case.

In *Congo v. Uganda*, the Court found that the conduct of Ugandan forces on Congolese territory gave rise to numerous violations of Uganda's obligations under several human rights treaties, including the ICCPR, the African Charter on Human and Peoples' Rights (ACHPR), and the CRC.

In order to address the DRC's allegations that Uganda had violated international humanitarian law and human rights law, the Court found it "essential" to first "consider the question as to whether or not Uganda was an occupying Power in the parts of Congolese territory where its troops were present at the relevant time."²³ After concluding that Uganda was an occupying Power in Ituri (a district within the DRC), the Court found that Article 43 of the 1907 Hague Regulations required Uganda "to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC."²⁴ The Court found that this obligation "comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party."²⁵

Article 43 of the 1907 Hague Regulations states, "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and

¹⁸ It should be noted, however, that the ICESCR imposes an obligation upon states parties to take steps, "individually and through international assistance and co-operation," toward the progressive realization of the rights contained in the Covenant. To the extent this implies an obligation on states parties to work jointly toward realization of the Covenant rights for all people (or at least all those individuals within States Parties to the Covenant), the ICESCR may incorporate an element of extraterritoriality.

¹⁹ *Id.*, at para. 112. The Court cites with approval the finding of the CESCR that the "State party's obligations under the Covenant apply to all territories and populations under its effective control." While this may be interpreted to apply to effective control over either territories or populations, it is difficult to conceive of effective control of a population, as opposed to certain individuals, without territorial control.

²⁰ *Id.*, at para. 113.

²¹ Given the similarity between article 2 of the CRC and article 2 of the ICCPR, it may be surmised that the Court applied the same standard to both. It should be noted, however, that the CRC contains economic and social rights as well as civil and political rights. See *infra*.

²² *Democratic Republic of Congo (DRC) v. Uganda*, International Court of Justice, 19 December 2005.

²³ *Id.*, at para. 166.

²⁴ *Id.*, at para. 178.

²⁵ *Id.*

ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” It thus appears that the Court found international human rights law incorporated into the law of occupation through Article 43’s reference to “the laws in force in the country.”

The Court then proceeded to examine the DRC’s submissions concerning alleged violations by Uganda. After noting that “it is not necessary for the Court to make findings of fact with regard to each individual incident alleged,”²⁶ the Court considered a number of UN and non-governmental organization (NGO) reports documenting abuses committed by or with the acquiescence of Ugandan forces. The Court considered that “it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.”²⁷ While it is unclear whether the phrase “in the occupied territories” modifies all of the enumerated abuses, it seems likely that it refers only to the final clause “did not take measures to ensure...” The documentation referred to by the Court included massive numbers of abuses committed in various parts of the DRC, including areas beyond the territory in which the Court had found Uganda to be an occupying Power.

The Court then considered which rules and principles of human rights and humanitarian law were relevant in the instant case. In doing so, it recalled that in its Israeli Wall Opinion the Court had “concluded that international human rights instruments are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’, particularly in occupied territories.”²⁸ It then found that the ICCPR, the ACHPR, the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict, as well as a number of IHL instruments were “applicable, as relevant, in the present case.”²⁹ In view of its generalized factual findings, the Court found that Uganda had breached each of these treaties.

The Court thus concluded that “Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.”³⁰

Although the characteristically imprecise language employed by the Court makes it difficult to draw clear conclusions, there appear to have been three significant developments in the Court’s jurisprudence.

First, the Court seemed to find two separate bases for the application of human rights law to the conduct of Ugandan forces operating in the DRC. In addition to reiterating the rule that human rights treaties are applicable “in respect of acts done by a state in the exercise of its jurisdiction outside its own territory,” the Court also found human rights law to be incorporated into the humanitarian law of occupation.³¹

²⁶ *Id.*, at para. 205.

²⁷ *Id.*, at para. 211.

²⁸ *Id.*, at para. 216.

²⁹ *Id.*, at para. 217.

³⁰ *Id.*, at para. 220.

³¹ This of course begs the question whether it would matter if Uganda was not a party to the relevant human rights treaties. If “laws in force in the country” includes human rights treaty obligations of the occupied state, then it would seem that it would not matter if the occupying Power was itself a party to those treaties as long as the occupier was bound by the rule contained in Article 43 (which the Court found to be binding on the Parties as customary law). In such a case, the occupier would be bound to observe those human rights obligations only within

Second, and directly related to the first, the Court made clear that human rights treaties may apply to a state's conduct even where that state's level of control falls short of that of an occupying Power. As noted above, while the Court did find Uganda to be an occupying Power in Ituri, it also appeared to hold Uganda responsible for human rights violations committed elsewhere in the DRC. Indeed, in restating the "exercise of its jurisdiction" rule, the Court added, "particularly in occupied territories," making it clear that application to a state's conduct in occupied territory is but one example of situations in which human rights treaties apply extraterritorially.

The third significant development is that the Court seems to indicate that there may be a single standard for all human rights treaties. In the Israeli Wall Opinion, the Court had 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." While it also found the ICESCR and CRC applicable in that Opinion, it seemed to adopt a slightly higher standard for the ICESCR, and possibly also for the CRC, as noted above. However, in restating this rule in *Congo 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...'"³² It then appears to employ this standard in finding applicable the ICCPR, the CRC and its Optional Protocol, and the ACHPR. Both the ACHPR and CRC provide for economic and social rights as well as civil and political rights.³³

Ultimately, however, the *Congo v. Uganda* judgment provides very little guidance as to what constitutes an act "done by a state in the exercise of its jurisdiction." Since the Court refrained from making specific findings of fact, the most that can be said is that at least some of the acts of the Ugandan forces documented in the Court's case-file met this standard, and that some of these acts occurred in territories where Uganda was not an occupying Power.

2. The Approach of Regional Human Rights Systems

Regional human rights institutions³⁴ have generated more extensive jurisprudence on this issue. Both the Inter-American and European Human Rights bodies have found that regional human rights treaties apply to extraterritorial conduct.

a. The Inter-American Commission on Human Rights

The Inter-American Commission has applied a relatively low threshold for extraterritorial application of Inter-American human rights law, simply requiring control over the individuals whose rights have been violated. In *Coard et al. v. the United States*,³⁵ the Commission examined allegations that the military action led by US armed forces in Grenada in October 1983 violated a series of norms of international

the occupied territory. One could perhaps argue that this interpretation would be limited to monist countries, where there would be a closer relationship between treaties binding *upon* and "laws in force *in*" the state. However, this would seem an inappropriate distinction to make as a matter of international law (i.e. to find that the content of the state's obligation turned upon the relationship between that state's municipal law and its international obligations).

³² *Id.*, at para. 216.

³³ The Court did not include the ICESCR in the list of applicable treaties, despite the fact that both the DRC and Uganda are parties. The DRC did not expressly allege violations of the ICESCR by Uganda. See Application of the DRC.

³⁴ The African Charter on Human and Peoples' Rights (ACHPR) does not contain language limiting the scope of application of the Charter to the territory or jurisdiction of states parties. Article 1 of the ACHPR simply states that "parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."

³⁵ *Coard et al. v. the United States*, Case 10.951, Report No. 109/99, September 29, 1999.

human rights and humanitarian law. In the course of its analysis, the Commission found that the phrase 'subject to its jurisdiction'³⁶ "may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad."³⁷ The Commission further stated that "[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."³⁸

The Commission made clear that neither the victim's nationality nor geographic location were decisive, and set forth the criteria of authority and control over the victim. The petitioners in this case, having been taken into custody by US forces, were clearly under the authority and control of the United States.

Notwithstanding the broad language employed by the Commission, it could be argued that certain facts in this case limit the reach of its holding. Since the petitioners were placed in detention on military vessels of the United States, a finding of jurisdiction could be grounded on this fact alone.³⁹ Similarly, petitioners had alleged that at the time they were arrested, the US had already consolidated its control over Grenada. It could thus be argued that it was this territorial control that enabled the Commission to find that the petitioners were under the authority and control of the US. However, the Commission made no mention of either of these facts in its analysis. A contemporaneous case confirms that this was not an oversight.

In *Alejandro v. Cuba*,⁴⁰ petitioners alleged that a military aircraft belonging to the Cuban Air Force shot down two unarmed civilian light airplanes resulting in the deaths of the four occupants of those airplanes. The Commission examined the evidence and found that the victims died as a consequence of direct actions taken "by agents of the Cuban State in international airspace."⁴¹

In determining whether the victims were within the jurisdiction of Cuba, the Commission again cited the standard of "authority and control."⁴² In this case, the victims were clearly not on Cuban territory or on any territory over which Cuba had any control. Nor were they in a Cuban vessel.⁴³ Nor were their bodies subsequently brought within Cuban territory. Further, while two of the victims were Cuban born, the other two were born in the United States. Thus, nationality could not serve as the jurisdictional link between the victims and Cuba. Authority and control in this case had to be found solely in the relationship between the agents of Cuba and the victims in the circumstances at the time of the incident.

The Commission found no evidence of any dialogue between Cuban armed forces and the victims, stating, "At no time did [they] notify or warn the civilian airplanes, try to use other interception methods,

³⁶ While the Declaration does not contain language expressly narrowing the scope of its application to individuals "subject to the jurisdiction" of the state party, the Commission read in this requirement. *Coard*, at para. 37 ("Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction.").

³⁷ *Coard*, at para. 37. This standard was recently reaffirmed in a letter from the Inter-American Commission to the US government indicating precautionary measures in respect of detainees at Guantanamo Bay, Cuba. Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002). (citing string of cases).

³⁸ *Id.*

³⁹ However, the Commission also considered whether the initial arrest of the petitioners, which did not occur on the ship, was a breach of US obligations, indicating that they were regarded as within the jurisdiction of the US prior to the time of their arrest.

⁴⁰ *Alejandro v. Cuba*, Case 11.589, Report No. 86/99, September 29, 1999.

⁴¹ *Id.*, at para. 25.

⁴² *Id.* The Commission's language was almost identical to that used in *Coard*.

⁴³ Their airplanes were US-registered.

or give them an opportunity to land.”⁴⁴ Nor were there any indicia of control other than the simple fact that the Cuban military aircraft had the victims in their cross-hairs. As noted by the Commission, their “first and only response was the intentional destruction of the civilian airplanes and their four occupants.”⁴⁵ 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”⁴⁶ and held therefore that the victims were within the jurisdiction of Cuba for the purpose of applying its human rights obligations to the instant case.⁴⁷

Thus, the Commission has established a relatively low threshold for the extraterritorial application of Inter-American human rights law. Indeed, it is hard to imagine a situation where human rights violations perpetrated by a state agent would fail to meet this test.⁴⁸

b. The European Commission and Court of Human Rights

In contrast to the approach of the Inter-American system, the jurisprudence of the European Court of Human Rights has been more cautious, careful to avoid an interpretation that would render the European Convention applicable to all state conduct across the globe.

The European Court has set forth various standards for determining whether individuals are within the jurisdiction of Contracting States (i.e. states parties) for the purpose of applying the European Convention on Human Rights to their conduct abroad. It has found the Convention to apply where a Contracting State exercises effective overall control of territory beyond its borders,⁴⁹ as well as in certain other limited circumstances where agents of that state carry out a governmental function on the territory of another state.⁵⁰

⁴⁴ *Id.*, at para. 8.

⁴⁵ *Id.*

⁴⁶ *Id.*, at para. 25. 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. Further, in the immediately preceding sentence, when restating the standard for extraterritorial application, the Commission stated, “The 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). 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 distinguish between negative and positive obligations, as will be explained *infra*.

⁴⁷ *Alejandro*.

⁴⁸ However, the Inter-American Commission on Human Rights recently rejected as inadmissible a petition 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 section on Regionality *infra*.

⁴⁹ *Cyprus v. Turkey*.

⁵⁰ *Bankovic*. As noted below, the jurisprudence of the European Court is presently in flux with regard to this issue. Recent cases seem to establish a lower standard.

The early jurisprudence of the European Commission of Human Rights seemed to correspond more closely to the approach of the Human Rights Committee. In the case of *W.M. v. Denmark*,⁵¹ in which a German citizen alleged human rights violative conduct on the part of the Danish ambassador in Berlin, the Commission found it clear “that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.”⁵² While it ultimately did not find a violation in that case, the breadth of its language closely parallels that employed by the Human Rights Committee in *Burgos / Lopez*.

The European Court of Human Rights initially appeared to employ a similarly broad understanding of jurisdiction. In the case of *Drozd and Janousek v. France and Spain*,⁵³ the Court noted that “[t]he term ‘jurisdiction’ is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.”⁵⁴ In that case, the applicant contended that French and Spanish judges who had been seconded to Andorran courts violated their rights under the Convention.

The Court began its analysis of whether the applicants came within the jurisdiction of France or Spain by re-stating the question as one of attribution:⁵⁵ “The question to be decided here is whether the acts complained of by Mr Drozd and Mr Janousek can be attributed to France or Spain or both, even though they were not performed on the territory of those States.”⁵⁶ Although it ultimately found that the conduct of the judges was not attributable to France or Spain, the Court implied that had it been attributable, individuals over whom the judges exercised authority would have been within the jurisdiction of those countries.

However, in later cases, the Court seemed to take a somewhat different approach. In a series of cases relating to the Turkish occupation of northern Cyprus, the Court began to place greater emphasis on territorial control. In *Loizidou v. Turkey* (preliminary objections),⁵⁷ the Court began its analysis by recalling “that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of ‘jurisdiction’ under this provision is not restricted to the national territory of the High Contracting Parties.”⁵⁸ It then proceeded to identify situations in which those outside of a state’s territory could still be deemed within the jurisdiction of that state.

⁵¹ *W.M. v. Denmark*, European Commission of Human Rights, Application No. 17392/90 (1992).

⁵² *Id.*, at para. 1.

⁵³ *Drozd and Janousek v. France and Spain*, European Court of Human Rights (27 May 1992).

⁵⁴ *Id.*, at para. 91.

⁵⁵ As noted above, the European Court at times conflates the issue of attribution with the scope of beneficiaries; however, in principle these are distinct issues. Attribution is concerned with the link between the relevant subject of human rights law (generally, a state) and the individual (or entity) alleged to have perpetrated the violation of human rights law (by engaging in conduct that unjustifiably interferes with human rights). The scope of beneficiaries is concerned with the link between the relevant subject of international law and the victim of the human rights violation. However, ascertaining the existence and extent of the latter link may require the prior determination of an issue attribution. For example, to determine whether an individual is within a state’s jurisdiction, it may be necessary to determine whether those who are exercising authority or control over those individuals are acting on behalf of that state.

⁵⁶ *Id.*

⁵⁷ *Loizidou v. Turkey* (preliminary objections), European Court of Human Rights, 23 February 1995.

⁵⁸ *Id.*, at para. 62.

It first mentioned cases, such as *Soering*,⁵⁹ in which the extradition or expulsion of a person by a Contracting State could give rise to a human rights violation, “and hence engage the responsibility of that State under the Convention.”⁶⁰ It should be noted, however, that this is not an example of extraterritorial application as the individual alleging a violation is actually within the territory of the state, as the Court subsequently recognizes in the *Bankovic* case discussed infra.⁶¹

It then identified a second category, recalling that the “responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory,” citing *Drozdz & Janousek*.⁶²

It then set forth a third situation in which the Convention could be found to apply extraterritorially: “[T]he responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”⁶³

The Court then noted that “the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops” and that “it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.”⁶⁴ The Court found therefore that “such acts are capable of falling within Turkish ‘jurisdiction’ within the meaning of Article 1 (art. 1) of the Convention.”

In its judgment on the merits,⁶⁵ the Court found that this extraterritorial jurisdiction had an extremely broad scope. The Court first found that the conduct of the Turkish Republic of Northern Cyprus (“TRNC”) was attributable to Turkey. This finding enabled the Court to view Turkish jurisdiction as encompassing all “[t]hose affected by [the] policies or actions” of the TRNC.⁶⁶

As noted above, in finding the conduct of the TRNC attributable to Turkey, the Court employed a somewhat lower standard than that set forth in the Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”).⁶⁷ It was unclear at first whether this lower standard was being employed solely to determine attribution for the purpose of establishing Turkish jurisdiction over the territory of northern Cyprus, or whether attribution was being found in the strict sense to hold that the conduct of the TRNC was conduct of Turkey.

⁵⁹ *Soering v. United Kingdom*, European Court of Human Rights, 7 July 1989.

⁶⁰ *Id.*

⁶¹ The Court recognizes this in the *Bankovic* case.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*, at para. 63.

⁶⁵ *Loizidou v. Turkey* (merits), European Court of Human Rights, 28 November 1996.

⁶⁶ *Id.*, at para. 56.

⁶⁷ ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001. The law of state responsibility comprises the secondary rules of international law, as opposed to the primary rules of international law that place obligations upon states. As such, these rules are of a framework nature, generally applicable across the full spectrum of substantive international law and unconcerned with the separate question of whether the conduct at issue conforms to what is required by those substantive norms. These rules, embodying the codification and progressive development of this area of international law, were adopted by the International Law Commission in 2001.

The subsequent case of *Cyprus v. Turkey*⁶⁸ confirmed that the Court was referring to attribution in the strict sense. In that case, the Court noted that the responsibility of Turkey, “[h]aving effective overall control over northern Cyprus, . . . cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.”⁶⁹ This approach enabled the Court to find that “Turkey’s ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.”⁷⁰ In adopting this approach, the Court essentially assimilated the TRNC to an organ of the Turkish state and the territory of northern Cyprus to Turkish territory for the purpose of applying the Convention.

Although the Court in the northern Cyprus cases focused its attention on the issue of territorial control, this did not seem to narrow in any way the other situations in which the European human rights institutions had found the Convention to apply extraterritorially, in particular the “exercise of authority” standard set forth in *W.M. v. Denmark*.

However, a subsequent, highly politically-charged case seemed to diminish the scope of the rule set forth by the Commission in *W.M. v. Denmark*. In the case of *Bankovic v. Certain NATO Member States*,⁷¹ the Court found that the applicants, relatives of individuals killed in the course of the NATO bombing of Serbia, were not within the jurisdiction of the respondent states. In rejecting the applicants’ claims as being beyond the jurisdiction of Contracting States, the Court synthesized its prior holdings and set forth the various situations in which it found the European Convention to apply extraterritorially.

The Court noted that the European Convention would apply to a state’s conduct abroad “when the . . . State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”⁷² To these two situations – the exercise of public powers either through effective control of territory or with consent – the Court added “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.”⁷³

The Court did not restate the broad “exercise of authority” standard of *W.M. v. Denmark*. Presumably, the Court intended *W.M.* to be encompassed as a case “involving the activities of its diplomatic or consular agents abroad.” However, this would seem to be a narrower interpretation of the standard applied in that case. In *W.M.*, the Commission found it clear that “that authorised agents of a State,

⁶⁸ *Cyprus v. Turkey*, European Court of Human Rights, 10 May 2001.

⁶⁹ *Id.*, at para. 77.

⁷⁰ *Id.*

⁷¹ *Bankovic and Others v Belgium and 16 Other Contracting States*, Eur. Ct. H.R. 52207/99, 41 ILM 517 (2001), at para. 71

⁷² *Bankovic*, at para. 71. The Court here seems to refer to two standards. The first – effective control of territory – seems to be a reiteration of the rule expressed in the northern Cyprus cases. The second seems intended to encompass a standard implicit in *Drozd and Janousek*. Had the conduct of the judges in that case been attributable to France or Spain, it is likely that the Court would have found the Convention to apply. Note however, that the Court in that case simply stated that the “responsibility [of Contracting States] can be involved because of acts of their authorities producing effects outside their own territory.” Similarly, in *Loizidou*, the Court reiterated that the “responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory,” citing *Drozd v. Janousek*. In *Bankovic*, the Court recasts this principle in narrower terms.

⁷³ *Id.*, at para. 73.

including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property.”⁷⁴ This seems to imply that it was not limited to acts of diplomatic or consular agents.

The Court expressly rejected the possibility, implicit in the Inter-American Commission’s *Alejandro* decision, 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 (or at least within the respective region) would be sufficient to bring that individual within the state’s “jurisdiction” for the purposes of applying its human rights obligations. The Court noted that such an approach would render “superfluous and devoid of any purpose” the Article 1 language “within their jurisdiction.”⁷⁵

Thus, the Court seemed to significantly narrow the scope of extraterritorial application of the Convention. The exercise of power and authority over persons would not be sufficient. The Court seemed to require territorial control (through military occupation), the performance of a public function with the permission⁷⁶ of the territorial state, or that the particular type of jurisdiction exercised be recognized in international law (i.e. cases involving diplomats or on vessels of the Contracting State).

Ultimately, the Court found that none of the recognized standards for extraterritorial application were applicable in the instant case. The NATO states were not in effective control of territory. Nor were they exercising a public power normally exercised by the Federal Republic of Yugoslavia with its permission. Finally, their conduct was not recognized as an exercise of jurisdiction by any other rule of international law.

However, the Court’s recent judgments show a more fluid approach to extraterritorial application of the Convention, projecting a trend toward convergence (or re-convergence) with the approach of the Human Rights Committee and Inter-American Commission.

In *Ilascu and Others v. Moldova and Russia*,⁷⁷ the Court was faced with an Application alleging breaches of the Convention by both Moldova and Russia arising out of human rights violations occurring in Transdnistria, a territory located within the internationally-recognized borders of Moldova, but over which Moldova had no effective control. Russia, however, was alleged to have indirect control over the events occurring within the territory. Most of the alleged human rights violations stemmed from acts of authorities of the “Moldavian Republic of Transdnistria” (“the MRT”), a self-proclaimed government that is not recognized by the international community.

In analyzing the responsibility of Moldova and Russia in relation to the alleged violations, the Court first had to determine whether the victims came within their respective jurisdictions. In determining the scope of Moldova’s jurisdiction, the Court began by recalling its earlier jurisprudence on the concept of jurisdiction.

It noted that “jurisdiction is presumed to be exercised normally throughout the State’s territory.” It then found, however, that

⁷⁴ Emphasis added.

⁷⁵ *Id.*, at para. 75.

⁷⁶ The Court thus appeared to exclude conduct committed against the wishes of the territorial state, unless imposed through military occupation of the territory. This stands in stark contrast to the finding of the Human Rights Committee that the expressed scope of article 2(1) “does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.” *Burgos/Lopez*, para. 12.3.

⁷⁷ *Ilascu and Others v. Moldova and Russia*, European Court of Human Rights, 8 July 2004.

This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned, acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.⁷⁸

In order to determine whether this was the case, the Court would have to “examine on the one hand all the objective facts capable of limiting the effective exercise of a State’s authority over its territory, and on the other the State’s own conduct.”⁷⁹ After recalling that the “undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with enjoyment of the rights and freedoms guaranteed, positive obligations,”⁸⁰ the Court notes that these positive obligations “remain even where the exercise of the State’s authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.”⁸¹

The Court next summarizes its earlier jurisprudence recognizing that “in exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.”⁸² It begins with discussion of the northern Cyprus cases, recalling the “effective control of an area” standard, as well as the rules of attribution developed in those cases. The Court then refers to “acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction,” citing the example of extradition to a State where there are “substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.”⁸³ At the same time, the Court recalls established rules of State Responsibility, including the principles relating to *ultra vires* conduct by state agents and the continuity of internationally wrongful acts.

The Court then, in a discussion that seems to blur the issue of jurisdiction with the merits of the case, seeks to determine “whether Moldova’s responsibility is engaged on account of either its duty to refrain from wrongful conduct or its positive obligations under the Convention.”⁸⁴ The Court notes that “even in the absence of effective control over the Transdnestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights

⁷⁸ *Ilascu*, para. 312 (citations omitted).

⁷⁹ *Id.*, at para. 313.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*, at para. 314.

⁸³ Interestingly, while the *Bankovic* Court tried to place the extradition cases outside the realm of extraterritorial application (by noting that the individual being extradited was physically present within the territory of the relevant Contracting State at the time of extradition), the Court in *Ilascu* places them in the context of “acts of Contracting States performed outside their territory or which produce effects there” amounting to exercises of “jurisdiction.” The Court also formulates more broadly the rule applicable to extradition cases, stating, “A State’s responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.” This broad formulation of the rule does not rely on the physical presence of the victim within the state’s territory, and extradition is cited as just one example of application of this rule. This is one of many signals in *Ilascu* that the Court is attempting to back away from the rigidity of its *Bakovic* decision.

⁸⁴ *Ilascu*, para 322.

guaranteed by the Convention.”⁸⁵ After discussion of the concept of positive obligations, the Court “concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention but that its responsibility for the acts complained of, committed in the territory of the ‘MRT’, over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention.”⁸⁶ It then analyzes the relevant conduct of the Moldovan government and further concludes that “Moldova’s responsibility is capable of being engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001.”⁸⁷

The Court then considers whether the applicants “come within the jurisdiction of the Russian Federation.”⁸⁸ It begins by examining the events in Transdnistria prior to Russia’s ratification of the ECHR. After analyzing the link between the Russian Federation and the MRT, the Court finds that the “Russian Federation’s responsibility is engaged in respect of the unlawful acts committed by the Transdnistrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting.”⁸⁹

Noting that Russian soldiers participated in the initial arrest and detention of the applicants within Transdnistria,⁹⁰ the Court finds that “on account of the above events the applicants came within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention, although at the time when they occurred the Convention was not in force with regard to the Russian Federation.”⁹¹ The Court continued, explaining, “This is because the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants’ arrest and detention, but also their transfer into the hands of the Transdnistrian police and regime, and the subsequent ill-treatment inflicted on them by those police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime.”⁹² In a somewhat circular analysis, the Court here refers to the “responsibility of the Russian Federation,” and implies that it is this “responsibility”⁹³ that brings the applicants within the jurisdiction of the Russia Federation. The Court then states, “In addition, regard being had to the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them.”⁹⁴ Thus, the Court seems to supplement its

⁸⁵ *Ilascu*, para. 331.

⁸⁶ This, of course, is not an example of extraterritorial application, since the victims were within the territory of Moldova; however, it is relevant to the Court’s jurisprudence on extraterritoriality, as will be discussed *infra*.

⁸⁷ *Id.*, at para. 352.

⁸⁸ *Id.*, at para. 376. Interestingly, the Court then rephrases its inquiry, stating that “the Court’s task is to determine whether . . . the Russian Federation can be held responsible for the alleged violations.” Para. 377. The Court here blurs the issue of responsibility with the issues of attribution as well as the scope of the State’s jurisdiction. See *infra*.

⁸⁹ *Ilascu*, para. 382.

⁹⁰ *Id.*, at para. 383.

⁹¹ *Id.*, at para. 384.

⁹² *Id.*

⁹³ It is unclear whether in using the term “responsibility” the Court is referring to responsibility under the Convention or to the analytically distinct issue of attribution of conduct. See *infra*. If the former, then the Court’s formulation is truly circular. If the latter, then the Court seems to imply that attribution to the state of human rights violative conduct is sufficient to bring the victims within the jurisdiction of that state for purposes of applying the Convention. This would be in direct contradiction with *Bankovic*. However, the Court may implicitly be relying on the control over Transdnistrian territory exercised by the MRT, the conduct of which is attributable to the Russian Federation. This would align the present case more closely with the northern Cyprus line of cases. However, in that case, it was the over control of the territory by Turkish forces that rendered the conduct of the TRNC attributable to Turkey, as noted below.

⁹⁴ *Id.*

finding of “responsibility” with a *Soering*-type analysis, even though, unlike *Soering*, the applicants were not on Russian territory.

The Court then seems to indicate that the complicity of Russian agents in acts of the MRT authorities renders the conduct of those authorities attributable to Russia, opining that “all of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities’ collaboration with that illegal regime, are capable of engaging responsibility for the acts of that regime.”⁹⁵ Since this conduct was all pre-ratification, the Court then queries “whether that responsibility remained engaged and whether it was still engaged at the time of the ratification of the Convention by the Russian Federation.”⁹⁶

The Court examined the continuing links between Russia and the MRT, and concluded, “All of the above proves that the ‘MRT’, set up in 1991-1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.”⁹⁷ The Court here in referring to the MRT appears to refer to the regime, as opposed to the territory.⁹⁸ Thus, the Court seems to have found that the MRT, as an administration, is under the effective authority of the Russian Federation.

“That being so,” the Court found that there was “a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants’ fate, as the Russian Federation’s policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation made no attempt to put an end to the applicants’ situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.”⁹⁹ In light of this continuous link of responsibility, the Court concluded that “the applicants therefore come within the ‘jurisdiction’ of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of.”¹⁰⁰

Significantly, nowhere did the Court find that the Russian Federation was in overall control of the territory of Transdniestria. However, using rules of attribution of its own design,¹⁰¹ it seems to have attributed the conduct of the MRT authorities to the Russian Federation. Once it had assimilated the MRT

⁹⁵ *Id.*, at para. 385. Again, the phrase “capable of engaging responsibility for the acts of that regime” seems to indicate that the conduct of that regime is attributable to the Russian Federation. However, the Court’s formulation makes this unclear.

⁹⁶ *Id.*

⁹⁷ Para. 392. Here the Court seems to employ an even lower standard - “decisive influence” or dependence (“survives by virtue of”) - for attribution. Given the Court’s reference, earlier in its judgment, to the continuity of internationally wrongful acts, the Court may believe that applying a lower standard for attribution in this context is warranted. However, the rules referred to by the Court in its discussion of the continuity of internationally wrongful acts pre-suppose an initial breach. In this instance, the pre-ratification conduct of the Russian Federation cannot constitute a breach of the Convention. Thus, the standard for continuity of an existing violation is inapplicable. Also, use of the phrase “survives by virtue of” Russian support parallels language used by the Court in *Cyprus v. Turkey* in finding the conduct of the TRNC attributable to Turkey. However, in that case the finding of attribution was based primarily on Turkey’s overall control of the territory of northern Cyprus.

⁹⁸ The Court appears to use the term “MRT” to refer alternatively to the territory of Transdniestria as well as to the separatist regime.

⁹⁹ *Id.*, at para. 393.

¹⁰⁰ *Id.*, at para. 394.

¹⁰¹ While the Court purports to rely on the established Law of State Responsibility in formulating its rules of attribution, it in fact departs from those rules significantly.

regime to an organ of the Russian Federation, it could then be argued that the Russian Federation was in fact in overall control of Transdniestria via the MRT authorities. However, this is not explicitly mentioned by the Court. Further, this is the inverse of its findings in the northern Cyprus cases. While the *Ilascu* Court cites its earlier jurisprudence relating to Turkey's responsibility in northern Cyprus, it neglects to point out that in that case, the conduct of the TRNC was initially found attributable to Turkey because of Turkey's effective overall control of the territory. All of the subsequent findings of attribution stemmed from this original finding. Absent reliance on a territorial control argument, the *Ilascu* Court seems to reduce its 'jurisdiction' inquiry to the simple question of whether alleged infringements were attributable to the Russian Federation. In so doing, the Court seems to have adopted a much lower standard than those set forth in *Bankovic*.

This trend in favor of more relaxed standards for extraterritorial application is also seen in the more recent case of *Issa v. Turkey*.¹⁰² In this case concerning the conduct of Turkish forces in northern Iraq, the Court again listed situations in which the European Convention would apply extraterritorially. In addition to the "effective overall control" standard of the northern Cyprus cases, the Court seemed to resurrect the "power and authority" standard. Citing the Commission's decision in *W.M. v. Denmark*, it stated, "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State."¹⁰³ The Court implies that this rule has been a consistent part of its jurisprudence, but that would seem not to be the case.¹⁰⁴ Of the various cases cited for this standard, none are the Court's own cases.¹⁰⁵ Indeed, the *Issa* Court cited cases of the Inter-American Commission and Human Rights Committee from which the Court had distanced itself in *Bankovic*, and even adopted the reasoning of the Human Rights Committee in *Burgos / Lopez*, stating, "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."¹⁰⁶

While this is a welcome development in the evolution of a coherent jurisprudence, it begs the question of the continued necessity of territorial control. If the exercise of power and authority over individuals is sufficient to find those individuals within the jurisdiction of the Contracting State, then it would seem nonsensical to retain the higher standard of effective control over territory. Presumably, anyone within territory under the effective control of a state would also be under that state's power and authority. Thus, after *Issa*, it would appear that the distinctions among the various standards cited by the European Court over the past decade have lost much of their significance in the context of determining whether individuals may fall within the jurisdiction of a Contracting State. However, these distinctions may still be relevant in determining other dimensions of the scope of that Contracting State's obligation as explained below in Sections B and C.

¹⁰² *Issa and Others v. Turkey*, European Court of Human Rights, 30 March 2005.

¹⁰³ *Id.*, at para. 71.

¹⁰⁴ One of the reasons for the apparent inconsistencies in the Court's jurisprudence may be the different ways in which the Court has formulated the question of whether extraterritorial conduct of the state has fallen within the scope of article 1. While the text of article one requires Contracting States to secure rights "to everyone within their jurisdiction," the Court has framed the question in a variety of ways. The Court variably refers to individuals, acts, matters, or property being within the jurisdiction of the particular state. At other times, the Court frames the question exclusively as one of attribution without clearly explaining the relationship between attribution and the separate question of whether individuals fall within the jurisdiction of the state.

¹⁰⁵ It does, however, cite Commission cases, including *W.M. v. Denmark*.

¹⁰⁶ *Id.* This formulation is almost identical to that used by the Human Rights Committee in *Burgos / Lopez*, which the Court had criticized in *Bankovic*.

c. **Regionality**

One element in particular of the European Court's jurisprudence warrants closer inspection. In the *Bankovic* case, the Court noted that "the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."¹⁰⁷ 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."¹⁰⁸ 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. This reasoning would of course only apply to regional human rights obligations, and would not be relevant to obligations arising under treaties open for universal participation, such as the ICCPR and ICESCR. However, even within the context of regional obligations, the continuing vitality of the legal space argument is questionable.

A number of considerations support a finding that regional human rights obligations do apply to a state's conduct beyond regional frontiers. Chief among these is the notion of universality. The very idea of human rights supports a finding that they would apply vis-à-vis all human beings. Although regional human rights norms are generated and formulated within a regional framework, they purport to be universally applicable.¹⁰⁹ As such, the focus of human rights law generally is on how states ought to behave with respect to any human being under their control. Thus, it is clearly established in the jurisprudence of all regional human rights bodies that human rights obligations apply irrespective of the nationality of the victim. As the Inter-American Commission has noted in a case involving extraterritorial conduct, "Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction."¹¹⁰

The regional nature of the treaty speaks not to the scope of beneficiaries, but to the willingness of states within the region to agree to a particular treaty regime and system of collective enforcement. As expressed in the preamble of the European Convention, "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, [were resolved] to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."

Finally, the European Court's jurisprudence is itself in flux with respect to this issue. The Court has diminished the force of its "legal space" argument. In *Issa*, the Court found that Turkish troops had been carrying out cross-border military operations "aimed at pursuing and eliminating terrorists who were seeking shelter in northern Iraq."¹¹¹ The Court noted that if Turkey "could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq" and if it could be shown that "at the relevant time, the victims were within that specific area," then "it

¹⁰⁷ *Id.*, at para. 80.

¹⁰⁸ *Id.*

¹⁰⁹ The preamble to the European Convention makes clear that the standards enunciated in that treaty are derived from the Universal Declaration and reaffirms the "profound belief [of the Contracting States] in those fundamental freedoms which are the foundation of justice and peace *in the world*," not just the region (emphasis added). The preamble of the American Declaration of the Rights and Duties of Man similarly employs the language of universality, asserting that "[a]ll men are born free and equal, in dignity and in rights."

¹¹⁰ *Coard* at para. 37; see also *Alejandre* at para 23

¹¹¹ *Issa*, at para. 73.

would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States...”¹¹² The Court essentially equates being within the jurisdiction of Turkey with being within the legal space of the Contracting States for the purpose of applying the Convention. This could be interpreted as relegating the legal space argument to circularity, at least in situations where Contracting States exercise a degree of territorial control.

B. *Range of Rights Applicable*

Under human rights treaties, the range of rights applicable within a state’s territory will normally be the full range of rights set forth in each treaty. However, this may not be the case when the state is operating abroad. In such situations, the range of applicable rights may be limited by the scope of the state’s authority or control in the circumstances. In general, it may be reasoned that as human rights law is generally predicated on a state’s authority and presumed capacity to control individuals and territories,¹¹³ a state’s human rights obligations while acting abroad would not be as extensive as when it acts on its own territory. Similarly, it may be the case that the application of certain rights requires a higher threshold of control.

As noted above, the ICJ in its Israeli Wall Opinion appeared to establish different thresholds of application for the International Covenants.. While the exercise of jurisdiction was sufficient for application of the ICCPR, the ICJ explicitly required *territorial* control to trigger application of the ICESCR. After noting that article 2 of the ICESCR does not contain a provision circumscribing the scope of states parties’ obligations, the ICJ acknowledged that the rights enumerated therein are “essentially territorial.” Nonetheless, the court found that “it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.”¹¹⁴ Here the Court appears to limit more narrowly the circumstances in which the ICESCR would apply extraterritorially. Rather than referring simply to the exercise of jurisdiction, the Court seems to require the exercise of territorial jurisdiction, which implies control over territory and not just over individuals.

It may be that this approach is linked to the nature of economic and social rights. In general, these rights are thought to require an expansive and more highly defined conception of the state. In situations of extraterritorial conduct, this conception is not necessarily applicable -- the full apparatus of the state is not readily available; nor is the level of control as great as that exercised by a state within its own territory.

However, in *Congo v. Uganda*, the Court seemed to indicate a single standard for the extraterritorial application of human rights treaties generally. It stated that “*international human instruments* are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction...’”¹¹⁵ It then appeared to employ this standard in finding applicable the ICCPR, the CRC and its Option Protocol, and the ACHPR. While both the ACHPR and CRC contain economic and social rights, there was no separate analysis of the scope of application of these instruments.

At the same time, however, the Court found these instruments applicable “as relevant.” This might simply mean that only those provisions setting forth rights actually infringed by acts of the Ugandan forces would be applicable. However, such an approach would fail to take account of positive

¹¹² *Id.*, at para. 74.

¹¹³ *Bankovic*.

¹¹⁴ *Israeli Wall Opinion*, at para. 112.

¹¹⁵ *Congo v. Belgium*, at para. 216.

obligations, particularly in the economic and social spheres, as will be discussed below. Alternatively, “as relevant” might indicate that some provisions of these treaties require a greater finding of control or more expansive an exercise of jurisdiction than others. Ultimately, the Court made no mention of the economic and social rights enumerated in the ACHPR or CRC,¹¹⁶ and only found violations of provisions concerning the right to life, liberty and security of person, and the protection of children in times of armed conflict.

Although the regional institutions provide little express guidance on this issue, the European institutions have indicated that the exercise of certain rights may be linked to territorial control, and have implied that such rights may not apply in situations falling short of territorial control.

Thus, in *W.M. v. Denmark*, in response to the applicant’s allegations that he was deprived of his right to move freely on Danish territory and that he was expelled without a decision being taken in accordance with law, the European Commission observed that “although, as stated above, a State party to the Convention may be held responsible either directly or indirectly for acts committed by its diplomatic agents, the provisions invoked by the applicant must be interpreted in the light of the special circumstances which prevail in situations as the one which is at issue in the present case.”¹¹⁷ Noting that “as the applicant, while the incident took place, was not on Danish territory,” the Commission held that “the provisions invoked by him are not applicable to his case.”¹¹⁸

In *Cyprus v. Turkey*, where the European Court found that Turkey had territorial control over northern Cyprus, the Court found the full range of Convention rights to be applicable. After finding that Turkey, by virtue of its effective overall control of northern Cyprus, was responsible for the conduct of the local authorities there (i.e. the TRNC), the Court held, “It follows that, in terms of Article 1 of the Convention, Turkey’s ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified...”¹¹⁹ This seems to imply that in situations falling short of effective overall control, Contracting States may be bound to observe a narrower range of rights.

More generally, the jurisprudence of regional institutions seems to indicate that the scope of a state’s obligations vary with the scope of the authority and control exercised. In *W.M v. Denmark*, the European Commission found it clear from the “constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State *to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.*”¹²⁰ This seems to imply that a state’s exercise of extraterritorial jurisdiction has a variable scope. Similarly, the European Court, in formulating the question of whether extraterritorial conduct of the state has fallen within the scope of article 1, has variously referred to individuals, acts, matters, or property being within the jurisdiction of the particular state. It seems then that individuals may come within the jurisdiction of a state’s jurisdiction to various degrees. For example, where a state brings an individual into its jurisdiction through a particular act, without having control generally over that individual or over the territory within which that individual may be found, it would seem then that the individual is within the jurisdiction of that state only for the purpose of that act.

¹¹⁶ As noted above, the Court did not include the ICESCR in its list of applicable treaties.

¹¹⁷ *W.M.*, at para. 2.

¹¹⁸ *Id.*

¹¹⁹ *Cyprus v. Turkey*, at para. 77.

¹²⁰ *W.M.*, at para. 1. Emphasis added.

As these institutions have linked their findings of “jurisdiction” to the scope of a state’s authority and control over people or territory, it may thus be argued that the range of rights states are bound to respect is dependent upon the level of that State’s control.¹²¹

Nonetheless, the European Court appeared to dismiss this possibility in *Bankovic*, flatly rejecting the applicants’ “claim 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.”¹²² The Court stated its 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.”¹²³

This position seems difficult to reconcile with the notion that a state’s exercise of jurisdiction may be limited to a narrow scope. Indeed, in the Court’s later jurisprudence, it seems to back away from the rigidity of this statement.¹²⁴

However, another approach is to focus the inquiry not on the question of which rights the state is obliged to secure, but instead on the level of obligation upon states with respect to those rights, as discussed below.

C. *Level of Obligation*

As noted above, the obligation to “respect and ensure” rights, or, in the words of the European Convention, to “secure” rights, entails a substantial degree of positive obligation.¹²⁵

As with the range of rights, the level of obligation may also be limited where the state operates abroad. The level of obligation may similarly be tied to the scope of a state’s extraterritorial activities or authority to act. In particular, it is arguable that human rights obligations requiring the adoption of affirmative measures may be more limited in an extraterritorial context.

This position finds support in the international jurisprudence cited above. In the *Israeli Wall Opinion*, the ICJ found that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction

¹²¹ This also seems to be the case with respect to customary human rights law. In general, customary law recognizes a narrower range of rights than that provided under treaty law. Further, the extraterritorial application of customary human rights law may be subject to limitations analogous to those applicable to human rights treaties. For example, the US JAG OLH notes that when the US carried out detention operations in Haiti as part of Operation Uphold Democracy, US forces complied with the customary human rights norms implicated by that operation, including freedom from arbitrary detention. JAG OLH (“Along this line, the Joint Task Force (JTF) lawyers first noted that the Universal Declaration of Human Rights does not prohibit detention or arrest, but simply protects civilians from the arbitrary application of these forms of liberty denial. The JTF could detain civilians who posed a legitimate threat to the force, its mission, or other Haitian civilians”). The Handbook notes that detainees were also “entitled to a baseline of humanitarian and due process protections”, including “the provision of a clean and safe holding area; rules and conduct that would prevent any form of physical maltreatment, degrading treatment, or intimidation; and rapid judicial review of their individual detention.” The US did not, however, “step into the shoes of the Haitian government, and did not become a guarantor of all the rights that international law requires a government to provide its own nationals.” As the US rejects extraterritorial application of human rights treaties, the Handbook refers here solely to customary law.

¹²² *Bankovic*, at para. 75.

¹²³ *Id.*

¹²⁴ See, e.g., *Ilascu*. See discussion *infra*.

¹²⁵ As indicated above in Part III, customary international law may entail a lower level of obligation.

outside its own territory.”¹²⁶ While the Human Rights Committee had referred to “conduct by the State party’s authorities,” the Court used the phrase “acts done by a State.” This difference in terminology may have some significance. While the term “conduct” encompasses both actions and omissions,¹²⁷ the term “acts” may be read to preclude the latter. Under this interpretation, only negative obligations would be applicable to Israel’s conduct.

As to the scope of obligation imposed on Israel by the ICESCR in the Occupied Territories, the Court stated, “In the exercise of the powers available to it [as the occupying Power], Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights.”¹²⁸ Thus, the scope of its obligation under the ICESCR may be co-extensive with the scope of its authority as an occupying Power. 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.”¹²⁹ 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. 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. Ultimately, however, the Court analyzed Israel’s conduct exclusively in the context of negative obligations, finding that “the construction of the wall and its associated régime impede” the exercise of a number of rights under both Covenants.¹³⁰ Nonetheless, its language setting forth the applicable law was broad enough to accommodate positive obligations in principle, at least in the context of occupation.

In *Congo v. Uganda*, the Court seemed to take a different approach, and this shift in approach is related to the two bases upon which the Court found human rights law to apply to Uganda’s conduct in the DRC.

In restating the rule from the *Israeli Wall Opinion*, the Court again refers to “acts” as opposed to conduct. However, in finding human rights law incorporated into the law of occupation, the Court clearly contemplates the possibility of culpable omission. In particular, the Court found that “Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.”¹³¹ This language clearly asserts the existence of a positive obligation on Uganda to act with vigilance to prevent human rights violations committed by third parties.¹³² However, what is unclear is whether this positive obligation is entailed by norms of human rights law themselves or by the application of Article 43 of the Hague Regulations, through which the norms of human rights law are applicable. In any event, as the Court found Article 43 to have acquired the status of customary law, it will make little difference in situations of occupation whether the positive obligation results directly from the norms of human rights law or whether it arises by operation of the rule contained in Article 43. However, in extraterritorial situations falling short of occupation, the degree of positive obligation entailed by human rights law, if any, remains unclear.

¹²⁶ *Israeli Wall Opinion*, at para. 111.

¹²⁷ ILC Articles, Article 2.

¹²⁸ *Israeli Wall Opinion*, at para. 112.

¹²⁹ *Id.*

¹³⁰ *Id.*, at para. 134.

¹³¹ *Congo v. Belgium*, at para. 179.

¹³² Similarly, in summarizing its findings of fact in para. 211, the Court enumerated acts of the UPDF as well as omissions (e.g., the UPDF troops “took no steps to put an end to such conflicts” and “did not take measures to ensure respect for human rights and international humanitarian law...”). However, the indicated omissions occurred in areas where Uganda was found to have been an occupying Power.

Again, the Court's finding that the ICCPR, CRC, and ACHPR are applicable "as relevant" compounds this ambiguity. Ultimately, the Court simply concludes, without any significant analysis, that certain provisions of these instruments have been violated. Thus, it remains unclear whether certain rights provided for in those treaties were simply not relevant to the facts of this case or whether the positive dimension of the obligation to ensure those rights was inapplicable in this particular context.

A similar analysis may be applied to the jurisprudence of regional institutions. In *Alejandre*, the Inter-American Commission recalled that "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..."¹³³ Again, it is worth noting that the Commission referred only to the obligation to respect rights. It did not mention the obligation to ensure rights. It may be that this was not intended to imply that Cuba would be limited to negative obligations. However, to date the Commission's finding of extraterritorial application of human rights obligations has been limited to finding violations of negative obligations. It is unclear whether the same analysis would apply to positive obligations.

The European Court seems to admit the possibility that a state's obligations may encompass positive obligations in an extraterritorial context, at least in situations of territorial control. In *Cyprus v. Turkey*, the European Court noted that since Turkey had effective control over the territory of Northern Cyprus, "its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support. Turkey's 'jurisdiction' under Article 1 was therefore considered to extend to securing the entire range of substantive Convention rights in northern Cyprus."¹³⁴ In using the term "securing" instead of "respecting" the Court may have implied that positive obligations were entailed. While the European Convention does not use term "respect" in its article 1, it could have employed this term as it is used by other human rights bodies if it wished to limit the scope of obligation to negative duties. The Court then addressed the question of whether Turkey was required to protect rights from private interference in northern Cyprus. It determined that it would address this issue on a case by case basis in light of the violation alleged.¹³⁵ In analyzing alleged violations by third parties, the Court found that Turkey's responsibility would be engaged if the applicant could establish a policy of acquiescence on the part of the TRNC.¹³⁶ It would thus appear that a mere failure to respond to perpetration of violations by non-state actors would be insufficient to trigger responsibility. The omission would be culpable only if it were pursuant to a policy of acquiescence. This approach blurs the distinction between negative and positive obligations.

In *W.M. v. Denmark*, as noted above, the European Commission seemed to admit the possibility of a variable scope of obligation, and this could be interpreted to apply to the degree of positive obligation entailed. In that case, the applicant contended that Denmark bore responsibility for human rights violations perpetrated by DDR police because the Danish Ambassador had summoned the police who arrested the applicant. In analyzing the responsibility of Denmark in relation to human rights violations perpetrated by the DDR authorities, the Court recalled "that an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention," citing the *Soering* case.¹³⁷ The Commission found, however, "that what happened to the applicant at the hands of the DDR authorities cannot in the

¹³³ *Alejandre*, at para. 25.

¹³⁴ *Bankovic*, at para. 70, interpreting its findings in *Cyprus v. Turkey*

¹³⁵ *Cyprus v Turkey* at para. 81

¹³⁶ *Id.*, at para. 346.

¹³⁷ *W.M.*, at para. 1.

circumstances be considered to be so exceptional as to engage the responsibility of Denmark.”¹³⁸ Clearly, the Commission was of the view that the Danish Ambassador was under no positive obligation in these circumstances to protect the applicant from the DDR authorities. Indeed, it seems Denmark was similarly free of any negative obligation to refrain from handing him over to the police.

However, in *Bankovic*, the European Court seemed to reject the possibility of a varying level of obligation. Again, the Court rejected the applicants’ claim that the scope of a Contracting State’s obligation was proportionate to its degree of control, asserting that “the applicants’ submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.”¹³⁹ The Court dismissed this possibility.

Essentially, the *Bankovic* Court seemed to take an all-or-nothing view of application of the Convention. In particular, the Court expressed the view “the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties’ positive obligations and, as such, of the scope and reach of the entire Convention system of human rights’ protection...”¹⁴⁰ It emphasized 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...”¹⁴¹

As phrased by the Court, this proposition does indeed seem unreasonable. To hold states responsible for extraterritorial consequences of their conduct that were neither intended nor foreseeable seems both unworkable and unrealistic, particularly in the context of positive obligations. But it certainly would not be unreasonable to admit the possibility of world-wide application of the Convention where a state was the direct perpetrator of an intentional human rights violation.

As noted above, the Court’s subsequent jurisprudence seems to indicate that *Bankovic* was anomalous.

In *Ilascu*, for example, the Court found that Moldova’s “jurisdiction” had a more limited scope by virtue of the fact that it did not have effective control over part of its territory. Here, the Court expressly tied the scope of Moldova’s jurisdiction to the level of Moldova’s control over the situation facing the applicants. Where a Contracting State is prevented from exercising its authority over its territory “by a constraining *de facto* situation,” the Court held that “such a factual situation *reduces the scope of that jurisdiction* in that the undertaking given by the State under Article 1 must be considered only in the light of the Contracting State’s positive obligations towards persons within its territory.”¹⁴² Before concluding that “Moldova’s responsibility is capable of being engaged under the Convention”¹⁴³ the Court had satisfied itself that “it was within the power of the Moldovan Government to take measures to secure to the applicants their rights under the Convention.”¹⁴⁴ The Court thus appears to link the scope of Moldova’s jurisdiction and responsibility, which it blurs together, to the scope of Moldova’s control over the territory

¹³⁸ *Id.*

¹³⁹ *Bankovic*, at para. 75.

¹⁴⁰ *Id.*, at para. 65.

¹⁴¹ *Id.*, at para. 75.

¹⁴² *Ilascu*, at para. 333 (emphasis added). The Court seems to find that only positive obligations are applicable to Moldova in this context. However, it may be that the Court has implicitly determined that negative obligations may be applicable but are simply not implicated by Moldova’s conduct. See *infra*.

¹⁴³ *Id.*, at para. 352.

¹⁴⁴ *Id.*, at para. 351. Note, however, that this blurs the question of jurisdiction with that of responsibility, as discussed below.

and the situation. While this would not be an example of extraterritorial application, as Transnistria is part of Moldovan territory, the approach of the *Ilascu* Court is in tension with the finding of the *Bankovic* Court that the Article 1 obligation of Contracting States cannot be subdivided and tailored to particular circumstances.

Also noteworthy is the repeated reference of the *Ilascu* Court to Moldova's positive obligation(s)¹⁴⁵ under Article 1 toward persons "within its territory." In other cases, the Court has not been so careful to include the latter phrase. It may be that the Court here is indicating that positive obligations are generally not applicable extraterritorially, except perhaps in those cases where an area can be assimilated to the territory of another state, such as in northern Cyprus, where the Court suggests that Turkey's obligations under the Convention may entail a positive dimension.¹⁴⁶

In the *Issa* case, in support of its inclusion of the "power and authority" standard, the Court stated, "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."¹⁴⁷ As with the *Israeli Wall* case and the *Alejandre* case, the word employed by the Court implies a context of violation of a negative obligation. Here, the Court refers to "perpetration," which could be read as encompassing only affirmative interference with rights, as oppose to a failure to adopt positive measures of protection. While this use of language may not have been intentional, it fits a pattern among human rights bodies of employing the language of negative obligations when finding extraterritorial application based on a standard of power or authority or control over individuals (and not over territory).

IV. Critique

As the foregoing analysis demonstrates, international jurisprudence has yet to produce clear criteria for establishing when extraterritorial application is triggered or clear parameters for determining the scope of a state's human rights obligations when it acts abroad. This results in part from the fact that none of the institutions identified above have developed a coherent framework for analyzing the extraterritorial application of human rights treaties.

Common problems underlie the inadequacy of each institution's approach to this issue. A central problem is the failure to distinguish clearly between the issue of attribution, the scope of obligation (as defined by the three parameters above), and the responsibility of States Parties for breaches of the treaty.

A state's international responsibility arises upon the commission of an internationally wrongful act by that state.¹⁴⁸ An internationally wrongful act consists of conduct attributable to a state that is not in conformity with what international law requires of that state. Thus, while the issue of whether conduct is attributable to a state plays a central role in the determination of whether there has been an internationally wrongful act by a state, it is an issue that is analytically distinct from the question of whether this conduct, if found to be attributable, is in conformity with what international law requires of the state.¹⁴⁹

¹⁴⁵ The Court appears to alternate between the single and plural forms of "obligation."

¹⁴⁶ To the extent that acquiescence would constitute a breach of its obligations. See above.

¹⁴⁷ *Issa*, at para. 71.

¹⁴⁸ Art. 1, ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001.

¹⁴⁹ According to the Inter-American Commission, there are "three elements that cause a State to be internationally responsible. . . , namely (i) whether there existed an action or a failure to act that violated an obligation enshrined in a rule of international law currently in force, which in this case would be the American Declaration; (ii) whether that action or a failure to act can be attributed to the State in its capacity as a juridical person, and (iii) whether harm or

At the same time, while the question of attribution is in principle separate from the content of a state's obligations arising under primary rules (e.g. a human rights treaty), this distinction may become difficult to discern in the context of a failure of a state to fulfill positive obligations in relation to the acts of non-state actors. In such situations, it is essential to distinguish between whether the conduct of non-state actors is attributable to a state and the separate question of whether a state has failed to fulfill an affirmative obligation, should one be imposed by a primary rule of international law, in relation to the conduct of non-state actors.

The attribution of conduct consisting of omissions presents conceptual difficulties in part because conduct consisting of omissions is, in a sense, always attributable. As omission is a lack of action, an actor is not required. Hence, the state is essentially in a constant state of omission.¹⁵⁰ However, in order for an omission to constitute a basis of responsibility, there must be a duty to act. The question of establishing a duty to act will turn on the content of the relevant primary rule. Thus, in these circumstances, the issue of attribution collapses into the content of the primary rule.

The distinction between attribution of the conduct of non-state actors and a state's responsibility for its omissions in relation to the conduct of non-state actors has special significance in the context of human rights law. As noted above, the ICJ, the HRC, and regional human rights bodies have all interpreted their respective human rights treaties as requiring states parties both to refrain from interfering with rights and also to take steps to prevent and respond to human rights violations committed by non-state actors.¹⁵¹ Where human rights violative conduct is attributable to a state, the state will have breached an obligation of result and responsibility will arise immediately. Where such conduct is not attributable to a state, the question of whether human rights law has been violated will be determined by the quality of the state's response to this conduct, generally governed by a "best efforts" standard.

Further, the issue of attribution is distinct from the question of whether an individual falls within the scope of beneficiaries of a State Party. Attribution turns on the relationship between a state and an actor; in the context of an alleged breach of negative human rights obligations, this actor would generally be the perpetrator.¹⁵² The scope of beneficiaries, and indeed, of jurisdiction, turns on the relationship between the state and the victim. Of course, these issues can intersect; for example, where an individual situated outside of a particular state's territory is subject to the control of a non-state actor, in order for that individual to come within the jurisdiction of the aforementioned state it may be necessary to establish that the conduct of the non-state actor is attributable to the state. In such situations, the rules of attribution function so as to assimilate the non-state actor to an organ of the state, as demonstrated in the northern Cyprus cases. In principle, however, the two concepts remain distinct.

damage was caused as a result of the illicit act." *Alejandro*, at para 29. The only problem with this formulation is that a finding that the first element has been met pre-supposes that the second has been met. If the action or failure to act violated an obligation under human rights law, then that action or failure to act must have been attributable to a state. Otherwise, it could not have constituted a violation of human rights law. Of course, a failure to act is always attributable, the only question being whether or not there was a duty to act. See *infra*.

¹⁵⁰ Hence, human rights institutions should exercise caution when extending application of human rights treaties to all individuals "affected by conduct." As it is well-established the "conduct" includes both acts and omissions, everyone in the world is continuously affected by the "conduct" of all states at all times. And to limit the term conduct to culpable omission is to create a circularity.

¹⁵¹ While the scope of obligation under human rights law clearly encompasses the failure to act in relation to the conduct of non-state actors even when there is no link between the non-state actors and the state, it must be recalled that the obligation does not itself extend to the non-state actors such that they become responsible under international law for the violations they perpetrate.

¹⁵² Again, in the context of an alleged breach of a positive obligation under human rights law, there need not be an identifiable actor.

An example of the elision of this distinction can be found in the Human Rights Committee's General Comment 31, in which the Committee opined that obligations under the ICCPR continue to apply in the context of collective action:

This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.¹⁵³

The Committee here fails to consider the issue of attribution, which must be examined whenever organs of a state are assigned to peace operations.¹⁵⁴ If armed forces are placed entirely and exclusively at the disposal of an intergovernmental organization, their conduct may no longer be attributable to the sending state.¹⁵⁵

Thus, the issue of attribution is related to both jurisdiction and responsibility. The attribution of conduct can give rise to the international responsibility of a state where that conduct is not in conformity with what international law requires. The rules of attribution can also be relevant to determining the scope of a state's "jurisdiction." However, a finding of attribution alone establishes neither jurisdiction nor responsibility. Conversely, a finding that someone whose rights have been infringed falls within a state's "jurisdiction" does not necessarily mean that that state is responsible for, or in relation to, any human rights infringement suffered by that individual.

These distinctions are often blurred in the jurisprudence of the various bodies surveyed above. The European Court, having the largest case-load of any of these institutions, has had ample opportunity to demonstrate this analytical confusion.

This confusion is frequently evinced in the Court's formulation of the issue of "jurisdiction." In *Drozd & Janousek*, the Court begins its inquiry into whether the applicants came within the Court's "jurisdiction *ratione personae*" (i.e. within the scope of beneficiaries) by formulating the question as "whether the acts complained of by Mr Drozd and Mr Janousek can be attributed to France or Spain or both, even though they were not performed on the territory of those States."¹⁵⁶ Here, the conflation of attribution with the scope of beneficiaries does not affect the outcome. Essentially, in order to establish whether the applicants were within the jurisdiction of France or Spain, the Court needs to examine the relationship between those countries and the applicants. On the facts of *Drozd & Janousek*, the only possible link between them was the fact that French and Spanish judges had presided over the prosecution of the applicants. The Court ultimately determined that since the judges had been seconded to Andorra, they were not acting in the capacity of French and Spanish judges. As such, their conduct was not attributable to France and Spain and the link necessary to establish "jurisdiction" did not exist.

However, by reducing the question of jurisdiction to one of attribution, it seems that the Court has silently assumed that if the conduct of the judges was attributable to France or Spain, then even though the judges

¹⁵³ Para. 10.

¹⁵⁴ The distinction between these questions was recognized in *Bankovic*, in which the European Court found that it was unnecessary to consider the "alleged several liability of the respondent States for an act carried out by an international organisation of which they are members" because the Court had already concluded that it was "not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question" (paras. 82-83).

¹⁵⁵ However, it is arguable that in such circumstances, the troops would no longer be "forces of a State Party."

¹⁵⁶ *Drozd & Janousek*, at para. 91.

were acting outside of the territories of those states, the applicants would come within the jurisdiction of those states (i.e. that the relationship between the judges and the applicants would have been sufficient to bring the individuals within their respective “jurisdictions”).¹⁵⁷ It appears that the Court failed to recognize that this was, in principle, a separate issue.

In *Loizidou v. Turkey* (preliminary objections), the Court starts off on the right track, making clear that it is “not called upon at the preliminary objections stage of its procedure to examine whether Turkey is actually responsible under the Convention for the acts which form the basis of the applicant's complaints.”¹⁵⁸ It then formulates the issue relevant to this stage of the proceedings as “whether the matters complained of by the applicant are capable of falling within the ‘jurisdiction’ of Turkey even though they occur outside her national territory.”¹⁵⁹ By using the term “capable of,” the Court seems to indicate that a finding that the matters actually were within Turkey’s jurisdiction would be tantamount to a finding that Turkey was responsible for a violation of the Convention. Thus, the Court here implicitly conflates the issue of scope of beneficiaries with responsibility.

After concluding that the impugned acts were “capable of falling within Turkish ‘jurisdiction,’” the Court points out, “Whether the matters complained of are imputable to Turkey and give rise to State responsibility are thus questions which fall to be determined by the Court at the merits phase.”¹⁶⁰ The Court seems to imply that Turkey’s responsibility would only arise if the matters complained of are “imputable” to Turkey. Use of the term “imputable” in this context foreshadows further confusion. It is unclear whether the Court is using the term to refer specifically to attribution or more generally to the possibility of Turkey’s responsibility arising in relation to human rights violations committed in northern Cyprus. If the former, the Court seems to be ruling out the possibility of positive obligations.

At the merits stage of the proceedings, the Court examines the issue of “Imputability.” In so doing, it merges jurisdiction, attribution, and responsibility. Turkey had submitted that all of the impugned acts were attributable to the TRNC and not to Turkey, and thus would not fall within Turkey’s jurisdiction. The Court seemed to accept that if the acts were attributable only to the TRNC, then Turkey’s responsibility could not arise.

The Court begins its analysis of “imputability” by stating, “As regards the question of imputability, the Court recalls in the first place that in its above-mentioned *Loizidou* judgment it stressed that under its established case-law the concept of ‘jurisdiction’ under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States,”¹⁶¹ again appearing to proceed on the assumption that jurisdiction is co-extensive with “imputability.”

“Accordingly,” the Court continues, “the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.”¹⁶² Here the Court refers to responsibility under the Convention, but this is, of course, a distinct question from that of attribution.

¹⁵⁷ Thus, the prosecution of the alleged perpetrators of the Lockerbie bombing by judges of a Scottish Court that sat in the Netherlands would bring the defendants within the jurisdiction of the UK for the purpose of applying the European Convention.

¹⁵⁸ *Loizidou v. Turkey (Preliminary Objections)*, at para 61.

¹⁵⁹ *Id.* Note that the Court formulates the question as whether “the matters complained of,” rather than the applicant, are capable of falling within Turkey’s jurisdiction. By using the term “matters,” the Court formulates the question at a greater level of abstraction, facilitating a finding of jurisdiction. Compare *Bankovic*, where the Court formulates the questions as “[w]hether the applicants and their deceased relatives came within the ‘jurisdiction’ of the respondent States within the meaning of Article 1 of the Convention.”

¹⁶⁰ *Id.*, at para. 64.

¹⁶¹ *Loizidou v. Turkey (merits)*, para. 52 (citations omitted).

¹⁶² *Id.*, at para. 52.

The Court's discussion seems to indicate that it is not using the term "imputable" in the sense of attribution, but in the sense of Convention responsibility (i.e. the issue of whether the conduct complained of gives rise to Turkey's responsibility under the Convention,¹⁶³ as opposed to whether that conduct is itself attributable to Turkey).¹⁶⁴ Thus, in citing the "the relevant principles of international law governing State responsibility," the Court seems to be referring not to the secondary rules of the general law of state responsibility, but to the primary rules of the law of state responsibility for injury to aliens.¹⁶⁵

After finding that Turkey, by virtue of its large military presence, was in effective overall control of northern Cyprus, the Court found that "[s]uch control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC'."¹⁶⁶ Again, it is unclear whether "entails her responsibility" refers to attribution.¹⁶⁷

Based on this finding, the Court views Turkey's "jurisdiction" expansively, holding that "[t]hose affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention."¹⁶⁸ The Court then concludes its analysis by stating, "[T]he continuous denial of the applicant's access to her property in northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's 'jurisdiction' within the meaning of Article 1 and is thus imputable to Turkey."¹⁶⁹ The Court's analysis is here reduced to a tautology. Since the conduct of the TRNC entails Turkey's responsibility, all those affected by its actions fall within Turkey's jurisdiction. Since these matters fall within Turkey's jurisdiction, they are "thus imputable to Turkey."

It could also be, however, that the Court is discussing two types of "imputability" in its analysis, referring alternately to attribution and Convention responsibility. Finding that the conduct of the TRNC was imputable (attributable) to Turkey made the matters complained of imputable to (giving rise to the Convention responsibility of) Turkey.

As noted above, the subsequent case of *Cyprus v. Turkey* supports the view that the Court's approach had been to find the conduct of the TRNC attributable to Turkey in the strict sense. Indeed, the Court appears to assimilate the TRNC to an organ of the Turkish government.

In that case, the Court draws a clear distinction between the TRNC and private individuals in northern Cyprus who may commit human rights violations. In response to Cyprus's claim that Turkey bore responsibility in relation to human rights violations perpetrated by private individuals, the Court made clear that this would be governed by a different standard than that applicable to violations perpetrated by the TRNC. With reference to responsibility in relation to violations committed by private individuals, the Court noted "that the acquiescence or connivance of the authorities of a Contracting State in the acts of

¹⁶³ For example, through a failure to fulfill a positive obligation in relation to those acts.

¹⁶⁴ The Court continues by indicating other situations in which state responsibility may arise

¹⁶⁵ Were it otherwise, the Court's formulation of special rules for imputability in these cases would be nonsensical. If imputability simply referred to attribution, there would be no need to circumscribe the situations in which the acts of a state's authorities would be imputable to the state. All conduct of a state's authorities is attributable to the state so long as those authorities are acting in their official capacity. Attribution of conduct is not dependent upon the relationship between the actor and those affected by the conduct. It could also be that the Court is blurring the distinction between these bodies of law.

¹⁶⁶ *Id.*, at para. 56.

¹⁶⁷ Note that the Appeals Chamber of the ICTY understood this finding as one of attribution, and cited it in support of its holding that "overall control" was sufficient to attribute the conduct of the Bosnian Serb Army to the then Federal Republic of Yugoslavia.

¹⁶⁸ *Id.*, at para. 56.

¹⁶⁹ *Id.*, at para. 57.

private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention."¹⁷⁰

Once again, the Court concludes, "subject to its subsequent considerations on the issue of private parties, that the matters complained of in the instant application fall within the 'jurisdiction' of Turkey within the meaning of Article 1 of the Convention and therefore entail the respondent State's responsibility under the Convention."¹⁷¹

The confusion becomes complete in *Ilascu*. Its consistent conflation of jurisdiction and responsibility poses a dilemma for the Court in analyzing the claims against Moldova. The applicants, physically situated within Moldovan territory, are clearly within Moldova's jurisdiction. However, the Court's conflation of jurisdiction with responsibility means that the Court cannot find that the applicants are within Moldovan jurisdiction without also finding that the matters complained of are "imputable" to Moldova, meaning either that the violations are attributable to Moldova or that Moldova has positive obligations in relation to those violations. The Court thus sets about determining the scope of Moldova's positive obligations in this context. It would be much clearer analytically if the Court had found that the applicants were within Moldova's jurisdiction. The Court could then deal separately, at a later stage of its analysis, with the question of whether Moldova was responsible for a violation of the Convention. In that later analysis, the Court could easily find that the acts of the MRT authorities, which are not organs of the Moldovan government, are not attributable to Moldova. This would leave only Moldova's positive obligations, which could then be assessed in light of the prevailing circumstances in Transdniestria.

In determining whether applicants are within the jurisdiction of the Russian Federation, the Court phrases the question as, "In the present case the Court's task is to determine whether . . . the Russian Federation can be held responsible for the alleged violations," again conflating responsibility and jurisdiction.¹⁷²

The Court proceeds to find the conduct of the MRT attributable to the Russian Federation, and then uses this finding to expand Russia's jurisdiction. By relying on its prior blurring of the distinction between attribution and responsibility, the Court is able to employ a lower standard for attribution. In the northern Cyprus cases, the Court based attribution of the conduct of the TRNC to Turkey on the fact that Turkey exercised effective overall control of that part of the island. While the Court in that case referred to the fact that the TRNC depended on Turkey for its survival, this alone was not sufficient for its conduct to be attributed to Turkey.

In recalling the standards developed in those cases, the Court notes, "In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention."¹⁷³ The Court continues, "That is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community."¹⁷⁴ It should be recalled, however, that "acquiescence or connivance" standard was employed by the *Cyprus v. Turkey* Court not in finding the TRNC's conduct attributable to Turkey, but rather in determining whether Turkey bore responsibility in relation to the human rights violations committed by private individuals in northern Cyprus.

¹⁷⁰ *Cyprus v. Turkey*, para. 81.

¹⁷¹ *Id.*, at para. 80. Note that the Court's merger of the scope of jurisdiction with that of responsibility makes it necessary to deal separately with the acts of private individuals.

¹⁷² *Ilascu*, at para. 377.

¹⁷³ *Id.*, at para. 318.

¹⁷⁴ *Id.*

The *Ilascu* Court appears to base its finding of attribution on the complicity of Russian soldiers, the military and political support provided by the Russian Federation, and the dependence of the MRT regime on this Russian support. Thus, the Court in *Ilascu*, while purporting to rely on established jurisprudence, in fact adopted a lower standard for attribution.

The European Court's jurisprudential gymnastics evince an effort to simulate coherence in the absence of a coherent analytical framework. However, it is possible to pull together the strands of jurisprudence of the various institutions examined above to create a framework that is analytically coherent, consistent with the central holdings of almost all of the cases, and faithful to the texts of the treaties.

V. Conclusions

In disaggregating the scope of application of human rights treaties into the three dimensions identified above and analyzing the relevant jurisprudence accordingly, it becomes clear that the phrase "within their jurisdiction" has a variable scope. If this scope is understood to encompass the range of individuals in relation to whom the states parties' obligations are applicable, as the texts of the treaties seem to indicate, then the practice of human rights bodies makes clear that the specific content of what human rights law requires in an extraterritorial context will vary depending upon the relationship between a given state party and an individual situated outside of that state party's territory.

In particular, it may be that negative obligations apply whenever a state acts extraterritorially¹⁷⁵ (at least with respect to intentional human rights violations, as opposed to indirect consequences), but that the degree of positive obligations will be dependent upon the type and degree of control (or power or authority) exercised by the state. This is not inconsistent with these institutions' general jurisprudence on positive obligations. 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 reasonableness,¹⁷⁶ such that the adoption of affirmative measures is only required when and to the extent that the relevant party *de jure* or *de facto* 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 treaties¹⁷⁷ and would vindicate the universal nature of human rights, which is proclaimed in the preambles of all of the human rights treaties considered in this analysis. 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,

¹⁷⁵ The phrase "acts extraterritorially" is meant to encompass acts outside the state's territory, as well as acts within the state's territory that infringe the rights of those situated outside of the state's territory.

¹⁷⁶ 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 *Velazquez-Rodriguez* case, the Inter-American Court of Human Rights noted that this obligation was not absolute; the standard is one of "due diligence." 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" (para. 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 also *Ilascu*.

¹⁷⁷ By not "dividing them up," in the words of the *Bankovic* Court.

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.

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.

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.”¹⁷⁸ 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.¹⁷⁹ Thus, for example, all states parties would be obliged to refrain from summarily executing individuals anywhere in the world. A state agent's extraterritorial act of summary execution would be sufficient to bring the victim within the “jurisdiction” of the state party to the extent necessary to apply that state's negative obligation to respect the right to life. However, the mere extraterritorial 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 ensure that individual's right to life from violation by a third party.¹⁸⁰

Finally, such an approach is supported by the text of the ICCPR. Specifically, the structure of Article 2(1) of the ICCPR supports the notion that negative obligations apply vis-à-vis all individuals everywhere, whereas positive obligations may have a more limited scope.

As noted above, article 2 of the ICCPR reads, “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...” 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.¹⁸¹ Thus, the provision may reasonably be read to oblige states parties 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.”¹⁸²

¹⁷⁸ *Bankovic*, at para. 75.

¹⁷⁹ *Id.*

¹⁸⁰ This would certainly 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.

¹⁸¹ It could even be argued that this is the most reasonable interpretation of the text, rendering recourse to the *travaux* unnecessary.

¹⁸² The structure of the American Convention on Human Rights even more readily lends itself to this interpretation. Article 1 of the American Convention provides that states parties undertake “to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination...” It would appear from the structure of the text that “all persons subject to their jurisdiction” modifies only the obligation to ensure rights. The text of the CRC, which provides “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination,” does not readily lend itself to this interpretation. Placing the scope language after the reference to the rights in the Covenant makes it more difficult to find that the limitation of scope applies only to the obligation to ensure. At the same time, this language differs from ICCPR in two respects. First, as with the AHCR and ECHR, there is no mention of territory. Second, the CRC refers to “their” jurisdiction, making it easier to argue that Convention is applicable to all children within any state party's jurisdiction. Of course, the counter argument

Ultimately, the question of what interpretation to adopt is underpinned by the more general question of the nature and purpose of human rights law. If human rights have a universal character and if the purpose of human rights law is to impose upon states obligations that correspond to those rights, then the most appropriate interpretation is that which regulates the conduct of states with respect to all human beings.

would be that since “jurisdiction” is singular, this refers to each state’s respective jurisdiction. Alternatively, one could argue that this is merely a reference to jurisdiction in the collective sense (i.e., within their collective jurisdiction). Finally, the establishment of different scopes of application for negative and positive obligations does not derive support from Article 1 of the European Convention as that treaty uses only the term “secure,” as opposed to the subdividing into “respect” and “ensure.” Nonetheless, as indicated above, the Court has consistently recognized a distinction between positive obligations and negative obligations, employing a different analysis to these different types of obligation.