

6-1-2007

# Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context

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## Recommended Citation

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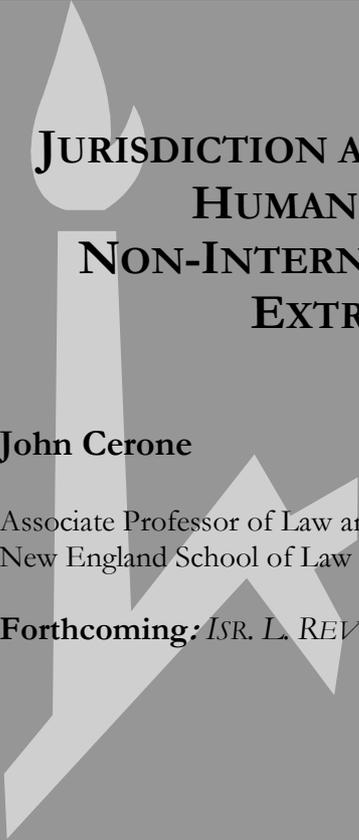
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**JURISDICTION AND POWER: THE INTERSECTION OF  
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**Forthcoming:** *ISR. L. REV.* Vol. 40, No.2, pp. 72-128, 2007

**Research Paper No. 12-07  
August 2007**

July, 7, 2007

Published by the International Law Forum of the Hebrew  
University of Jerusalem Law Faculty

Editor: Dr. Tomer Broude  
Assistant Editor: Itamar Morad

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# JURISDICTION AND POWER: THE INTERSECTION OF HUMAN RIGHTS LAW & THE LAW OF NON-INTERNATIONAL ARMED CONFLICT IN AN EXTRATERRITORIAL CONTEXT

*John Cerone\**

## ABSTRACT

The events of recent years have prompted a closer examination of the legal complexities arising from transnational armed conflicts pitting a state against a non-state organized armed group based outside the state's territory. For much of the Twentieth Century it remained unclear whether human rights law apply to a state's conduct during armed conflict or occupation. Despite continuing objections on the part of a handful of states, a consensus is evolving in favor of the view that human rights law applies in full alongside humanitarian law.

Once it is settled that human rights law does not cease to apply by reason of the inception of a state of armed conflict, it is easy to see how this body of law would apply alongside humanitarian law in an internal armed conflict. The situation becomes more complex, however, when a state is engaged in a non-international armed conflict taking place outside of that state's territory.

Unlike human rights law, the law of armed conflict was designed to apply primarily in an inter-state context. Thus, the vast majority of its provisions clearly apply to a state's extraterritorial conduct, specifically in the territory of the opposing state. But what of that branch of humanitarian law that developed to regulate non-international (i.e., non-inter-state) armed conflict? Recently, controversy arose as to whether Common Article 3 applies only to internal conflicts. The question of the extraterritorial application of Common Article 3 must be examined in light of the more general evolution in humanitarian law in favor of recognizing rights of individuals as such.

There has been a substantial degree of convergence between the law of international armed conflict and the law of non-international armed conflict. A result of this convergence has been that individuals involved in a non-international armed conflict can now benefit from many of the protections once available only in the context of inter-state conflicts.

At the same time, some have relied on this convergence to extend to non-international armed conflicts not only the prohibitions of the law of international armed conflict, but also, controversially, authorizations. In any event, notwithstanding continuing controversy over its content, there seems to be a general consensus supporting the proposition that the law of non-international armed conflict applies extraterritorially. As noted above, demonstrating the applicability of humanitarian law outside of a state's territory is facilitated by the fact that the bulk of the law of armed conflict was designed to apply in an interstate context, presupposing that states would be acting on each other's territory. That some of these rules are now deemed to apply even in an internal setting does not lessen the presumption that they will still apply extraterritorially, at least insofar as they consist of prohibitions and do not purport to impose obligations on third states.

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The situation is more complex under human rights law, which was not primarily designed to apply extraterritorially. In order to ascertain whether human rights law is applicable in the context of transnational conflicts with non-state groups, it is essential to consider the extent to which human rights law is applicable in relation to individuals outside the state's territory.

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 abroad?

Thus, it would seem that there may be an identifiable trend toward recognizing varying levels of obligation. In particular, it may be that negative obligations apply whenever a state acts extraterritorially (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. 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. This approach would preserve the integrity of the respective treaties 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. From its inception, the international law of armed conflict followed the projection of power. The *jus in bello* would apply to armed conflicts irrespective of physical location, so long as opposability as between the warring parties was satisfied. The same could be said of the law of state responsibility for injury to aliens. While the application of both bodies of law clearly extended beyond the state's jurisdictional reach, neither could penetrate into the sphere of the state's domestic jurisdiction in the narrowest sense. Human Rights law was developed to fill that gap.

But just as humanitarian law ultimately began to press inward against that external membrane of a state's domestic jurisdiction, human rights law has now begun to exert outward pressure against the inner wall of the state's jurisdiction. Indeed, these two processes - of inward penetration and outward projection - can be seen along a single continuum with a common seam. That seam is manifested in the structural evolution of the international legal system that was consolidated in the years immediately following World War II. The principal structural development of that period was the emergence of the individual human being as a subject of international law, capable of bearing international rights and duties.

This structural development corresponded to a coalescence of values around a principle conceived as transcendental and universal - human dignity. Recognition by the newly re-conceived international community that the dignity of the individual human being was something entitled to legal protection led to the transformation of this principle into positive law. It is this conception of human rights as both transcendental and universal that pushes against the concept of jurisdiction - pushing simultaneously into the domestic sphere and out of it - and underscores both its artificiality and diminished existence. It is this conception, far more than the force of legal reasoning from positive law that has enabled both human rights law and humanitarian law to grasp the outer and inner reaches of the power of the state.

To the extent these rules are designed to protect individuals from abuses of state power, realization of that design entails application coextensive with the projection of that power. While the exact contours of their application may not be settled, the traditional principles of good faith and reasonableness in the circumstances provide ample guidance for shaping those contours.

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# 1. INTRODUCTION

The events of recent years have prompted a closer examination of the legal complexities arising from transnational armed conflicts pitting a state against a non-state organized armed group based outside the state's territory. These conflicts do not fit neatly into the traditional inter-state structure of the international legal system.

From the inception of the Westphalian system, the sovereign equality of states and the related principle of non-intervention were paramount, and international law largely consisted of a network of reciprocal obligations that focused almost exclusively on inter-state relations. The past century, however, has witnessed significant erosion of the principle of non-intervention, once considered to shield a state's internal conduct from external scrutiny. As a result, international norms, particularly in the areas of human rights law and the law of armed conflict,<sup>1</sup> have increasingly penetrated the domestic sphere.

The horrors of the Second World War precipitated rapid legal developments in this regard. The prosecution of Crimes against Humanity at Nuremberg and Tokyo, the adoption of the Genocide Convention and the Universal Declaration of Human Rights, and the inclusion in the 1949 Geneva Conventions of rules applicable in non-international armed conflicts all demonstrated that international law was no longer concerned exclusively with inter-state conduct.

In the decades to follow, the substance of both human rights law and the law of armed conflict would become normatively enriched, providing a substantial legal framework for the regulation of internal armed conflicts. But can these norms, having penetrated the domestic sphere and, arguably, adapted to that context, apply beyond that sphere such that they would regulate a transnational, non-interstate armed conflict?

The purpose of this article is to outline the issues underlying this question, and to provide a framework for answering it. As a preliminary matter, Section II examines the

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<sup>1</sup> Human rights law and humanitarian law (i.e. the law of armed conflict) are separate bodies of international law with distinct modes of application. While human rights law is primarily concerned with the way a state treats those within its domain, "[h]umanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities." ICTY: Prosecutor v. Kunarac, Kovac, and Vukovic, Case no. IT-96-23-T and IT-96-23/1, Trial Chamber II, Judgment, para. 470 (February 22, 2001). Other distinctions between human rights and humanitarian law include the subjects of obligations, the institutions competent to determine violations, the period of application, the scope of beneficiaries, the locus of application, the range of rights protected, and the sources of obligations.

relationship in general between human rights law and international humanitarian law. Section III explores the application of the law of non-international armed conflict in an extraterritorial context. Section IV delineates a framework for understanding the application of human rights law<sup>2</sup> in relation to individuals outside of a state's territory. Section V examines the intersection of values and structural developments that guided the evolution of these bodies of law. Section VI concludes the analysis by discussing implications of the present legal framework and suggesting principles to guide future jurisprudential development.

## **2. THE RELATIONSHIP BETWEEN HUMAN RIGHTS LAW AND HUMANITARIAN LAW IN TIMES OF ARMED CONFLICT**

For much of the Twentieth Century it remained unclear whether human rights law would apply to a state's conduct during armed conflict or occupation, with some states having taken the position that these situations were governed by the *lex specialis* of humanitarian law, to the exclusion of human rights law. Others took the position that human rights law applied in full alongside humanitarian law. In support of their position, they noted that the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties contain provisions permitting derogation from certain obligations in times "of public emergency which threatens the life of the nation," the inclusion of which implicitly recognizes that human rights law applies to all situations, subject to the possible derogation from certain obligations.<sup>3</sup>

Despite continuing objections on the part of a handful of states, a consensus is evolving in favor of this latter view. As stated by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*: "The Court

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<sup>2</sup> This refers to international human rights law in the strict sense (i.e. not including humanitarian law and international criminal law). The present analysis will focus on the International Covenant on Civil and Political Rights [hereinafter ICCPR], the International Covenant on Economic, Social, and Cultural Rights, and their regional counterparts. Reference will also be made to relevant customary human rights law.

<sup>3</sup> International Covenant on Civil and Political Rights, U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), art. 4. While states may derogate from certain human rights obligations when faced with a public emergency, strict limitations apply.

observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”<sup>4</sup>

This position is shared by the Inter-American Commission on Human Rights (IACHR)<sup>5</sup> and the Human Rights Committee,<sup>6</sup> and has been echoed in political fora as well.<sup>7</sup>

As the ICJ clarified in a subsequent opinion: “[T]here are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”<sup>8</sup>

In situations where these branches of international law overlap, the ICJ,<sup>9</sup> the IACHR,<sup>10</sup> and the Human Rights Committee<sup>11</sup> have all concluded that the application of human rights law in times of armed conflict or occupation must be informed by the standards of humanitarian law. Thus, after noting that the “right not arbitrarily to be deprived of one’s life” is non-derogable, the ICJ explained:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be

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<sup>4</sup> Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226 (July 8), at, para. 25 [hereinafter *Nuclear Weapons* case].

<sup>5</sup> See *Coard et al. v. the United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/ser, I./R./109/99 ¶ 39 (1999). Given the pervasive phenomenon of cross-fertilization among international fora, particularly among human rights fora, it is not uncommon to cite jurisprudence from regional fora as precedent for universal regimes. Regional practice is also particularly useful since the regional institutions, the combined membership of which comprises a large proportion of UN member states, tend to be more active, and thus have broader bases of experience within their spheres of competence.

<sup>6</sup> Human Rights Committee, General Comment No. 31 [80]: Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004) [hereinafter General Comment No. 31]. *Concluding Observation of the Human Rights Committee*, Israel, ¶ 11, CCPR/CO/78/ISR (Aug. 21, 2003).

<sup>7</sup> See Security Council Resolution 1265, ¶ 4, U.N. Doc. S/RES/1265 (Sept. 17, 1999).

<sup>8</sup> *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 I.C.J. 163, (July 9), at para. 106 [hereinafter *Wall* opinion].

<sup>9</sup> *Id.* at para. 106.

<sup>10</sup> See *Coard v. the United States*, *supra* note 5.

<sup>11</sup> See General Comment No. 31, *supra* note 6, at para. 11.

decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>12</sup>

Once it is settled that human rights law does not cease to apply by reason of the inception of a state of armed conflict, it is easy to see how this body of law would apply alongside humanitarian law in an internal armed conflict. As noted by the Commission in the *Abella* case, “It is, moreover, during situations of internal armed conflict that these two branches of international law most converge and reinforce each other.”<sup>13</sup>

The situation becomes more complex, however, when a state is engaged in a non-international armed conflict taking place outside of that state’s territory.

### **3. THE LAW OF NON-INTERNATIONAL ARMED CONFLICT IN AN EXTRATERRITORIAL CONTEXT**

Unlike human rights law, the law of armed conflict was designed to apply primarily in an inter-state context. Thus, the vast majority of its provisions would clearly apply to a state’s extraterritorial conduct, specifically in the territory of the opposing state. But what of that branch of humanitarian law that was developed to regulate non-international (i.e., non-inter-state) armed conflict?

Any consideration of the application of the law of non-international armed conflict in an extraterritorial setting must begin with an understanding of how this body of international law evolved.

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<sup>12</sup> *Nuclear Weapons* case, *supra* note 4, at para. 25.

<sup>13</sup> Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/ser.L/V/II.95 doc. 7 rev. at 271, at ¶ 160 (1997).

### **3.1 The Development of the Law of Non-International Armed Conflict**<sup>14</sup>

The early codifications of humanitarian law were embedded in the classical inter-state structure of the international legal system. Since non-international conflict refers to a dispute other than one between states, it was traditionally not the concern of international law. Further, the paradigm case of non-international armed conflict is internal conflict, e.g., a civil war. The principle of non-intervention generally prevented international regulation of such conflicts.<sup>15</sup>

The Hague Conventions of 1899 and 1907, for example, applied only to inter-state conflicts<sup>16</sup> and protected individuals only to the extent they were objects of the adversary. The law was reciprocity based, and applied exclusively to conflicts in which all states engaged in the conflict were also parties to the Conventions.<sup>17</sup> Thus, the Hague Conventions could not apply as such during World War II, even as between states parties to the Conventions, since some of the belligerents had not become parties to those Conventions.<sup>18</sup>

While the 1949 Geneva Conventions marked significant advances over the Hague Conventions, they were still primarily concerned with inter-state armed conflict. Common Article 2 of the 1949 Geneva Conventions provides that “the present Convention shall apply to all cases of ... armed conflict which may arise between two or more of the High Contracting [state] Parties.” However, the adoption of the 1949 Conventions also yielded the first treaty provision expressly regulating non-international armed conflict. Common Article 3 of the Conventions applies to “armed conflict[s] not of an international character

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<sup>14</sup> The present analysis focuses on the law of non-international armed conflict as set forth in Common Article 3 of the Geneva Conventions. It does not encompass the Additional Protocols to the 1949 Conventions, which have different thresholds for application.

<sup>15</sup> Some degree of international regulation may have been entailed under the pre-UN Charter law of neutrality. In particular, where insurgent groups reached a certain critical mass, they could possibly achieve belligerent status, imposing a duty of neutrality on other states. However, this regulation itself flowed from the principle of non-intervention.

<sup>16</sup> However, the ICTY has held that the basic rules of these Conventions have since evolved through customary law to apply to non-international conflicts as well. Prosecutor *v.* Tadic, Case No. IT-94-1, ICTY Appeal Decision, para. 127 (Oct. 2, 1995) [hereinafter Tadic Appeal Decision].

<sup>17</sup> See, e.g., Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 2, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague Convention IV]. (“The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.”)

<sup>18</sup> However, certain norms of the Hague law had by that time acquired the status of customary law, and were applicable as such.

occurring in the territory of one of the High Contracting Parties.” It is the only substantive provision in the Conventions that applies in non-international armed conflict, and protects only against the most serious abuses.<sup>19</sup>

While neither the Hague Conventions nor the Geneva Conventions define the phrase “armed conflict,” definitions for both international and non-international armed conflict have been set forth in international jurisprudence. According to the jurisprudence of one international criminal court, an armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>20</sup>

A peculiar feature of the law of non-international armed conflict is its application to non-state groups. As noted above, the traditional subject of international law is the state. Common Article 3, however, binds both states and non-state groups engaged in non-international conflicts.

Another significant feature of the law of non-international armed conflict is the way in which it is framed. Common Article 3 does not speak in terms of authorization, but only in terms of prohibition. As only one state is typically involved<sup>21</sup> in a non-international armed conflict, there can be no exchange of rights and duties among states. For example, while the law of inter-state armed conflict authorizes the conflicting states to detain enemy combatants for the duration of hostilities, no analogous provision exists in the law of non-international armed conflict. As the central case of non-international armed conflict is an internal conflict, such authorization is unnecessary. Of course the state is free to detain insurgents operating within its territory.

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<sup>19</sup> Under Common Article 3, “the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to” persons “taking no active part in the hostilities,” including those placed hors de combat:

- (a) Violence to life and person in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>20</sup> Tadic Appeal Decision, *supra* note 16, at para. 70.

<sup>21</sup> Of course more than one state could be battling the same non-state group. However, this would not alter the nature of the conflict as long as the states were not in conflict with each other.

Related to this is the absence of the combatant's privilege. In international armed conflict, privileged combatants<sup>22</sup> are permitted to engage in acts which would otherwise be regarded as criminal, e.g. murder, so long as those acts do not violate the law of armed conflict. They are thus immune from prosecution for such acts. In addition, upon capture, they are entitled to prisoner-of-war treatment. This privilege exists only in international armed conflict.<sup>23</sup>

Thus, non-state combatants in a non-international armed conflict may be prosecuted for all hostile acts, including violations of ordinary domestic law, irrespective of whether they have violated any norms of international law. In addition, they cannot be entitled to prisoner of war status, since such status does not exist in the law of non-international armed conflict. It is for these reasons that Common Article 3 specifically prohibits “[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” it being understood that the state has the power to prosecute the insurgents for all of their hostile acts. In the context of an internal armed conflict, the state would indisputably have jurisdiction to prosecute.

However, this equation is altered if such a conflict spills out onto the territory of another state.

### ***3.2 Common Article 3 in a Transnational Setting***

The text of Common Article 3 provides little guidance as to whether it was intended to apply outside of a state's territory. It could be argued that use of the term “non-international,” instead of internal, was a conscious choice intended to ensure that all armed conflicts were covered. Under that reading of “non-international” armed conflict, the phrase would encompass any armed conflict other than one that was international in the sense of

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<sup>22</sup> The term “enemy” combatant simply means that the person is a combatant who is fighting on behalf of the enemy. It does not denote privileged status or lack thereof. The legally meaningful distinction is between “privileged” and “unprivileged” (sometimes described as “lawful” and “unlawful”) combatants, the test for which is set forth in Article 4 of the Third Geneva Convention.

<sup>23</sup> While the International Criminal Tribunal for the former Yugoslavia has held that much of the law of international armed conflict, including the basic rules of the Hague Conventions, has evolved through customary law to apply to non-international armed conflicts as well, it is unlikely that the combatant's privilege would have similarly evolved given the direct and substantial threat it would pose to state sovereignty.

Common Article 2 (i.e. interstate). This position rests on the logic of the Convention regime in the context of the international legal system. If Common Article 3 would apply even in the context of a purely internal conflict, then a fortiori it would apply to a conflict with a transnational dimension, in which the principle of non-intervention would have less force.

However, some have focused on the phrase “occurring in the territory of one of the High Contracting Parties,” arguing that the plain meaning of this language would limit the application of Common Article 3 to internal conflicts. This reading comports with the notion that the provisions of Common Article 3 were drafted against the backdrop of state authority and jurisdiction over the battlefield, an authority and jurisdiction which would not exist (or would exist to a much lesser extent) outside of the state’s territory.

The International Court of Justice seems to have adopted the former reading of Common Article 3. In *Nicaragua v. U.S.*, after noting that Common Article 3 applies in conflicts not of an international character, the ICJ stated that there was:

no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity.’<sup>24</sup>

This position has also been adopted by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia. In its 1995 *Tadic Appeal Decision*, the Chamber noted that the ICJ had “confirmed that these rules reflect ‘elementary considerations of humanity’ applicable under customary international law to any armed conflict, whether it is of an internal or international character.”<sup>25</sup> It therefore held that, “at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.”<sup>26</sup> These authorities seem to have interpreted the phrase “conflict not of an international character” as being residual, covering any armed conflict that is not inter-state. They thus have held that

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<sup>24</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), at para. 218 (citing *Corfu Channel*, Merits, ICJ Reports 1949, at 22). Although the Court ultimately refrained from characterizing the conflict in which the US was engaged in Nicaragua, it held that Common Article 3 would apply in any event as a minimum yardstick for all armed conflicts. It thus clearly took the position that Common Article 3 applies beyond a state’s territory.

<sup>25</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction), para. 102 (Aug. 10, 1995).

<sup>26</sup> *Id.*, at para. 102.

the standards of Common Article 3 have evolved into a baseline of legal protection applicable in all armed conflicts, whether international or non-international.

This question arose recently in a case before the US Supreme Court. In *Hamdan v. Rumsfeld*,<sup>27</sup> the Supreme Court held that Common Article 3 regulated US conduct in relation to an alleged Al-Qaeda affiliate captured in the context of a transnational armed conflict. Hamdan was captured in Afghanistan in November 2001 in the course of the armed conflict between the US and the then de facto government of Afghanistan. The law of armed conflict clearly applies to that conflict, and the US government accepts this position.<sup>28</sup> In the Supreme Court, the US government had taken the position that there were in fact two simultaneous conflicts occurring in Afghanistan. One conflict was between the US and the Taliban (fighting on behalf of Afghanistan, a state party to the Geneva Conventions), and the other was a separate conflict with Al-Qaeda. It regarded the former as an international armed conflict to which the Geneva Conventions were applicable. However, it asserted that the Conventions, including Common Article 3, could not be applied to the conflict with Al-Qaeda. The US took the position that Common Article 3 applies only to internal armed conflicts.<sup>29</sup> Because the conflict with Al-Qaeda was transnational in nature, it was neither interstate nor internal.<sup>30</sup> Essentially, the US posited a gap in the application of the Conventions—that there were some armed conflicts to which no part of the Conventions could apply. This position was endorsed by the majority in the US Court of Appeals for the DC Circuit in its July 2005 judgment in the same case.<sup>31</sup>

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<sup>27</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

<sup>28</sup> The US position seems to be somewhat broader. In a letter dated 31 January 2006, addressed to the Office of the High Commissioner for Human Rights, the Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva wrote, “The United States has made clear its position that it is engaged in a continuing armed conflict against Al Qaida, that the law of war applies to the conduct of that war and related detention operations. . .” Indeed, the US justifies its continued detention of the Guantanamo detainees by reference to the law of armed conflict. In replying to inquiries by UN and related human rights bodies about the legal basis for detaining the individuals at Guantanamo, the US has consistently asserted that “[t]he law of war allows the United States—and any other countries engaged in combat—to hold enemy combatants without charges or access to counsel for the duration of hostilities.” Response of the United States of America dated October 21, 2005 to Inquiry of the UNCHR Special Rapporteurs dated August 8, 2005 Pertaining to Detainees at Guantanamo Bay; *see also* Annex to Second Periodic Report of the United States to the Committee Against Torture, filed on May 6, 2005.

<sup>29</sup> It should be noted however that there has been within the US military a long standing policy giving a very broad read to Common Article 3, holding it applicable in a wide range of military operations.

<sup>30</sup> The US also took the position that the Geneva Conventions, as legally binding agreements between states, could not apply to the conflict with Al-Qaeda because the latter was not a party to the Conventions, reflecting its view of the inapplicability of the Conventions to transnational armed conflicts with non-state groups.

<sup>31</sup> *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

The Supreme Court had a range of options before it. If it viewed the situation in Afghanistan as one single international armed conflict, the entire regime of the 1949 Conventions would be applicable. It would then have had to deal separately with the question of Hamdan's individual status in order to determine which protections he would receive under the Conventions. If it viewed it as a single non-international armed conflict, e.g., by reasoning that the US intervened in an ongoing non-international armed conflict with the consent of the *de jure* government, or if it took the view that there was a separate conflict with Al-Qaeda, it would have to determine whether Common Article 3 applies to such conflicts.

Ultimately, the Court chose not to take a position on whether there were two separate conflicts, and refrained from characterizing the nature of the conflict(s). It adopted the position that “there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories”—Common Article 3.<sup>32</sup> The Court reasoned that the “term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations,” essentially adopting the residual view of Common Article 3. It found that this provision:

affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory [state] who are involved in a conflict ‘in the territory of’ a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase ‘not of an international character’ bears its literal meaning.<sup>33</sup>

Despite its strenuous objections in the *Hamdan* case, the US Government has since accepted the applicability of Common Article 3 to transnational armed conflicts with non-state entities. In light of the *Hamdan* judgment, the Office of the US Secretary of Defense, in a memorandum dated July 7, 2006, requested Defense Department leadership to ensure that all Department personnel adhere to the standards of Common Article 3, and to “promptly

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<sup>32</sup>It reserved judgment on whether other provisions of the Conventions were applicable. By taking this position, the Court essentially also adopted the position taken by the International Court of Justice that Common Article 3 is a “minimum yardstick” for all armed conflicts, international or non-international. *See Nicaragua v. USA*, *supra* note 24, at para. 218.

<sup>33</sup>*Hamdan v. Rumsfeld*, *supra* note 27, at the opinion of Judge Stevens, para. 4.

review all relevant directives, regulations, policies, practices, and procedures” to ensure that they comply with these standards. The memorandum noted that “[t]he Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda.”<sup>34</sup>

### ***3.3 The Evolution of Humanitarian Law***

The question of the extraterritorial application of Common Article 3 must also be examined in light of the more general evolution in humanitarian law in favor of recognizing rights of individuals as such.

One of the most significant international legal developments of the 20th century was the universal recognition that the protection of human dignity is a proper concern of international law. While this development is seen most clearly in the great corpus of human rights law created since the conclusion of the Second World War, parallel developments may be discerned in the evolution of humanitarian law as well.

As noted above, the Hague Conventions were drafted rigidly along the lines of the inter-state system. The language of those Conventions was language of prohibition and obligation, as opposed to rights-based language. For example, rather than providing POWs with a “right” to humane treatment, the Fourth Hague Convention requires that POWs be “humanely treated.”<sup>35</sup> In the event of breach, the only remedy provided for in that Convention is inter-state compensation.<sup>36</sup>

By 1949, humanitarian law began to embrace the language of rights. This approach is exemplified in Article 8 of the Fourth Geneva Convention, which provides that “[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.” The Geneva Conventions also prohibit reprisals against protected persons, emphasizing a further deviation from the classical reciprocity-based system. Nonetheless, the Conventions retained some of the baggage of

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<sup>34</sup> July 7, 2006 memo entitled, “Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense,” the Office of the US Secretary of Defense. It should be noted that although the holding of the Supreme Court in *Hamdan* was limited to the facts of that particular case (i.e. an individual detained in the course of the US invasion of Afghanistan), the Memorandum indicates a broader reading of the Court’s holding—that Common Article 3 applies to the conflict with Al Qaeda.

<sup>35</sup> Fourth Hague Convention, *supra* note 17, Annex, Article 4.

<sup>36</sup> *Id.* at Article 3.

the Westphalian system. The bulk of the protections of the Fourth Convention were afforded only to the nationals of the enemy State, preserving a degree of reciprocity.<sup>37</sup> By 1977, however, the drafters of Protocol I had recognized that human dignity demanded that all victims of conflict be provided with certain basic protections irrespective of nationality. Article 75 of Protocol I essentially encapsulates human rights law, providing basic rights to individuals even *vis-à-vis* their own government. Article 75 represents the complete abandonment of the nationality test, and the shedding of reciprocity at least with regard to protecting the fundamental rights of human beings.

While many of the above-mentioned provisions would not by their terms apply in a non-international armed conflict, they demonstrate an overall trend in humanitarian law toward recognition of the good of protecting individuals as such. Indeed, this recognition has led to an ever-increasing pool of humanitarian norms that have been deemed by international courts to have evolved through custom such that they now apply to non-international conflicts.

As noted below in the context of human rights law, the more focused the law becomes on the protection of individual human beings, the less justified formal distinctions become in ascertaining eligibility for this protection.

### **3.4 Implications of the Convergence of the Law of International and Non-international Armed Conflict**

There has been a substantial degree of convergence between the law of international armed conflict and the law of non-international armed conflict. A result of this convergence has been that individuals involved in a non-international armed conflict can now benefit from many of the protections once available only in the context of inter-state conflicts. For example, the Rome Statute criminalizes in the context of non-international armed conflict violations of many of the basic rules enshrined in the Hague Conventions. These rules include, *inter alia*, the prohibitions on: the denial of quarter, pillage, the employment of

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<sup>37</sup> See, e.g., Geneva Convention (IV), Article 4, *supra* note 19.

certain types of weapons, and the killing or wounding treacherously of a combatant adversary.<sup>38</sup>

At the same time, some have relied on this convergence to extend to non-international armed conflicts not only the prohibitions of the law of international armed conflict, but also authorizations. From the initiation of the “War on Terror,” the US government has consistently asserted that the “law of war”<sup>39</sup> authorizes the detention of enemy combatants.

The traditional understanding of the law of non-international armed conflict was that it contained only prohibitions. While the law of international armed conflict affords to privileged combatants a privilege to kill and detain enemy combatants, this would not apply in a non-international armed conflict. Certainly states would not want to extend to insurgent groups authorization to engage in hostilities or to detain or kill members of the state’s forces. The states themselves, having sovereignty over their territory, would require no international authorization to use force in the context of internal conflicts.<sup>40</sup>

However, where a state acts on the territory of another state, the state, in general, cannot invoke its own sovereign authority. In the context of an international armed conflict, the combatants’ privilege serves a function in the place of this authority. The privilege would apply reciprocally, and neither state could prosecute lawful acts of war committed by privileged enemy combatants, jurisdictional competence otherwise notwithstanding. In a non-international armed conflict, no such privilege has been traditionally understood to exist. Thus, hostile acts committed by a state’s forces against members of a non-state group on the territory of another state would not be privileged or otherwise authorized.<sup>41</sup>

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<sup>38</sup> Rome Statute of the International Criminal Court, 1 July 2002, 2187 U.N.T.S. 3. *See* Article 8.

<sup>39</sup> While the US Government has frequently invoked the “law of war” to justify its conduct in recent years, the meaning of that phrase within the US legal system is unclear. First, it may refer to the international law of armed conflict as such. Second, it could refer to this same body of international law as it is understood within the US legal system (i.e. as interpreted by those empowered under US law to do so). Or, third, it could refer to the second category as supplemented or modified by other related US law, including common law, legislation, and other legal instruments.

<sup>40</sup> Certain rules of international law would, of course, operate to restrain that use of force.

<sup>41</sup> Some have argued that in the post-9/11 world, the right of self-defense could authorize incursions into a state’s territory for the purpose of defending against an armed attack by a non-state group operating within that other state’s territory. Even if this argument could be accepted as a basis for absolving the state of responsibility for an otherwise internationally wrongful act, this issue would be legally distinct from the question of whether the conduct of the state’s forces was privileged as against application of the territorial state’s domestic law. While the territorial state could of course grant such a privilege, it is highly unlikely that this would be required by international law.

Nonetheless, the present US Administration appears to take the position that the law of armed conflict provides authority to detain and kill members of Al Qaeda even on the territory of third states.<sup>42</sup> To bolster its position, it could point to the increasing penetration of the law of international armed conflict into the realm of non-international armed conflict.

However, there is a key difference with respect to those norms that have been found by international criminal courts to have evolved into the law applicable in non-international conflicts. To date, only prohibitions have been found to have so evolved. These duties to refrain from certain conduct impose negative obligations upon states. It is quite another thing to assert the existence of a right to act on the territory of another state in the absence of that state's consent.

In any event, notwithstanding continuing controversy over its content, there seems to be a general consensus supporting the proposition that the law of non-international armed conflict applies extraterritorially. As noted above, demonstrating the applicability of humanitarian law outside of a state's territory is facilitated by the fact that the bulk of the law of armed conflict was designed to apply in an interstate context, presupposing that states would be acting on each other's territory. That some of these rules are now deemed to apply even in an internal setting does not lessen the presumption that they will still apply extraterritorially, at least insofar as they consist of prohibitions and do not purport to impose obligations on third states.

The situation is more complex under human rights law, which was not primarily designed to apply extraterritorially.

#### **4. THE APPLICATION OF HUMAN RIGHTS LAW IN RELATION TO INDIVIDUALS OUTSIDE THE STATE'S TERRITORY**

In order to ascertain whether human rights law is applicable in the context of transnational conflicts with non-state groups, it is essential to consider the extent to which human rights law is applicable in relation to individuals outside the state's territory.

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<sup>42</sup> Such authority could of course be conferred by the territorial state, subject to certain limitations. However, the Bush administration seems to claim that it would have such authority even in the absence of the territorial state's consent.

As noted above, prior to the development of human rights law, international law was concerned almost exclusively with states' external conduct. The notion that international law took cognizance of and regulated a state's conduct on the territory of other states and toward foreign nationals<sup>43</sup> was established long before the Universal Declaration of Human Rights was adopted. However, abuses committed within a state's territory and against its own nationals were virtually invisible to international law. Human rights law thus filled a serious gap by regulating the way a state treated its own people.

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, international and regional human rights institutions 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 abroad?

In order to answer this question, it is essential to closely examine the content and scope of application of human rights obligations.

### **1. The Content of Human Rights Obligations—"to Respect and to Ensure"**

Human rights law generally binds states, and states alone. Human rights treaties, such as the ICCPR, place responsibility for "respecting and ensuring" human rights squarely upon states

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<sup>43</sup> This included violations perpetrated against foreign nationals abroad. See M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW (1937).

parties.<sup>44</sup> Thus, only conduct<sup>45</sup> attributable to the state can constitute an internationally wrongful act under these treaties, and only the state can be held responsible on the international plane for such violations. However, this is not to say that only acts of state officials can engage the international responsibility of the state under human rights law. Human rights law imposes positive obligations on states. Thus, the failure to act may also constitute a violation of human rights law.

Article 2(1) of the ICCPR states that “[e]ach State Party to the present Covenant undertakes *to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...”<sup>46</sup> In its General Comments, the Human Rights Committee has construed this provision to oblige states to protect the rights contained in the Covenant against non-state interference.<sup>47</sup> In General Comment 31, the Committee stated:

[h]owever the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against

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<sup>44</sup> ICCPR, *supra* note 3, at Article 2. While the preambles of the ICCPR and ICESR both speak of duties of individuals, no normative content for this language has been determined. The idea of duties under human rights law is generally employed in the context of permissible restrictions on rights made through, *e.g.*, claw-back clauses. *See* Article 19(3), ICCPR. Finally, although the African Charter on Human and Peoples Rights (ACHPR) sets forth duties in its operative text, these provisions have never been used by the African Commission to find individuals responsible for breaches of the Charter. Indeed, there are no procedures for alleging a breach of these duties. ACHPR, Adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, reproduced in 21 ILM 58 and came into force on October 21, 1986.

<sup>45</sup> Such conduct may consist of an action or omission. *See cf.* ILC Articles on Responsibility of States for Internationally Wrongful Acts, GA Res. 86/83, Annex, U.N. Doc. A/RES/86/83 (Dec. 12, 2001) at art. 2. . The rules of attribution set forth in the Articles are declaratory of existing customary international law.

<sup>46</sup> (Emphasis added J.C.) Customary law may entail a more limited level of obligation. It is unclear, for example, whether customary law requires states to “ensure” rights as that term has been interpreted by human rights mechanisms. For example, the US Restatement provides that a

“state violates international law when, as a matter of policy, it practices, encourages, or condones any of the following: 1. Genocide, 2. Slavery or slave trade, 3. Murder or causing the disappearance of individuals, 4. Torture or other cruel, inhumane, or degrading treatment or punishment, 5. Prolonged arbitrary detention, 6. Systematic racial discrimination, or 7. A consistent pattern of gross violations of internationally recognized human rights.

Restatement (Third) Of The Foreign Relations Law Of The Us: Protection Of Persons § 702 (1987). By limiting this obligation to situations when the State, “as a matter of policy, . . . practices, encourages, or condones” the violations, this passage may be read to exclude an obligation to take affirmative steps to prevent or respond to violations by non-State actors, an obligation which clearly obtains under the major human rights treaties.

<sup>47</sup> *See, e.g.*, General Comment No. 31, *supra* note 6. *See also* Human Rights Committee General Comments 6, 10, 16, 17, 18, 20, 21, 27, 28, and 31. Human Rights Committee General Comments are *available at* <http://www.ohchr.org/english/bodies/hrc/comments.htm> (last visited August 12, 2007).

violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights,<sup>48</sup> as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.<sup>49</sup>

The regional human rights institutions have similarly interpreted comparable provisions<sup>50</sup> in their respective treaties.<sup>51</sup>

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<sup>48</sup> Note that the Committee here risks conflating the distinction just drawn. The Committee would have been better advised to characterize such conduct as a failure to ensure rights as opposed to a violation of rights.

<sup>49</sup> General Comment 31, *supra* note 6, at para. 8.

<sup>50</sup> See American Convention on Human Rights American Convention on Human Rights, art. 1(1), July 18, 1978, O.A.S.T. S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter ECHR]. Article 1 of the European Convention requires the High Contracting Parties to "secure" the rights contained in the Convention. The European Court has interpreted article one to entail a scope of obligation similar to that encompassed by the phrase "to respect and to ensure" as interpreted by the Human Rights Committee. The African Commission on Human and Peoples Rights has gone farther, interpreting article 1 of the African Charter, which obliges states to "recognize" rights and to "adopt ... measures to give effect to them," to entail the obligations to respect, protect, promote, and fulfil the rights contained in the Charter. See Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria). Case No. ACHPR/COMM/A044/1, printed in Fifteenth Annual Activity Report of the African commission on Human and People's Rights 2001 available at [http://www.achpr.org/english/activity\\_reports/activity15\\_en.pdf](http://www.achpr.org/english/activity_reports/activity15_en.pdf).

<sup>51</sup> *Id.*; Velásquez-Rodríguez, Case, Inter-Am Ct. H.R. (Ser.C) No. 4 (1988); Applic. 15599/94, A v. U.K., report of 18 Sep. 1997; Eur. Ct. H.R.: Kiliç v. Turkey, Appl. No. 22492/93 (given March 28, 2000), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=22492/93&sessid=1757379&skin=hudoc-en> (last visited August 13, 2007); Nelson E. Jiménez v. Colombia, Inter-Am. C.H.R., Report No. 4/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 93 ¶ 7.2, 9 (1997). As stated by the *Velásquez-Rodríguez* Court, "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." *Velásquez-Rodríguez* case, at para. 172. The "due diligence" standard "has been generally accepted as a measure of evaluating a State's responsibility for violation of human rights by private actors." Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, E/CN.4/1995/42, para. 103 (citing Moore, Int. Arb. 495 (1872)). Application of the "due diligence" standard can be seen in the reports of UN special rapporteurs, UN special representatives, and the Secretary-General; comments, views, and concluding observations of human rights treaty bodies; reports on expert group meetings; resolutions of the Commission on Human Rights and the Economic and Social Council; Declarations by the General Assembly, and the writings of publicists. See John Cerone, *The Human Rights Framework Applicable to Trafficking in Persons and its Incorporation into UNMIK Regulation 2001/4*, 7 INT'L PEACEKEEPING: Y.B. INT'L PEACE OP. 43-98 (2002).

Thus, human rights violations committed by non-state actors may give rise to state responsibility even when there is no connection between the perpetrators and the state. The obligation to “ensure” rights under the major human rights treaties requires states to take reasonable, effective steps to prevent and to respond to human rights violations committed by non-state actors.

The obligation to respect rights and the obligation to ensure rights are governed by different standards. Thus, 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<sup>52</sup> 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.

Much of the jurisprudence on responsibility for preventing and responding to violations committed by non-state actors has developed in the context of non-state actors operating within the relevant state’s territory. It is unclear to what extent this interpretation of the obligation to ensure rights can be transposed to an extraterritorial context.

Thus, in examining the question of whether human rights law applies to a transnational armed conflict with a non-state group, a distinction may need to be drawn between negative and positive obligations. Any analysis of this issue must consider not only the state’s human rights violative conduct, but also whether the state, when acting abroad, is obliged to take steps to protect individuals located in the relevant territory from human rights violative conduct perpetrated by others, including the non-state group with which it is engaged in conflict.

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<sup>52</sup> 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.

## **2. The Scope of Application of Human Rights Obligations**

The scope of application of human rights law is not easily discerned. In an effort to bring order to an otherwise chaotic array of judicial (and quasi-judicial) decisions, this section will provide a framework for delineating the scope of human rights obligations by examining three different parameters: the scope of beneficiaries, the range of rights applicable, and the level of obligation. The scope of beneficiaries refers to those individuals whose rights must be respected and ensured by the relevant state (or other subject of obligation under human rights law).<sup>53</sup> 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.

It should be noted that the scope of obligation may vary depending upon whether the relevant source of law is treaty or custom, the terms of particular treaties, and, as well, the context in which the state is operating.

### **4.1 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.

A common feature of human rights treaties is that the scope of beneficiaries<sup>54</sup> (i.e., those whose rights the state is obliged to respect and ensure) is typically limited to those within a state's territory or subject to its jurisdiction.<sup>55</sup>

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<sup>53</sup> In general, as states are the typical subjects of obligations under human rights law, states are referred to throughout the analysis. However, in most contexts, intergovernmental organizations may also be included to the extent that they may be deemed subjects of obligations under human rights law. Thus, throughout this analysis "states" is used as short-hand for "subjects of obligations under human rights law."

<sup>54</sup> Use of the term beneficiaries is not intended to imply that individual human beings are not rights-holders under human rights law.

<sup>55</sup> Article 2(1) ICCPR, *supra* note 3; Article 1 ECHR, *supra* note 50; Article 1 ACHR, *supra* note 50. 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).

While it was initially unclear whether this language could encompass a state's conduct abroad, the extraterritorial application of human rights treaties has now been clearly established in the jurisprudence of several international judicial and quasi-judicial bodies.

### **1. The Approach of UN and UN-Related Institutions**

The Human Rights Committee has consistently held that the ICCPR can have extraterritorial applications,<sup>56</sup> 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."<sup>57</sup>

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."<sup>58</sup> 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 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

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<sup>56</sup> See, e.g., Concluding Observations of the Human Rights Committee: Israel. CCPR/CO/78/ISR, ¶ 11 (Aug. 21, 2003); Human Rights Committee, Comments on United States of America, U.N. Doc. CCPR/C/79/Add 50, ¶ 19 (1995); Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Iran (Islamic Republic of Iran), CCPR/C/SR.1253, ¶ 63 (July 30, 1993) .

<sup>57</sup> *Burgos/ Lopez v. Uruguay*, *supra* note 55, at para. 12.3. See also John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUR. J. INT'L L. 469 (June 2001). In *Burgos/Lopez v. Uruguay*, 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."

<sup>58</sup> General Comment No. 31, *supra* note 6, at para. 10.

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.<sup>59</sup>

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.<sup>60</sup>

The Committee's position was endorsed in part by the International Court of Justice in its 2004 Advisory Opinion on Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory. 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 (CROC) 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."<sup>61</sup> However, in contrast to the Human Rights Committee's broad reference to conduct by authorities "that affect [sic] the enjoyment of rights," the Court employed the more specific, and arguably circular, formulation "acts done . . . in the exercise of its jurisdiction."<sup>62</sup> It seems that the Court may have intended to establish a narrower standard in this respect.<sup>63</sup> The Court did not cite General Comment 31

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<sup>59</sup> *Id.*

<sup>60</sup> Observations on Israel, *supra* note 56.

<sup>61</sup> *Wall* opinion, *supra* note 8, at para. 111.

<sup>62</sup> *Id.*

<sup>63</sup> The scope of conduct that affects the enjoyment of rights would seem to be broader than the category of acts done in the exercise of a state's jurisdiction having such effects.

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.<sup>64</sup> 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 parties’ obligations,<sup>65</sup> 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.”<sup>66</sup> 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 CROC, the Court simply noted Article 2 of the CROC, 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.”<sup>67</sup> Given the absence of any separate analysis of

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<sup>64</sup> *Wall* opinion, *supra* note 8, at para 109.

<sup>65</sup> It should be noted, however, that the International Covenant on Economic, Social and Cultural Rights (1976), 993 U.N.T.S. 3 [hereinafter 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.

<sup>66</sup> 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.

<sup>67</sup> *Id.* at para. 113.

the CROC, it is unclear what standard the Court applied in finding that Convention applicable.<sup>68</sup>

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*.<sup>69</sup> 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 CROC.

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."<sup>70</sup> 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."<sup>71</sup> 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."<sup>72</sup>

Article 43 of the 1907 Hague Regulations states: "[t]he 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 ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." It thus

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<sup>68</sup> Given the similarity between Article 2 of the CROC 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 CROC contains economic and social rights as well as civil and political rights. *See infra*. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>69</sup> Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 116, para. 119 (Dec. 19) [hereinafter DRC v. Uganda].

<sup>70</sup> *Id.* at para. 166.

<sup>71</sup> *Id.* at para. 178.

<sup>72</sup> *Id.*

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,"<sup>73</sup> the Court considered a number of UN and 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."<sup>74</sup> 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..."<sup>75</sup> 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 *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."<sup>76</sup> It then found that the ICCPR, the ACHPR, the CROC and its Optional Protocol on Involvement of Children in Armed Conflict, as well as a number of IHL instruments were "applicable, as relevant, in the present case."<sup>77</sup> In view of its generalized factual findings, the Court found that Uganda had breached each of these treaties.

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<sup>73</sup> *Id.* at para. 205.

<sup>74</sup> *Id.* at 211.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 216.

<sup>77</sup> *Id.* at 217.

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.”<sup>78</sup>

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.<sup>79</sup>

Second, and directly related to the first, the Court made clear that human 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.<sup>80</sup> In the *Wall* opinion, the Court had found

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<sup>78</sup> *Id.* at 220.

<sup>79</sup> 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 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).

<sup>80</sup> This would not likely apply to suppression treaties such as the Convention Against Torture, 10 Dec. 1984, 1465 U.N.T.S. 85 [hereinafter CAT] to the extent such treaties could fall within the category of “international

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 CROC applicable in that Opinion, it seemed to adopt a slightly higher standard for the ICESCR, and possibly also for the CROC, as noted above. However, in restating this rule in *DRC v. Uganda*, the Court does not refer specifically to the ICCPR and states instead that:

*international human rights instruments* are applicable “in respect of acts done by a State in the exercise of its jurisdiction...”<sup>81</sup> It then appears to employ this standard in finding applicable the ICCPR, the CRC and its Option Protocol, and the ACHPR. Both the ACHPR and CRC provide for economic and social rights as well as civil and political rights.<sup>82</sup>

Ultimately, however, the *DRC 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 institutions<sup>83</sup> 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.<sup>84</sup>

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human rights instruments,” due to the different nature and mode of operation of such treaties. The scope limitation in CAT serves a different function and different parts of that treaty are subject to different scope limitations.

<sup>81</sup> *Id.* at para. 216.

<sup>82</sup> 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*, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=51&case=116&code=co&p3=0> (last visited July 20, 2007).

<sup>83</sup> The 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.” *See supra* note 50.

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 the exercise of power, authority, or control over the individuals whose rights have been violated.<sup>85</sup>

In *Alejandro v. Cuba*,<sup>86</sup> the Commission determined that Cuba had violated its human rights obligations when one of its military aircraft shot down two unarmed civilian light airplanes resulting in the deaths of the four occupants of those airplanes. In this case, there were no 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, the Cuban forces' "first and only response was the intentional destruction of the civilian airplanes and their four occupants."<sup>87</sup> 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"<sup>88</sup> 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.<sup>89</sup>

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<sup>84</sup> 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*.

<sup>85</sup> *See, e.g., Coard et al. v. the United States supra* note 5; *Alejandro v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. en 586 (1999); *Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures*, Inter-Am. C.H.R. (March 13, 2002).

<sup>86</sup> *Alejandro v. Cuba, supra* note 84.

<sup>87</sup> *Id.* at para. 8

<sup>88</sup> 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 J.C.). 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. *See infra*.

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 intentionally perpetrated by a state agent would fail to meet this test.<sup>90</sup>

*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,<sup>91</sup> as well as in certain other limited circumstances where agents of that state carry out a governmental function on the territory of another state.<sup>92</sup>

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*,<sup>93</sup> 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:

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<sup>89</sup> *Id.* at para. 25.

<sup>90</sup> However, the Inter-American Commission on Human Rights recently declined to communicate a petition alleging that conduct of US forces in Iraq violated Inter-American human rights law. The Commission did not provide reasons for rejecting the position, but it may have been due to the fact that the alleged violations occurred outside of the region. See John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, ASIL INSIGHT, (Oct. 2005), available at <http://www.asil.org/insights/2005/10/insights051025.html> (last visited Aug. 12, 2007). The European Court has also grappled with the issue of regionality. See John Cerone, *Out of Bounds? Considering the Reach of International Human Rights Law*, Working Paper No. 5, at 19 (2006), New York University School of Law Center for Human Rights and Global Justice [hereinafter *Out of Bounds*].

<sup>91</sup> *Cyprus v. Turkey*, 2001–IV Eur. Ct. H.R. 1 (GC).

<sup>92</sup> *Banković v. Belgium*, 2001–XII Eur. Ct. H.R. 333 (GC). 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.

<sup>93</sup> *W.M. v. Denmark*, App. No. 17392/90, 73 Eur. H. R. Rep. 193, (1992).

“... 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.”<sup>94</sup>

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.

The European Court of Human Rights initially appeared to employ a similarly broad understanding of jurisdiction.<sup>95</sup> 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),<sup>96</sup> the Court held:

[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.<sup>97</sup>

In the subsequent case of *Cyprus v. Turkey*,<sup>98</sup> 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.”<sup>99</sup> 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

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<sup>94</sup> *Id.* at para. 1.

<sup>95</sup> *See, e.g., Drozd and Janousek v. France and Spain*, 240 Eur. Ct. H.R. (ser. A) at 1 (1992).

<sup>96</sup> *Loizidou v. Turkey* 310 Eur. Ct. H.R. (ser. A)(1995)(preliminary objections)[hereinafter *Loizidou* (preliminary objections)].

<sup>97</sup> *Id.*

<sup>98</sup> *Cyprus v. Turkey*, *supra* note 91.

<sup>99</sup> *Id.* at para. 77.

those rights are imputable to Turkey.”<sup>100</sup> 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.<sup>101</sup>

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 *Banković v. Belgium*,<sup>102</sup> 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

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<sup>100</sup> *Id.*

<sup>101</sup> In adopting the effective overall control test and finding that it was therefore not necessary to determine whether Turkey actually exercised detailed control over the policies and actions of the authorities of the Turkish Republic of Northern Cyprus (TRNC), the ECHR seemed to adopt a lower standard for attribution than that employed by the ICJ in the Nicaragua case and set forth in Article 8 of the Articles on State Responsibility. *Nicar. v. U.S.*, *supra* note 24. This was expressly recognized by the ICTY Appeals Chamber in *Tadić*, in which it departed from the rule formulated by the ICJ for attribution of the conduct of organized, hierarchical groups. While the ICJ had held that the proper standard for attribution was “effective control” over the group, including direction and participation in the particular act to be attributed, *id.* para. 115, the ICTY found “overall control” to be sufficient and has not required direction or participation by the state in the specific conduct, *Tadić*, *supra* note 16, at para. 120. In finding further that the state could be held responsible even for acts contrary to specific instructions, the ICTY Appeals Chamber noted that, generally speaking, “the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.” *Id.* at para. 121. The Appeals Chamber also made clear that it was applying its interpretation of the rules of attribution under the Law of State Responsibility and was thus not relying on a *lex specialis* theory for its departure from the *Nicaragua* judgment. *Id.* at para. 115, 122.

<sup>102</sup> *Banković v. Belgium*, *supra* note 92.

public powers normally to be exercised by that Government.”<sup>103</sup> 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.”<sup>104</sup> However, the Court did not restate the broad “exercise of authority” standard of *W.M. v. Denmark*.

The Court expressly rejected the possibility, implicit in the Inter-American Commission’s *Alejandre* 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)<sup>105</sup> would be sufficient to bring that individual within the state’s “jurisdiction” for the purposes of applying its human rights

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<sup>103</sup> *Id.* at para. 71. The Court here seems to refer here 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 v. France*, (*supra* note 95). 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* (preliminary objections), *supra* note 96, 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. France*. In *Banković v. Belgium*, *supra* note 92, the Court recasts this principle in narrower terms.

<sup>104</sup> *Id.* at para. 73.

<sup>105</sup> One additional element of the *Banković v. Belgium*, *id.* decision warrants closer inspection. In that 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.” *Id.* at para. 80. It found that “the Convention is a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.” *Id.* As the Federal Republic of Yugoslavia was not a party to the Convention, it did not comprise part of this legal space. Essentially, the Court found that the European human rights system was designed within and for a particular region, and was not intended to make Council of Europe states responsible for securing the rights of individuals throughout the world. This proposition 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. 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. 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. See *Issa v. Turkey*, *infra* note 123, at para. 74.

obligations. The Court noted that such an approach would render “superfluous and devoid of any purpose” the Article 1 language “within their jurisdiction.”<sup>106</sup>

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 permission<sup>107</sup> 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).

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 *Ilaşcu v. Moldova and Russia*,<sup>108</sup> 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 Transdniestria, 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 Transdniestria” (“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:

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<sup>106</sup> *Id.* at para. 75.

<sup>107</sup> 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*, *supra* note 55, at para. 12.3.

<sup>108</sup> *Ilaşcu v. Moldova and Russia*, 2004-VII Eur. Ct. H. R. 1030 (GC).

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.<sup>109</sup>

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.”<sup>110</sup> 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,”<sup>111</sup> 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.”<sup>112</sup>

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.”<sup>113</sup> The Court notes that:

even in the absence of effective control over the Transdnistrian 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 guaranteed by the Convention.<sup>114</sup>

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

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<sup>109</sup> *Id.* at para. 312 (citations omitted).

<sup>110</sup> *Id.* at para. 313.

<sup>111</sup> *Id.* at para. 313.

<sup>112</sup> *Id.* at para. 313.

<sup>113</sup> *Id.* at para. 322.

<sup>114</sup> *Id.* at para. 331.

effective authority, is to be assessed in the light of its positive obligations under the Convention.<sup>115</sup>

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.”

The Court then considers whether the applicants “come within the jurisdiction of the Russian Federation.”<sup>116</sup> It begins by examining the events in Transdniestria 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 Transdniestrian 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.”<sup>117</sup>

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.<sup>118</sup>

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<sup>115</sup> 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*.

<sup>116</sup> *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*.

<sup>117</sup> *Id.* at para. 382.

<sup>118</sup> *Id.* at 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*, *supra* note 90, 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.

The Court here in referring to the MRT appears to refer to the regime, as opposed to the territory.<sup>119</sup> 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.<sup>120</sup>

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.”<sup>121</sup>

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,<sup>122</sup> it seems to have attributed the conduct of the MRT authorities to the Russian Federation. Once it had assimilated the MRT 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.<sup>123</sup>

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<sup>119</sup> The Court appears to use the term “MRT” to refer alternatively to the territory of Transdniestria as well as to the separatist regime.

<sup>120</sup> *Id.* at para. 393.

<sup>121</sup> *Id.* at para. 394.

<sup>122</sup> 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.

<sup>123</sup> Further, this is the inverse of its findings in the northern Cyprus cases. While the *Ilaşcu* 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 *Ilaşcu* 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 *Banković v. Belgium*, *supra* note 91.

This trend in favor of more relaxed standards for extraterritorial application is also seen in the more recent case of *Issa v. Turkey*.<sup>124</sup> 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.”<sup>125</sup> The Court implies that this rule has been a consistent part of its jurisprudence, but that would seem not to be the case.<sup>126</sup> Of the various cases cited for this standard, none are the Court’s own cases.<sup>127</sup> Indeed, the *Issa* Court cited cases of the Inter-American Commission and Human Rights Committee from which the Court had distanced itself in *Banković*, 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.”<sup>128</sup>

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

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<sup>124</sup> *Issa v. Turkey*, 41 Eur. Ct. H.R. 27 (2004).

<sup>125</sup> *Id.* at para. 71.

<sup>126</sup> 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.

<sup>127</sup> It does, however, cite Commission cases, including *W.M. v. Denmark*, *supra* note 93.

<sup>128</sup> This formulation is almost identical to that used by the Human Rights Committee in *Burgos/Lopez*, which the Court had criticized in *Banković v. Belgium*, *supra* note 92.

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.

### **3. Customary Human Rights Law**

Finally, 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.<sup>129</sup>

#### **4.2 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,<sup>130</sup> 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 the *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

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<sup>129</sup> OPERATIONAL LAW HANDBOOK, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL ch. 3 (Maj. Derek I. Grimes, ed., 2005) [hereinafter JAG OLH], ("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.

<sup>130</sup> *Banković v. Belgium*, *supra* note 92,

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."<sup>131</sup> 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.<sup>132</sup>

However, in *DRC 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...'"<sup>133</sup> It then appeared to employ this standard in finding applicable the ICCPR, the CROC and its Option Protocol, and the ACHPR. While both the ACHPR and CROC 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 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

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<sup>131</sup> *Wall* opinion, *supra* note 8, at para. 112.

<sup>132</sup> It could also be argued that economic and social rights have considerable implications in the sphere of resource allocation and expanding jurisdiction in this regard might hinder their realization within the national territory itself.

<sup>133</sup> *DRC v. Uganda*, *supra* note 69, at para. 216.

social rights enumerated in the ACHPR or CROC,<sup>134</sup> 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."<sup>135</sup> 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."<sup>136</sup>

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..."<sup>137</sup> 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

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<sup>134</sup> As noted above, the Court did not include the ICESCR in its list of applicable treaties.

<sup>135</sup> *W.M. v. Denmark*, *supra* note 93, at para. 2.

<sup>136</sup> *Id.*

<sup>137</sup> *Cyprus v. Turkey*, *supra* note 91, at para. 77.

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.”<sup>138</sup> 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.

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.<sup>139</sup>

Nonetheless, the European Court appeared to dismiss this possibility in *Banković v. Belgium*, 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.”<sup>140</sup> The Court stated its view that “the

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<sup>138</sup> *W.M. v. Denmark*, *supra* note 93, at para. 1. (Emphasis added J.C.).

<sup>139</sup> *See, e.g.*, *Al-Skeini v. Sec. of State for Defence* [2005] EWCA (Civ) 1609, para. 48 [hereinafter *Al-Skeini* (CA)]. 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, *supra* note 128 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 civilian.”) 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.” *Id.* at 49. As the US rejects extraterritorial application of human rights treaties, the Handbook refers here solely to customary law. *Id.* at 48.

<sup>140</sup> *Banković v. Belgium*, *supra* note 92, at para. 75.

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."<sup>141</sup>

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.<sup>142</sup>

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.

### **4.3 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.<sup>143</sup>

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 *Wall* opinion, the ICJ found that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."<sup>144</sup> 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,<sup>145</sup> the term "acts" may

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<sup>141</sup> *Id.*

<sup>142</sup> See, e.g., *Ilaşcu v. Moldova and Russia*, *supra* note 108. See Cerone, *Out of Bounds?*, *supra* note at 19 (2006), New York University School of Law Center for Human Rights and Global Justice.

<sup>143</sup> As indicated above in Part III, customary international law may entail a lower level of obligation.

<sup>144</sup> *Wall* opinion, *supra* note 8, at para. 111.

<sup>145</sup> ILC Articles, *supra* note 45, at Article 2.

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 on this basis [i.e., as the occupying Power], Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights."<sup>146</sup> 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."<sup>147</sup> 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 [sic]" the exercise of a number of rights under both Covenants.<sup>148</sup> 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 *DRC 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 "exercise of its jurisdiction" rule from the *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

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<sup>146</sup>*Wall* opinion, *supra* note 8, at para. 112.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at para. 134.

other actors present in the occupied territory, including rebel groups acting on their own account.”<sup>149</sup> 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.<sup>150</sup> 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.

Again, the Court’s finding that the ICCPR, CROC, 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 *Alejandro v. Cuba*, 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.”<sup>151</sup> 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

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<sup>149</sup> *DRC v. Uganda*, *supra* note 69, at para. 179.

<sup>150</sup> *Id.* at 211. 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.

<sup>151</sup> *Alejandro v. Cuba*, *supra* note 84, at para. 25.

violations of negative obligations. It is unclear whether the same analysis would apply to positive obligations.<sup>152</sup>

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."<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup> 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

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<sup>152</sup> Indeed, the material capability of ensuring rights in extraterritorial cases falling short of occupation is unclear.

<sup>153</sup> *Banković v. Belgium*, *supra* note 91, at para. 70, interpreting its findings in *Cyprus v. Turkey*

<sup>154</sup> *Cyprus v. Turkey*, *supra* note 90, at para. 81

<sup>155</sup> *Id.* at para. 346.

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.<sup>156</sup> The Commission found, however, “that what happened to the applicant at the hands of the DDR authorities cannot in the circumstances be considered to be so exceptional as to engage the responsibility of Denmark.”<sup>157</sup> 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 *Banković v. Belgium*, 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.”<sup>158</sup> The Court dismissed this possibility.

Essentially, the *Banković* 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...”<sup>159</sup> 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...”<sup>160</sup>

As phrased by the Court, this proposition does indeed seem unreasonable. To hold states responsible for extraterritorial consequences of their conduct that were neither

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<sup>156</sup> *W.M. v. Denmark*, *supra* note 93, at para. 1.

<sup>157</sup> *Id.*

<sup>158</sup> *Banković v. Belgium*, *supra* note 92, at para. 75.

<sup>159</sup> *Id.* at para. 65.

<sup>160</sup> *Id.* at para. 75.

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 *Banković v. Belgium* was anomalous.

In *Ilaşcu*, 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."<sup>161</sup> Before concluding that "Moldova's responsibility is capable of being engaged under the Convention"<sup>162</sup> 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."<sup>163</sup> The Court thus appears to link the scope of Moldova's jurisdiction and responsibility, which it blurs together,<sup>164</sup> to the scope of Moldova's control over the territory and the situation. While this would not be an example of extraterritorial application, as Transdniestria is part of Moldovan territory, the approach of the *Ilaşcu* Court is in tension with the finding of the *Banković* 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 *Ilaşcu* Court to Moldova's positive obligation(s)<sup>165</sup> under Article 1 toward persons "within its territory." In other cases, the

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<sup>161</sup> *Ilaşcu v. Moldova and Russia*, *supra* note 108, 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*.

<sup>162</sup> *Id.*, at para. 352.

<sup>163</sup> *Id.*, at para. 351. Note, however, that this blurs the question of jurisdiction with that of responsibility, as discussed below.

<sup>164</sup> The Court's confusion becomes complete in *Ilaşcu v. Moldova and Russia*, *supra* note 108. For a comprehensive analysis, see Cerone, *Out of Bounds?*, *supra* note 90.

<sup>165</sup> The Court appears to alternate between the single and plural forms of "obligation."

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.<sup>166</sup>

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.”<sup>167</sup> As with the *Wall* opinion and the *Alejandro* 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).

Thus, it would seem that there may be an identifiable trend toward recognizing varying levels of obligation. In particular, it may be that negative obligations apply whenever a state acts extraterritorially<sup>168</sup> (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,<sup>169</sup> such

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<sup>166</sup> To the extent that acquiescence would constitute a breach of its obligations. See above.

<sup>167</sup> *Issa v. Turkey*, *supra* note 124, at para. 71.

<sup>168</sup> 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.

<sup>169</sup> Similar reasoning is implicit in the jurisprudence of human rights mechanisms finding that the obligation to ensure rights against violations by private actors is bounded by a scope of reasonableness. For example, in the *Velasquez-Rodriguez* case, *supra* note 51, 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

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 treaties<sup>170</sup> 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, 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.”<sup>171</sup> 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. 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

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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 Ilaşcu v. Moldova and Russia, supra* note 108.

<sup>170</sup> By not “dividing them up,” in the words of the *Banković* Court (*supra* note 92),

<sup>171</sup> *Banković v. Belgium, id.* at para. 75.

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 protect that individual's right to life from violation by a third party.<sup>172</sup>

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, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind..." 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.<sup>173</sup> Thus, the provision may reasonably be read to oblige states to respect all of the rights in the Covenant *vis-à-vis* all persons, but to ensure them only to those within the state's territory and subject

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<sup>172</sup> 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.

<sup>173</sup> It could even be argued that this is the most reasonable interpretation of the text, rendering recourse to the *travaux* unnecessary. In any event, the *travaux* may be read consistently with the above proffered interpretation. While it has been argued persuasively that the drafting history demonstrates the drafters' intent that the ICCPR apply only within the territory of each State Party (Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially*, 99 AM. J. INT'L L. 124 (2005)), that is not the only reasonable reading of the *travaux*. The statements cited in support of exclusively territorial application demonstrate a concern about extraterritorial application of positive obligations. These statements generally refer to the obligation to 'ensure' rights, and cite the impracticability of "ensuring" rights outside of the state's territory. This preoccupation with the application of positive obligations is understandable in light of the fact that during the 1950 debate on inclusion of the word "territory," the phrase "to respect" had not yet been introduced into the draft Covenant. The existing text used only the phrase "to ensure." During the March 1950 session of the Commission on Human Rights, Eleanor Roosevelt, speaking as the US representative, recalled her delegation's proposal that article 2(1) be amended to read: "The High Contracting Parties undertake to *guarantee* to all persons residing on their territory and within their jurisdiction the rights defined in the present covenant." UN Doc. EICN.4ISR.193, at 13 (1950). As with the phrase "to ensure," the phrase "to guarantee" includes a positive dimension. Thus, it could equally be said that the desire for exclusively territorial application was limited to the obligation 'to ensure' or 'to guarantee,' and was not intended to limit the obligation "to respect," which was subsequently introduced into the draft Covenant.

to its jurisdiction, with both of these obligations subject to the proviso “without distinction of any kind.”<sup>174</sup>

## 5. POWER, JURISDICTION, AND HUMAN DIGNITY

From its inception, the international law of armed conflict followed the projection of power. The *jus in bello* would apply to armed conflicts irrespective of physical location, so long as opposability as between the warring parties was satisfied. The same could be said of the law of state responsibility for injury to aliens. While the application of both bodies of law clearly extended beyond the state’s jurisdictional reach, neither could penetrate into the sphere of the state’s domestic jurisdiction in the narrowest sense. Traditionally, international law did not reach those matters entirely within the state’s jurisdiction, including the behavior of the state toward its own nationals.

But just as humanitarian law ultimately began to press inward against that external membrane of a state’s domestic jurisdiction, human rights law has now begun to exert outward pressure against the inner wall of the state’s jurisdiction. Indeed, these two processes—of inward penetration and outward projection—can be seen along a single continuum with a common seam. That seam is manifested in the structural evolution of the

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<sup>174</sup> 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 CROC, which provides “[s]tates 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 the ICCPR in two respects. First, as with the ACHR and ECHR, there is no mention of territory. Second, the CROC 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 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.

international legal system that was consolidated in the years immediately following World War II. The principal structural development of that period was the emergence<sup>175</sup> of the individual human being as a subject of international law, capable of bearing international rights and duties.

The evolution of the status of the individual can be seen in a range of international legal developments. As noted above, many of these developments were expressed in a progression of humanitarian law instruments that gradually moved from a state-centered focus to an individual-centered focus. These instruments increasingly embraced the language of individual rights and duties, invoked transcendental values, diminished requirements of inter-state reciprocity and nationality-based protection, and moved away from inter-state compensation as the exclusive remedy for violations. These structural developments were consolidated in the work of the Nuremberg Tribunal, which recognized the subjecthood of the individual in strict legal terms. Ultimately, this process culminated in the adoption of the Universal Declaration against the backdrop of the UN Charter—that is, in the birth of human rights law.

The structural development corresponded to a coalescence of values around a principle conceived as transcendental and universal—human dignity.<sup>176</sup> Recognition by the newly re-conceived international community that the dignity of the individual human being was something entitled to legal protection led to the transformation of this principle into positive law. It is this conception of human rights as both transcendental and universal that pushes against the concept of jurisdiction—pushing simultaneously into the domestic sphere and out of it—and underscores both its artificiality and diminished existence. It is this conception, far more than the force of legal reasoning from positive law<sup>177</sup> that has enabled both human rights law and humanitarian law to grasp the outer and inner reaches of the power of the state.

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<sup>175</sup> It could of course be argued that this was the re-emergence of a much older idea. Jurists such as Grotius had little difficulty conceiving of the individual as a subject of international law. International law in that period was largely comprised of natural law, which, as made clear by Grotius, bound in the first place individuals, and was only through extrapolation rendered applicable to states.

<sup>176</sup> The notion of human dignity and the language of universality figures prominently in the preambles of all major human rights and humanitarian law treaties of the modern era. Such terminology is also frequently invoked by states, as well as international courts and human rights bodies in discharging their functions.

<sup>177</sup> Indeed, many of the tensions highlighted in the above analysis could be said to result from the expansive application of rules designed and intended for predominantly, if not exclusively, internal application.

## 6. CONCLUSIONS

Human rights law and the law of non-international armed conflict, while developed primarily to regulate state conduct within its territory, are not limited thereto. There is increasing authority to support the proposition that both of these bodies of law will apply simultaneously in the course of a transnational conflict between a state and a non-state armed group. Nonetheless, there remain significant gaps that provide ample opportunity for judicial institutions to further elaborate on what is required of states in these situations.

There is growing acceptance of the application of Common Article 3 in a transnational armed conflict. The implications of its application, however, remain unclear. Can these standards be applied to a state's conduct on the territory of another state in the absence of authority and jurisdiction over that territory? How is this determination affected by the consent or absence of consent of the territorial state to the operations occurring within its borders? While Common Article 3 clearly prohibits certain acts against detained persons, can it also provide implicit authorization for detention in the first place? Although those fighting on behalf of the non-state group would not benefit from the combatant's privilege and thus have no immunity from prosecution for ordinary crimes, would the opposing state have jurisdiction to prosecute ordinary crimes committed beyond the state's territorial jurisdiction?<sup>178</sup>

The extraterritorial application of human rights law has been clearly established such that, in principle, a state's human rights obligations will continue to apply even when it is engaged in hostilities far from its home territory. However, international jurisprudence has yet to produce clear criteria for when extraterritorial application is triggered or clear parameters for determining the scope of a state's human rights obligations when it acts abroad.

Nonetheless, the following principles may underlie a general trend in human rights jurisprudence. The first is that the negative dimension of human rights obligations will apply to a state's conduct in relation to all those who are directly affected by that conduct anywhere in the world. The second principle is that the positive dimension of these

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<sup>178</sup> Potential bases of jurisdiction in this context might be the passive personality or protective principles.

obligations will be based upon the degree of control exercised by the state, subject to a standard of reasonableness.

Ultimately, the question of whether these bodies of law apply beyond a state's territory goes to the purpose of the creation of these norms and the values underlying them. As both bodies of law are rooted in the notion that the dignity of the individual is entitled to protection, there seems little reason to restrict their application to the state's territory. To the extent these rules are designed to protect individuals from abuses of state power, realization of that design entails application coextensive with the projection of that power. While the exact contours of their application may not be settled, the traditional principles of good faith and reasonableness in the circumstances provide ample guidance for shaping those contours.