Routledge Studies in Human Rights

STATES, HUMAN RIGHTS, AND DISTANT STRANGERS

THE NORMATIVE JUSTIFICATION OF EXTRATERRITORIAL OBLIGATIONS IN HUMAN RIGHTS LAW

Angela Müller

'This book is an essential contribution to the scholarship on extraterritorial human rights obligations, and Angela Müller provides an in depth and convincing analysis not only of the legal basis for such obligations, but more importantly, their normative foundation. Setting out the tension between the territorial conception of human rights obligations and the empirical fact that states impact upon human rights enjoyment for individuals far beyond their borders, Müller bases her analysis on legal philosophy to challenge the often dominant approach that rights are universal, but obligations are territorial. Müller frames her thorough and mature analysis around the necessity to return to the normative origins of human rights law, namely that of equality and universality. This book is vital for our legal and normative understanding of extraterritorial and global human rights obligations.'

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'The book innovatively addresses key questions of human rights law and theory: Based on a critical assessment of counterarguments, it develops a strikingly profound justificatory theory of extraterritorial human rights obligations and shows its substantial consequences for the interpretation of crucial elements of contemporary human rights law. The arguments are sharp, concise, compelling and a pleasure to read.'

Matthias Mahlmann, *Professor of Legal Philosophy and International Law at the University of Zurich*

'This book is a must-read in the field of extraterritorial human rights obligations—a most careful analysis both of legal and ethical aspects.'

Oliver Diggelmann, *Professor of International Law at the University of Zurich*

States, Human Rights, and Distant Strangers

This book combines legal and philosophical perspectives to address the question of whether states are bound by human rights when they act with effects on people abroad—states' extraterritorial human rights obligations. Taking an innovative approach, it begins with a profound legal analysis of the issue at national, supranational, and international levels and then engages in depth with counterarguments against extraterritorially applying human rights, on the basis of which it develops its own ethical justificatory theory of extraterritorial human rights obligations. The book closes the circle by showing what the practical implications of this theory for the interpretation (and possible evolvement) of human rights law would be. In a world where critiques of, and resistance to, the general idea of universal human rights are on rise, the book contributes to closing the gap between judicial and normative perspectives on extraterritorial human rights obligations by inquiring into the ethical underpinnings of this topical legal challenge.

This book will be of key interest to scholars and students in human rights, international law, and more broadly in political philosophy, philosophy of law, and international relations.

Angela Müller is Head of AlgorithmWatch CH and Head of Policy and Advocacy at AlgorithmWatch. Before writing her PhD thesis on extraterritorial human rights obligations at the University of Zurich, she obtained an MA in Political and Economic Philosophy from the University of Berne. During her academic career, she was a visiting researcher at Columbia University, New York, and Hebrew University, Jerusalem.

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The Faculty of Law of the University of Zurich hereby authorizes the printing of this dissertation, without indicating an opinion of the views expressed in the work.

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The sheer cynicism behind the phenomenon of states trying to avoid the reach of human rights by crossing borders or when acting abroad has not stopped to appall me. This book is motivated by the sincere conviction that both morality and law demand otherwise—and that sound research and good arguments are an important (even if far from the only) tool needed to counter these tendencies. I am aware of how privileged I was to be able to devote a substantial part of my time to this research. Likewise, I am aware of how limited my perspective on the applicability of human rights remains compared to those who have experienced what it means to have their dignity disrespected, sometimes on a daily basis. Thus, my contribution is modest, but I hope that it eventually has an impact in practice, too.

Note

1 Müller, Angela, 'Justifying Extraterritorial Human Rights Obligations: An Ethical Perspective', in Gibney, Mark et al. (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Abingdon/New York: Routledge, 2022), 53–64; Müller, Angela, 'Security Measures Abroad and Extraterritorial Human Rights Obligations', in Fritsche, Ruwen et al. (eds.), *Unsicherheiten des Rechts*, Archiv für Rechts- und Sozialphilosophie—Beihefte, 162 (Stuttgart: Franz Steiner Verlag, 2020), 103–114.

Abbreviations

AfCHPR	African Charter on Human and Peoples' Rights [Banjul Charter]
ACHR	American Convention on Human Rights [Pact of San José]
ADRD	American Declaration on the Rights and Duties of Man
AI	Artificial Intelligence
A.M.	Angela Müller
amend.	Amendment
ArCHR	Arab Charter on Human Rights
art./Art.	Article
BBl	Bundesblatt [Federal Gazette of Switzerland]
BGE	Entscheidungen des Schweizerischen Bundesgerichts [Decisions of the Federal Court of Switzerland]
BV	Bundesverfassung der Schweizerischen Eidgenossenschaft [Federal Constitution of the Swiss Confederation]
BVerfG	Bundesverfassungsgericht [Federal Constitutional Court of Germany]
BVerfGE	Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court of Germany]
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	Human Rights Committee
CESCR	Committee on Economic, Social, and Cultural Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
cf.	*confer* [compare]
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union [formerly: Court of Justice of the European Communities]
Comm. No.	Communication Number
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities

dec.	decision
EC	European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights]
EComHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
edn.	edition
ed./eds.	editor / editors
e.g.	*exempli gratia* [for example]
ESC	European Social Charter
et al.	et alii / et aliae [and others]
ETS	European Treaty Series
EU	European Union
f.	*folio* [and the following page/paragraph/section]
ff.	*folio* [and the following pages/paragraphs/sections]
fn.	footnote
GC	Grand Chamber
GDPR	General Data Protection Regulation
GG	Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany]
IACHR	Inter-American Commission for Human Rights
IACtHR	Inter-American Court of Human Rights
Ibid.	*ibidem* [in the same place]
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
i.e.	*id est* [that is]
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IHRR	International Human Rights Report
IR Realism	International Relations Realism
no.	number
OAS	Organization of American States
OHCHR	Office of the UN High Commissioner for Human Rights
O.J.	Official Journal
OP	Optional Protocol
OPAC-CRC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
para.	paragraph
Prot.	Protocol
slip. op.	slip opinion

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNCs	Transnational Corporations
TRNC	Turkish Republic of Northern Cyprus
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
US	United States
U.S. Const.	Constitution of the United States
v.	*versus*
VCLT	Vienna Convention on the Law of Treaties
vol.	Volume

1 Introduction

1.1 The Territorial Conditionality of Human Rights

1.1.1 The Territorial Paradigm Behind Human Rights Law

The foundational idea behind the concept of human rights is to protect the essential aspects of what it means for a human being to live a life in dignity—and to do so through rights that are universally assigned to every individual qua being human.

In 1945, the world suffered a collective shock: The realization of what states and their agents are capable of doing to human beings had started to dawn on it. It led the global community to recognize that people can no longer solely rely on domestic legal protections of individuals' dignity, which had traditionally enshrined fundamental rights on the constitutional level as rights of individuals vis-à-vis their state of citizenship. In addition, a complementary regime of safeguarding rights at the international level was required.

As a major step, this resulted in the adoption of the *Universal Declaration of Human Rights* (UDHR).[1] Up until today, it serves as one of the essential touchstones of human rights norms, having laid the groundwork for the subsequent progressive evolution of the international human rights regime, which translates these rights into corresponding obligations on the part of states. Over the course of the following decades, an expansive body of basic human rights has been enshrined in the form of legally binding norms of international law, many of which have achieved full or near-universal validity. In contrast to traditional public international law, which has always been between states, modern *international human rights law* (IHRL) recognized individuals as direct subjects of international legal norms. Thereby, states have subjected themselves to obligations that apply both to how they act toward one another as well as toward individual human beings.

After having witnessed two World Wars—and countless other conflicts and atrocities—, the intention behind IHRL was to overcome the narrowness of a *citizens'* rights approach by expanding the reach of human rights norms to *everyone residing on a state's territory*. The criterion for being protected shifted from citizenship to territorial residency, which brought with it a significant

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expansion of the scope of individuals safeguarded against the abuse of state power.[2] This territorial approach was also mirrored in IHRL forming part of public international law, which in turn has largely been based on the principles of the Peace of Westphalia of 1648. IHRL has adopted among its central pillars the Westphalian principles of the division of the globe into territorial states, of exclusive and far-reaching territorial sovereignty, and of noninterference. This implied a state-centered and territorial paradigm for the application of human rights, too. In many cases, this expansion has also been adopted for the scope of constitutionally protected individual rights in domestic frameworks.

Eight decades later, state actions continue to appall the global community—and many of them take place well beyond the offending state's territory. While states that interfere and thereby infringe individuals' rights abroad are by no means a new phenomenon, the significant globalization processes of the last decades have multiplied states' means for such interferences, many of which do no longer require 'boots on the ground'. For example, technological developments pose a multitude of novel challenges, as intrusions in the digital space—through cyberattacks, algorithmic decision-making, deepfakes generated by so-called Artificial Intelligence (AI), automated weapons, or the dissemination of content on online platforms—are hard to be pinned down to territory: Users, servers, and companies are spread across the globe, and so are the victims of human rights violations committed through digital infrastructures. Intelligence strategies like targeted killings by unmanned aerial vehicles, extraordinary renditions, or digital surveillance are increasingly performed on or with effects on other states' territories. Technological means as well as transport systems and routes continuously perforate state borders and increase the transnational flow of individuals—and so do the manifold causes behind global migration. In the economic realm, global trade systems open up a variety of ways for states to affect 'outsiders'.[3] States also face novel challenges in protecting individuals from infringements of their human rights that result from climate change, and the same is true for nuclear threats, terrorism, or organized crime, many of which create cross-border networks of non-state actors. At the same time, neither are the strategies and means states opt for when they try to address these phenomena confined to their own territories, as sanction regimes, foreign investments, or intelligence strategies exemplify. In brief, the social, economic, and cultural world of individuals across the globe is more interconnected than ever before. At the political level, domestic and foreign affairs are no longer separate domains but mutually influence and depend on each other. In the legal domain, various processes of integration and emerging supranational or international structures begin to weaken the dichotomy between insiders and outsiders.[4]

These increasingly multilevel and transnational processes have exponentially increased *diagonal* relations, i.e., relations between states and extraterritorially located individuals.[5] While we have observed for centuries that states can affect people abroad, today, the amount of individuals a state can have an impact on and the means by which it can do so have been multiplied. Against this

background, it appears that a territorial paradigm for the applicability of legal human rights norms results in a protection vacuum by creating 'legal black holes': Expanding the scope of protection after the Second World War—from citizens to everyone on the territory—has had the effect that a state is, at least at first sight, not obligated to respect, protect, and fulfill human rights of those located *outside their territories*.[6] The fact that states can and do affect individuals abroad, and the countless ways in which they do, indicate that a territorial confinement of legal norms that aim at protecting human beings is at least partially insufficient. If the moral idea behind human rights obligations of states is the protection of *human beings*, should not the very same idea also guide human rights law? And then, should not transnational or diagonal relationships between states and individuals abroad also be regulated by these very norms? In other words, should human rights law apply *extraterritorially*, too?

This book will address these questions from a perspective of legal philosophy, exploring the normative foundations of extraterritorial obligations of states within human rights law—at the domestic, supranational, and international levels. It thus asks whether there are normative reasons for assuming that human rights norms shall require states to respect, protect, and fulfill rights when their conduct affects individuals abroad.

1.1.2 Contested Extraterritorial Applicability Today

The topicality and urgency of the question is not only underlined by today's world, in which states' ability to act beyond their territorial borders has increased exponentially. But also, on many levels of human rights law, extraterritorial obligations remain a contested concept, indicating the need for further research on the topic.

Fundamental rights are primarily enshrined in the framework of domestic legal orders, typically in the form of constitutional norms. While in some domestic systems, they generally constrain the exercise of public authority—thus, at least in principle, irrespective of *where* it manifests itself—other systems tend to confine the reach of fundamental rights to their territories. The rights guaranteed at supranational and international levels amount to subsidiary regimes of protection, which complement domestic ones. The fact that they are anchored at these legal levels could be taken precisely to reflect that human rights norms require guardianship that does not end at states' borders—and thus that they must also be protected by other than domestic regimes. Yet, even here, the territorial paradigm still heavily influences how the applicability of these rights is interpreted.[7] First, though increasingly acknowledging an expanding scope of extraterritorial applicability, case law is still marked by ongoing difficulties in constructing principled and consistent approaches to the issue. Arguably, this partly arises from the state-centered pillars on which IHRL as part of international law rests. This appears unsatisfactory, especially in light of the serious human rights implications of contemporary

global phenomena. The urgent need for adequate governance of essentially transnational issues, such as climate change or digital surveillance, necessitates coherent approaches to the question of human rights duties beyond borders.

Second, a number of key stakeholders still perceive human rights as territorially limited claims of residents vis-à-vis their domestic state. In particular, governments of *states*—the duty-bearers at stake here—regularly confirm their view that the applicability of international bills of rights is strictly limited to their territories: Respecting human rights or contributing to their enjoyment abroad are portrayed as laudable acts of charity but not perceived as stringent legal obligations. While some reject extraterritorial applicability in principle, most opposition surfaces when states are confronted with concrete situations or norms that shall be applied beyond borders.[8] The political climate across the globe appears to support this line of reasoning. Various commentators declare we have witnessed the end of the liberal international order, with its ideas of universal human rights and democracy: "The jungle grows back"[9] and "the era of values is over—the world watches the return of Realpolitik".[10] In this new age of multipolarity, the world might have arrived at a "sovereigntist turn",[11] in which "[a]spirations to bring harmony to the relationship between ethics and foreign policy have had their day, for now at least. Liberalism is in retreat both as a comprehensive doctrine and as a compass to guide the ship of states".[12] Accordingly, the question is posed: "Are we heading towards a post human rights world?".[13]

In a similar vein, political leaders all over the world combine nationalist ideologies with populist tactics. In doing so, they emphasize the distinction between insiders and outsiders: "Wise leaders always put the good of their own people and their own country first. The future does not belong to globalists. The future belongs to patriots".[14] The ideas of equality and justice are abandoned for a "welfare state chauvinism", while global cooperation in general and international human rights norms in particular tend to be portrayed as undermining states' capacity to promote the interests of their members, i.e., as illegitimate constraints on the pursuit of states' national interests.[15]

In sum, the status of extraterritorial human rights obligations in human rights law has yet to be clarified—and they are far from being accepted by the primary duty-bearers, i.e., *states*. An analysis of these obligations cannot ignore these aspects of contemporary reality. It must engage with ideologies of political movements that continue to have or are gaining political power, and which oppose the idea of owing anything to those beyond borders. This is so especially in light of the fact that some of them form (part of) a government, and thus reflect the position of central duty-bearers at stake.

1.1.3 The Contribution of Scholarship

The debate on extraterritorial human rights obligations within *legal scholarship* is mainly focused on *international* norms, even though there exist parallel debates on specific domestic regimes, most prominently on that of the *United*

States (US), as well as a rapidly growing body of work on the issue in the supranational regime of the *European Union* (EU).

While the general discussion of duties to individuals abroad has a long history in legal thought,[16] the contemporary debate on extraterritoriality in IHRL was mainly initiated in the late 1990s. In its beginnings, it was primarily inspired by particular cases and by becoming aware of the difficulties judicial or quasi-judicial bodies encountered when confronted with extraterritorial situations, especially in their attempts to develop principled approaches to the issue. Next to academic analyses, the work of human rights practitioners, *United Nations* (UN) bodies, and experts stimulated the rapid advancement of the discussions.

At that point, these discussions were mainly focused on the general question of *whether* human rights norms can be applied abroad. Thereby, the concept of *jurisdiction* was made into the pivot of the debate: Jurisdiction (implicitly or explicitly) figures as the main threshold of applicability in most human rights treaties, among which the *European Convention on Human Rights* (ECHR)[17] and the *International Covenant on Civil and Political Rights* (ICCPR),[18] which have stood at the center of scholarly attention from the outset.[19]

Today, a considerable part of work has moved beyond these questions on general legitimacy and the interpretation of jurisdiction, turning to the analysis of more technical aspects and of nuances of legal implementation.[20] This has been accompanied by an increased interest into the extraterritorial applicability of economic, social, and cultural rights as well as on duties to protect and fulfill,[21] supplementing the focus on civil and political rights and on the duty to respect, which remain central foci of the debate.[22] In addition, a further prominent sub-strand has developed around the extraterritorial obligations of *non-state actors*, with a particular focus on *Transnational Corporations* (TNCs).[23]

The impressive body of research developed over the last three decades has made the topic of extraterritorial obligations into one of the most prominent within legal scholarship on IHRL. Today, the nuanced, advanced, and diversified academic debate, which is often linked to human rights practice,[24] importantly contributes to increasing consistency in jurisprudence.

Within the framework of *moral, political, and legal philosophy*, questions of global justice, the conflict between duties to compatriots and duties to strangers, or the status and value of the political community have long and extensively been discussed. In addition, there exists an abundance of foundational work on the theoretical underpinnings of human rights. However, attention has often focused on duties of individuals, on positive duties to provide, or exclusively on moral obligations without linking them to legal practice (with the more recent debate on the 'Responsibility to Protect' (R2P) forming a notable exception).[25]

While these debates provide significant starting points, there exists at least a partial lacuna when it comes to the justificatory normative background of extraterritorially applying legal human rights obligations of states. The specific

question of whether *law* should subject *a state* to *human rights obligations* vis-à-vis *extraterritorially located individuals* is rarely explicitly addressed from the perspective of legal and political philosophy.[26] Lastly, the idea of a universalist conception of human rights, which has long been celebrated as a major achievement of the last century, is increasingly confronted with new and revived strands of academic critique, i.e., with skeptical and revisionist perspectives on its foundation, evolution, or implementation.[27] At times, this is coupled with an equally observable renewed emphasis on the need to categorically distinguish the domestic from the global sphere.

1.2 The Need for a Justificatory Theory of Extraterritorial Human Rights Obligations

The contemporary status of extraterritorial human rights obligations in political reality, legal practice, and academic debates points to several lacunae that motivate the focus and approach of this book. First, with regard to the scholarly debate in the *legal* field, the increasing move away from the discussion on the general justifiability, validity, and acceptance of extraterritorial obligations and toward more technical issues of scope and legal implementation is, to a certain extent, in tension with the fact that political and legal hurdles continue to exist: Neither have extraterritorial duties been generally accepted in political reality nor has the judiciary come up with consistent principles of applying them. Furthermore, this development is in tension with the issue of extraterritorial applicability being linked to foundational normative questions of pressing relevance in today's world—such as the adequacy of a state-centered approach in human rights law in light of immensely powerful private actors, the role of state sovereignty, the status of the manifold emerging transnational relations, and the role of international law in regulating these issues.

Second, the academic debate has primarily evolved in the field of law. It is not satisfactorily accompanied by a corresponding discussion on the theoretical underpinnings of legal extraterritorial human rights obligations in the field of moral, political, and legal philosophy. Undeniably, there are valuable contributions (mostly by legal scholars) that do provide such theoretical reflection and attempt to better integrate various perspectives in an inter- or transdisciplinary way.[28] Nonetheless, *in toto*, the philosophical debates on global justice and human rights theory have rarely taken up the specific question at issue, i.e., the normative justification of extraterritorial obligations in human rights law, in a comprehensive way—despite the fact that human rights are generally perceived as one of the main currencies of global justice.[29]

Third, this gap in philosophical groundwork can be felt in jurisprudence. The continuing controversial status of judicial bodies' approaches to extraterritorial applicability indicates that a firmer grounding of the normative principles behind it would valuably contribute to increasing coherence in case law.

Fourth, all of the above appears even more urgent in light of contemporary globalized reality, the variety of global challenges that transcend borders, and

the countless ways states have to affect and threaten human rights abroad. And lastly, a glimpse of the political world testifies to this need for normative groundwork. There is concrete and continuing opposition on the part of some states, the most central duty-bearers, to expanding human rights law beyond borders, and the global political climate suggests that ideologies supporting this opposition will continue to have (and gain) influence. While this empirical observation says nothing about the normative legitimacy of extraterritorial human rights obligations, it illustrates the need for strengthening their justificatory background. One should avoid falling into the trap of cosmopolitan naiveté by ignoring the existence and potential rise of such ideologies—and their *de facto* influence on the acceptance of obligations to distant strangers: "[A]t moments of great political crisis the theoretical approaches that underlie normative claims really matter".[30]

Against the background of these lacunae, this book's aim is to address foundational normative principles behind extraterritorial human rights obligations—and to translate them to the legal level. It starts from the assumption that in light of the moral idea behind it, human rights law should also provide protection against extraterritorial violations—and that this can be justified. To do so, and in light of the theoretical and practical skepticism that continues to exist, an informed approach first requires to address counterarguments, i.e., identifying arguments that could underlie a 'territorial view',[31] and respond to them. Based on a thorough critique of territorial views, the book will develop elements of a *justificatory theory of extraterritorial human rights obligations* by linking legal and philosophical perspectives. These justificatory foundations should have concrete consequences for the question of extraterritorial applicability in human rights law—and the last part of the book will shed light on what they could look like.

By strengthening the normative grounds on which extraterritorial obligations rest and by taking an interdisciplinary perspective, the book aims to bridge the gaps between reality, scholarship, and case law. Ultimately, it hopes to provide normative prerequisites for developing principled approaches at the legal level, which will in turn help to endow judicial bodies with firmer argumentative instruments in addressing the issue. In times in which the means for and the occurrences of transnational rights violations have increased significantly, this objective is of timely importance.[32]

1.3 The Book's Approach

1.3.1 Structure and Method

The book is divided into three main parts. After these introductory remarks, the first part focuses on the *legal framework* at constitutional, supranational, and international levels. It intends to provide a non-exhaustive overview of existing jurisprudential approaches to extraterritorial applicability by reference to particular legal systems: in Chapter 2, domestic law through a brief look

at the Constitutions of Switzerland and Germany and a more detailed look at US constitutional law; in Chapter 3, the supranational framework of the EU; and in Chapter 4, international human rights norms as enshrined in their most central treaties—primarily the ECHR and the ICCPR—and in customary international law. Even though the focus lies on IHRL and within it, to a certain degree, on the field of civil and political rights, the outcome of the analysis aims to cover questions of human rights norms in general.

These examples will serve to illustrate both the variety of challenges arising in extraterritorial situations and the judicial difficulties in addressing them in a cogent manner. The three-level approach underlines the topicality of the extraterritoriality question, which prompts foundational questions at different legal levels and within various legal regimes.

This qualitative analysis of relevant cases serves as the point of departure for and importantly informs the subsequent ethical inquiry in the second part. Setting the scene in Chapter 6, it identifies six theoretical approaches within the tradition of *statism* that provide premises for normative arguments against expanding human rights obligations beyond borders. Via reconstructing these arguments, Chapter 7 develops a systematic and multifaceted critique of the territorial view. This then provides the basis for the next and core step in Chapter 8, the development of the book's justificatory theory of extraterritorial human rights obligations. Subsequently, the intention of the third part is to transpose this theory to the level of legal practice, a project that hinges on the relation between morality and law as explicated in Chapter 9. In Chapter 10, it translates the justificatory theory developed into a coherent interpretation of *jurisdiction* as the main applicability threshold of IHRL—an interpretation that, however, also fits other levels of human rights law—and considers potential challenges of practicability when legally implementing these obligations. Chapter 11 summarizes and evaluates the implications of the findings for the bigger picture of human rights theory, global justice theory, and human rights law.

While the book aims to bridge the gap between various scholarly fields and takes an interdisciplinary perspective, and while it comprehensively analyzes the legal status quo, it is not an empirical study. It is directed at normative theory building and situated in the academic tradition of the philosophy of law, conducting legal and philosophical analyses by employing methods of conceptual, hermeneutic, and normative reasoning. This approach is motivated by the presumption that normative research in ethics and law must essentially and reciprocally inform each other: Neither shall the former overlook important aspects of how legal norms are created, implemented, and institutionalized nor does legal scholarship benefit from ignoring ethical reasoning that stands behind legal norms. Obviously, this presumption in turn hinges on the relation between morality and law—here, on their relation in the domain of human rights. It is most plausibly not the case that all outcomes of philosophical argumentation are immediately applicable to the legal sphere, but this book starts from the assumption that there are at least *some* legal domains

in which a principled ethical background theory is crucial for developing, implementing, and interpreting legal norms[33]—and that *human rights law* is among those domains. A justificatory normative theory of human rights should ideally provide the guiding principle for conceptualizing, interpreting, and applying corresponding legal rights at national, supranational, regional, and global levels.[34]

This implies neither that moral human rights are to be realized exclusively via legal implementation nor that all of them should directly be translated into legal counterparts. While all of them essentially involve a claim to some form of legal implementation, they certainly also generate duties that go beyond law and require other means, such as social recognition, political measures, active agitation, activism, and many more.[35] The claim here is simply that ethical considerations about the foundational idea behind it should also govern and inform human rights law and the way it is interpreted. This is mirrored not only in the fact that human rights norms are paradigmatically framed in abstract terms and essentially need to be concretized but also in many (domestic and international) legal texts, which explicitly regard human rights as moral rights that belong to every human being *qua* being human and that are *recognized* within legal documents but do not *initially emanate* from them.[36]

The other side of the coin, which is not any less important, is that normative reasoning in legal theory should consult the legal domain, its actual content, institutions, instruments, and judgments, and cannot ignore positive law: If ethical reasoning hopes to be relevant to the interpretation and evolution of legal norms, then it must itself take account of legal reality. On this basis, the first, legally oriented part of this book provides the point of departure for the normative, ethically oriented inquiry in its second part, while its third part rounds off by transposing the normative findings to legal implementation, taking into account concrete legal notions as well as issues of practicability, feasibility, and justiciability.

One could object that, in light of the level of sophistication achieved in the legal debate on extraterritorial application of human rights, it should not "wait for the theoretical air to clear"[37] but concentrate on analyzing the question in concrete situations, in courtrooms, and on a case-by-case basis. Yet, as *Amartya Sen* puts it, human rights must achieve a "secure intellectual standing"[38]—and to this end, it is necessary to address conceptual points of critique. Unless opposing positions are systematically addressed, the normative foundation of extraterritorial duties remains vague. This might in turn negatively affect the degree to which such duties are factually accepted, both in political reality and in courtrooms. Ultimately, those who would most dramatically be affected by such developments are typically those who function as the weakest elements in the chain: the victims of human rights violations. Accordingly, the following reflections hope to contribute in a substantial and fruitful way to a topical scholarly debate that is of particular practical significance in the contemporary globalized and technologically advanced world, in which territorial borders have become more porous than ever. If human

rights law shall remain effective in addressing these complex and partly novel challenges—and, thereby, in effectively protecting people—it will benefit from interdisciplinary research on the background principles involved.

1.3.2 The Book's Scope

To set the book's scope, it is necessary to clarify central notions. First, the term *extraterritoriality* generally refers to the question of whether a state can or should set, apply, or enforce its norms vis-à-vis subjects who are not located on its territory. For the topic at issue here, it addresses whether human rights norms, to which state A is bound by domestic, supranational, or international law, are to be applied vis-à-vis *person X, who is not located on the territory of state A* (but rather on that of state B). According to this definition, it is irrelevant where state A's corresponding *actions* take place and where the state agent perpetrating the action is located.[39]

As a consequence, the question of extraterritorial obligations also pertains to domestic acts that have effects abroad. For example, it includes the denial of humanitarian visa to people applying from abroad (where, even though the decision was taken on state territory, the persons affected are located outside) but excludes questions on how a state treats refugees on its own territory (where those affected are located on the state's territory at the time of the act).

Moreover, these actions can be of a legislative, executive, or administrative nature, can amount to official state tasks or not, and be conducted on a legal basis or not. They also include both actions and omissions: Human rights require states to perform certain actions as well as to refrain from other actions, and the question of their extraterritorial applicability also arises in relation to the latter. The decisive criterion for triggering the question of extraterritorial applicability is only the location of X, the potential addressee of the norm and the potential victim of breaches of the norm. The applicability of legal norms, in principle, amounts to a prospective question that cannot depend on the properties of the corresponding action. Categorically, it belongs to the evaluation of the formal *admissibility* of complaints.[40]

Related to this, the book will not analyze the legitimacy of distinguishing between different categories of people *on a state's territory* (such as between citizens and noncitizens, people sojourning only temporarily, or people specifically asking for protection, such as refugees).[41]

Second, the—controversially debated—notions of 'human rights' and 'fundamental rights' generally refer to rights assigned to individuals *qua* their being human. These subjective rights are complex structures of intermingled normative positions with two essential parts: the *claim* of the right-holder and the *obligation* of the addressee of the right, i.e., the duty-bearer.[42]

Whereas human rights are legally enshrined at various levels, the presumption is that there is no foundational normative difference between domestic, supranational, or international norms: All of them arise from the same ethical

idea. What differentiates them is the duty-bearers for which they respectively generate obligations: At the constitutional level, *fundamental rights* constrain only the domestic state, whereas international *human rights* obligations bind Member States (of the relevant treaty) or all states universally (in the case of customary international law and *ius cogens*).[43] Thus, the difference between *fundamental* and *human* rights is not one of substance but lies in the legal levels they belong to. Therefore, their central applicability principles should converge, too (even though specific circumstances will have to be considered when transposing these principles to legal practice).

In addition, the analysis will be aware of important—and gradually overlapping—distinctions. There is a difference between negative duties (i.e., duties to refrain from infringing on rights) and positive duties (i.e., duties to take specific measures). Furthermore, human rights generate obligations to respect (i.e., to refrain from violating), to protect (i.e., to protect from violations committed by third parties), and to fulfill rights (i.e., to work toward realizing human rights enjoyment). And, one can distinguish duties of a state that is *already* acting with extraterritorial effects and duties to *take up* actions with extraterritorial impact.[44]

Third, putting the research focus on obligations of *states* does not mean that these are necessarily the *only* duty-bearers in the human rights context. It is likely the case that non-state actors (e.g., TNCs) or collective bodies (e.g., international organizations) are or should be subject to moral and/or legal human rights obligations too. While these issues will selectively be touched upon, especially in relation to the obligations of the EU (which is an international organization), it is beyond the scope of the analysis to comprehensively examine them. Moreover, neither shall the framing of the question be taken to imply any claim about the necessity, resilience, or desirability of the contemporary global system of dividing the world into territorial states. The research question simply takes this system as the current "empirical background condition" that must be taken into account for normative approaches to global issues.[45]

As a further step to bring out the book's scope, it is important to say what it is not about. To this end, it must be demarcated from two other debates that touch upon the implications of human rights beyond borders, the first of which concerns the concept of a *Responsibility to Protect* (R2P). It is said to arise when a state potentially or actually commits gross and systematic atrocities on its population, such as genocide, crimes against humanity, war crimes, or ethnic cleansing, which triggers a corresponding responsibility of the international community to coercively intervene on humanitarian grounds (if necessary by military means) to prevent or end the atrocities.[46]

While the topic is closely related, R2P is limited to very *serious and widespread* violations of human rights committed *by the domestic state*. The corresponding human rights obligations thus stay with the domestic state—only the latter's unwillingness or inability to comply can trigger *subsidiary* rights or 'responsibilities' *to protect* of the international community.

In contrast, the question of extraterritorial obligations in human rights law pursued here enquires into the diagonal relation between an individual and a foreign state, asking whether *third states* have *direct* human rights obligations to individuals abroad, which in principle exist not only subsidiarily but regardless of the conduct of the domestic state, are multidimensional (i.e., obligations to respect, protect, and fulfill), and are not (or at least not exclusively) to be discharged by foreign interventions.

Second, the book does not address *universal jurisdiction*, which, in general international law, focuses on a state's entitlement to exercise *adjudicative* jurisdiction over situations abroad on the basis of the universality principle. Behind this (not undisputed) principle stands the assumption that certain horrendous acts, most importantly the violation of *ius cogens*, occasion a nexus to all states because they not only transgress victims' rights but the rights and values of humanity as such, the respect of which lies in the interests of every member of the global community, entitling any state to put their perpetrators on trial, irrespective of where the crimes have taken place.[47]

While the debate on the legitimacy of universal jurisdiction is doubtlessly relevant when reflecting about human rights violations beyond borders, it is concerned with the *de iure entitlement* of a state to *adjudicate retrospectively* over violations committed by *other agents*. It does not concern the question pursued here, which is in principle independent of states' *de iure* entitlement to do so, does not take an exclusively retrospective perspective, is not limited to adjudicative measures, and does not concern the conduct of third parties but a state's own conduct.

While it is important to demarcate the debates from the question pursued here, it is equally important to stress that all of them reflect productive attempts to evaluate the status and reach of universal human rights in contemporary international law.

Notes

1 *Universal Declaration of Human Rights*, 10 December 1948, A/RES/217 A(III) (UDHR).
2 Leisering, Britta, Menschenrechte an den europäischen Außengrenzen: Das Ringen um Schutzstandards für Flüchtlinge (Frankfurt a.M.: Campus, 2016), 43 ff.
3 In what follows, the term 'outsiders' will be used to denote individuals who are not located on a state's territory, as opposed to 'insiders'.
4 Habermas, Jürgen, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', *Politische Theorie*, Philosophische Texte, vol. IV (Frankfurt a.M.: Suhrkamp, 2009), 313–401, 381 ff.
5 Cf. the terminology used by Brilmayer, Lea, *Justifying International Acts* (Ithaca/London: Cornell University Press, 1989), 84.
6 Gibney, Mark et al., 'Introduction', in Gibney, Mark et al. (eds.), *Routledge Handbook on Extraterritorial Human Rights Obligations* (Abingdon/New York: Routledge, 2022), 1. On the term 'legal black holes', e.g., Wilde, Ralph, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and

Political Rights', *Michigan Journal of International Law*, 26/3 (2005), 739–806; Steyn, Johan, 'Guantanamo Bay: The Legal Black Hole', *The International and Comparative Law Quarterly*, 53/1 (2004), 1–15.

7 See Chapters 2–5. On the terminological difference between *fundamental* and *human* rights, Section 1.3.2.

8 Gibney, Mark, 'The Historical Development of Extraterritorial Obligations', in Gibney, Mark et al. (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Abingdon/New York: Routledge, 2022), 13–24, 14 ff.; Wilde, Ralph, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights', in Sheeran, Scott & Rodley, Nigel Sir (eds.), *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), 635–661, 636. For concrete examples, Sections 2.3 and 4.5.

9 Kagan, Robert, *The Jungle Grows Back: America and Our Imperiled World* (New York: Knopf Doubleday, 2018).

10 Gujer, Eric, 'Die Ära der Werte ist vorbei—die Welt erlebt die Rückkehr der Realpolitik', *Neue Zürcher Zeitung*, 30 November 2018. Cf. e.g., Margolies, Daniel S. et al., 'Introduction', in Margolies, Daniel S. et al. (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (Abingdon/New York: Routledge, 2019), 1–10, 1; the various contributions in Maull, Hanns W. (ed.), *The Rise and Decline of the Post-Cold War International Order* (Oxford: Oxford University Press, 2018).

11 For example, Hopgood, Stephen, 'Human Rights in the Real World', in Brown, Chris & Eckersley, Robin (eds.), *The Oxford Handbook of International Political Theory* (Oxford: Oxford University Press, 2018), 304–315, 312 f.

12 Dunne, Tim, 'Ethical Foreign Policy in a Multipolar World', in Brown, Chris & Eckersley, Robin (eds.), *The Oxford Handbook of International Political Theory* (Oxford: Oxford University Press, 2018), 495–507, 505; see also various other contributions in Brown, Chris & Eckersley, Robin (eds.), *The Oxford Handbook of International Political Theory* (Oxford: Oxford University Press, 2018).

13 Foulkes, Imogen, 'Are We Heading towards a "Post Human Rights World"?', *BBC News*, 30 December 2016.

14 Trump, Donald, 'Remarks by President Trump to the 74th Session of the United Nations General Assembly', *The White House*, 24 September 2019, www.whitehouse.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/.

15 Sabel, Charles, 'Sovereignty and Complex Interdependence: Some Surprising Indications of Their Compatibility', in Satz, Debra & Lever, Annabelle (eds.), *Ideas That Matter: Democracy, Justice, Rights* (New York: Oxford University Press, 2019), 201–230, 203; Beardsworth, Richard; Brown, Garrett Wallace & Shapcott, Richard, 'Introduction', in Beardsworth, Richard; Brown, Garrett Wallace & Shapcott, Richard (eds.), *The State and Cosmopolitan Responsibilities* (Oxford: Oxford University Press, 2019), 1–12, 2; Sabel, *Sovereignty*.

16 Cf. Glanville, Luke, 'The Responsibility to Protect beyond Borders in the Law of Nature and Nations', *European Journal of International Law*, 28/4 (2017), 1069–1095.

17 *European Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights]*, 4 November 1950 (as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13), 213 UNTS 221, ETS 5 (ECHR).

18 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (ICCPR). On the concept of jurisdiction in IHRL, Section 4.3.

19 Examples of early research on these two treaties include Meron, Theodor, 'Extraterritoriality of Human Rights Treaties', *American Journal of International Law*, 89/1 (1995), 78–82; Skogly, Sigrun I. & Gibney, Mark, 'Transnational Human Rights Obligations', *Human Rights Quarterly*, 24/3 (2002), 781–798; the contributions in Coomans, Fons & Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004); Gondek, Michal, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', *Netherlands International Law Review*, 52/3 (2005), 349–387; Wilde, Ralph, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?', *European Human Rights Law Review*, 10/2 (2005), 115–124; Ben-Naftali, Orna, 'The Extraterritorial Application of Human Rights to Occupied Territories', *Proceedings of the Annual Meeting of the American Society of International Law*, 100 (2006), 90–95; De Schutter, Olivier, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', *Baltic Yearbook of International Law*, 6 (2006), 185–247; Loucaides, Loukis, 'Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case', *European Human Rights Law Review*, 4 (2006), 391–407.

20 Reflected, e.g., in Vandenhole, Wouter (ed.), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Abingdon/New York: Routledge, 2015).

21 Examples include Coomans, Fons & Künnemann, Rolf (eds.), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Cambridge/Portland: Intersentia, 2012); De Schutter, Olivier et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', *Human Rights Quarterly*, 34/4 (2012), 1084–1169; Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013).

22 For more recent research on civil and political rights, see various contributions in Gibney, Mark et al. (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Abingdon/New York: Routledge, 2022); Besson, Samantha, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', *Leiden Journal of International Law*, 25/4 (2012), 857–884; Ryngaert, Cedric, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights', *Merkourios—Utrecht Journal of International & European Law*, 28/74 (2012), 57–60; Da Costa, Karen, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden/Boston: Martinus Nijhoff, 2013); Milanović, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2013); Wilde, *Civil and Political Rights*; Milanović, Marko, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age', *Harvard International Law Journal*, 56/1 (2015), 81–146; Raible, Lea, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game Changers', *European Human Rights Law Review*, 21/2 (2016), 161–168; Joseph, Sarah & Dipnall, Sam, 'Scope of Application', in Moeckli, Daniel; Shah,

Sangeeta & Sivakumaran, Sandesh (eds.), *International Human Rights Law*, 3rd edn (Oxford: Oxford University Press, 2018), 110–131; Karakas, Isil & Bakirci, Hasan, 'Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility', in Aaken, Anne van & Motoc, Iulia (eds.), *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018), 112–134.

23 The debate was intensified by the 'Ruggie Principles', HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework [Ruggie Principles], Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/17/31, Annex, 16 June 2011. On the debate, e.g., Deva, Surya & Bilchitz, David (eds.), *Building a Treaty on Business and Human Rights* (Cambridge: Cambridge University Press, 2017).

24 This is reflected in the fact that inclusive networks on the issue unite practitioners, civil society, and academics, prominently ETO Consortium, 'About Us', www.etoconsortium.org/en/about/.

25 Section 6.2; cf. also the analysis in Besson, Samantha, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution?', *Social Philosophy and Policy*, 32/1 (2015), 244–268, 246 f. On R2P, Section 1.3.2.

26 Langford, Malcolm & Darrow, Mac, 'Moral Theory, International Law and Global Justice', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 419–444.

27 For example, Moyn, Samuel, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2012). See Chapters 6 and 7.

28 In detail and for references, Section 6.2.1.

29 Tan, Kok-Chor, *Justice without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004), 46.

30 Sutch, Peter, 'The Slow Normalization of Normative Political Theory: Cosmopolitanism and Communitarianism Then and Now', in Brown, Chris & Eckersley, Robin (eds.), *The Oxford Handbook of International Political Theory* (Oxford: Oxford University Press, 2018), 35–47, 37.

31 In what follows, the terms 'territorial view' or 'territorial conception' are used as shortcuts for views that embrace a territorial limitation of human rights obligations.

32 For a summarized version, Müller, Angela, 'Justifying Extraterritorial Human Rights Obligations: An Ethical Perspective', in Gibney, Mark et al. (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Abingdon/New York: Routledge, 2022), 53–64.

33 Buchanan, Allen, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International* Law (New York: Oxford University Press, 2004), 16 ff., 21 ff.; Ratner, Steven R., *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford: Oxford University Press, 2015), 2. On the relation between morality and law, further Section 6.1; Chapter 9.

34 Cf. Mahlmann, Matthias, *Elemente einer ethischen Grundrechtstheorie* (Baden-Baden: Nomos, 2008), 13 ff., 27 ff.

35 Sen, Amartya, 'Elements of a Theory of Human Rights', *Philosophy & Public Affairs*, 32/4 (2004), 315–356, 326 ff., 342 ff.

36 For example, Preamble *UDHR*; cf. Mahlmann, Matthias, 'Universalism', *Max Planck Encyclopedia of Comparative Constitutional Law*, 2016, para. 31; Mahlmann, Matthias, 'Mind and Rights: Neuroscience, Philosophy and the Foundations of Legal Justice', in Sellers, M.N.S. (ed.), *Law, Reason, and Emotion* (Cambridge: Cambridge University Press, 2017), 80–137, 92 f., 109.
37 Sen, *Elements*, 317.
38 Ibid., 317.
39 Kamminga, Menno T., 'Extraterritoriality', in Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, 2012, chap. A1. Some opt for different terminology like 'global', 'transnational', or 'external'. On terminological issues, Skogly, Sigrun I., *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerpen/Oxford: Intersentia, 2006), 5; Gibney, Mark, 'On Terminology: Extraterritorial Obligations', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 32–47; Langford, Malcolm et al., 'Introduction', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 3–31, 12 f. Various treaties clarify that the location of the rights-holder is the decisive criterion. The ECHR requires States Parties to "secure to *everyone within their jurisdiction*" the fundamental rights enshrined in the Convention, Art. 1 *ECHR*, emphasis added. Cf. also Art. 2(1) *ICCPR*; Art. 2(1) *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (CRC); Art. 1(1) *American Convention on Human Rights [Pact of San José]*, 22 November 1969, 1144 UNTS 123 (ACHR); Art. 2 *Arab Charter on Human Rights [revised]*, 15 September 1994, 12 IHRR 893 (2005) (ArCHR).
40 Vandenhole, Wouter, 'Obligations and Responsibility in a Plural and Diverse Duty-Bearer Human Rights Regime', in Vandenhole, Wouter (ed.), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Abingdon/New York: Routledge, 2015), 115–135, 117. However, courts sometimes link the question to the merits, as the context is often highly relevant. On this topic and on the relation between jurisdiction and state responsibility, Sections 4.5 and 10.2.2.
41 Section 6.2.2.
42 Mahlmann, Matthias, *Rechtsphilosophie und Rechtstheorie*, 7th edn (Baden-Baden: Nomos, 2023), 395. The notions of 'obligation' and 'duty' will be used interchangeably.
43 Section 4.1.
44 Ratner, Steven R., 'Between Minimum and Optimum World Public Order: An Ethical Path for the Future', in Arsanjani, Mahnoush H. et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden: Brill, 2010), 195–216, 207 ff., 212.
45 Brown, Garrett Wallace & Jarvis, Samuel, 'Motivating Cosmopolitanism and the Responsibility for the Health of Others', in Beardsworth, Richard; Brown, Garrett Wallace & Shapcott, Richard (eds.), *The State and Cosmopolitan Responsibilities* (Oxford: Oxford University Press, 2019), 203–223, 205. Cf. the critique that the mere project of analyzing extraterritorial human rights obligations is caught within the presumptions of the statist systems and its distinction between insiders and outsiders, Wilde, Ralph, 'Dilemmas in Promoting Global Economic Justice

through Human Rights Law', in Bhuta, Nehal (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford: Oxford University Press, 2016), 127–175, 152 ff.

46 UNGA, *2005 World Summit Outcome*, A/RES/60/1, 24 October 2005, para. 139.

47 Mahlmann, Matthias, *Konkrete Gerechtigkeit*, 6th edn (Baden-Baden: Nomos, 2022), 201.

Part I
Legal Framework

2 Fundamental Rights Protection in Domestic Constitutions

2.1 The External Dimension of Domestic Constitutions

Taking a look at the extraterritorial application of fundamental rights in *domestic law* is a helpful starting point for the subsequent discussion on international human rights, on which the focus will lie. First, this is because the former debate is older than its counterpart in IHRL. Arguably, this partly results from the inherent external dimensions constitutions display: Constitutions essentially function as a way to delimit insiders from outsiders, to set the social, administrative, and geographical boundaries of the state. The more globalized the world becomes and the more porous these boundaries get, the more significant and complicated these external dimensions become. *Inter alia*, they concern the ways a state treats outsiders (both those who wish to enter its territory and those who do not) and the ways in which it protects domestic interests of citizens against those of outsiders.[1] Second, fundamental rights enshrined in constitutions are often declared to reflect a domestic acknowledgment of *universal* human rights anchored in international law, assigned by virtue of *being human* and on the basis of human dignity.[2] Because of this "dual positivization of fundamental rights", by adhering to constitutional rights, states simultaneously contribute to the protection of universal human rights and thus of fundamental values on which the international legal system is based.[3]

Third, related to this line of reasoning is the debate on 'Global Constitutionalism', i.e., on whether international law has undergone a transformative process of constitutionalization on formal, functional, procedural, and substantive dimensions—from primarily contractual law to public law and to constitutional-like functions.[4] From this angle, international human rights can also be regarded as constitutional principles enshrined in international law, and domestic and international rights protection as not only a dual but a "mutual positivization", mutually legitimizing and complementing each other.[5]

Adopting these perspectives to the question of extraterritorial applicability leads to several interpretations. On the one hand, one could either argue for domestic and international rights having the same scopes of application as a

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result of which their extraterritorial reach should be coextensive too. On the other hand, one could hold that their respective applicability must differ precisely because of their different grounding: In contrast to international rights, domestic rights are enshrined in municipal law, which is inherently and necessarily tied to a limited jurisdictional space, and they are not assigned by virtue of being human but by virtue of residing, being located, or being a citizen of this very space. Following this line of reasoning, due to the very essence of domestically enshrined fundamental rights, they would only be applicable on a state's territory (or within its jurisdiction) and do not amount to universal principles in the first place. They would thus also lack the transnational claim that comes with IHRL as part of international law.

What is crucial for the discussion at hand is that all of the above interpretations on the relation between domestic fundamental rights and international human rights are compatible with the claim that the scope of application of the latter should be *at least as wide* as that of the former. In other words, and this should be kept in mind in what follows, the degree to which *domestic* rights are applied abroad provides the *minimal* baseline for the extraterritorial application of *international* rights. Hence, an inquiry into this minimal baseline appears a good starting point for the analysis to come.

2.2 Illustrations of a Broad Approach: Switzerland and Germany

Constitutional approaches to the applicability of fundamental rights protection vary. Some state constitutions apply them as constraints to the exercise of public authority in general and thereby, at least *prima facie*, without any territorial limitations. An illustration of such an approach is the wording of the Constitution of Switzerland.

First, in its Article 35(1), it holds: "Fundamental rights must be upheld throughout the legal system".[6] Enacted in 1999, the Swiss Constitution thereby understands fundamental rights as expressing foundational values judgments, the constitutive normative basis upon which the entire legal order is built. Second, the Swiss Constitution importantly adds that "[w]hoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation".[7] The choice of a functional over a personal criterion shows that the corresponding obligations apply to the state (and everyone acting on its behalf) in all aspects of its conduct, to all branches of the government, whether within the domain of its official tasks or outside.[8] In their justiciable dimension, i.e., their application to concrete cases by the judiciary, fundamental rights bind all branches of the state. On a programmatic level, they primarily address the legislative, requiring it to realize their normative substance in law-making. Finally, as ancillary standards, they set indirectly justiciable benchmarks for applying other norms, which must conform to fundamental rights, and serve as essential points of reference for executive decisions and administrative measures.[9]

In light of the wording in Article 35 and the foundational normative role assigned to fundamental rights, commentators broadly agree that fundamental rights should today be regarded as correspondingly pertaining to foreign policy and extraterritorial matters, too. Insofar as they serve as the standard against which all state conduct is judged, this, at least in principle, includes its conduct with effects abroad, too.[10]

A further constitutional Article on foreign relations supports this view. It obliges the Swiss Confederation to "assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful co-existence of peoples as well as the conservation of natural resources".[11] This explicit reference to human rights is noteworthy: On the one hand, it constitutes the foundation of all human rights-related efforts Switzerland undertakes abroad, including regarding domestic issues in foreign states. On the other hand, it requires the state to take into consideration human rights in all domains of foreign policy, implying an obligation to assess and consider the human rights impact of all its conduct with effects abroad. In brief, fundamental rights provide essential points of reference for both legislative and executive activities in foreign relations.[12]

Their programmatic influence is detectable in a variety of Federal Acts the wordings of which suggest extraterritorial reach. They either explicitly refer to the aim of fundamental rights protection—such as the revised Act on Data Protection[13]—or legally oblige authorities to consider fundamental rights of individuals abroad in specific Articles. For example, in principle, Intelligence Services are legally obliged to ensure, if their activities take place or have effects abroad, "that interference with the fundamental rights of the persons concerned can be limited to what is necessary",[14] and private security companies[15] are prohibited from conducting operations abroad "if it may be assumed that the recipients will use the services in connection with the commission of serious human rights violations".[16] That said, these examples of implicit legislative references to the extraterritorial applicability of fundamental rights in the *wording* of Federal Acts evidently only go so far. It is a different question whether they are *in practice* not trumped by other motives of Swiss foreign policy. For example, the Federal Act on intelligence services (NDG) has widely been criticized for authorizing operations that are fundamentally in tension with a range of human rights—toward people on Swiss territory and beyond.[17]

Moreover, it is also a different question to which extent this role of fundamental rights, setting objective principles for the state in its conduct with effects abroad, entails the justiciability of individual rights in situations of alleged extraterritorial violations. As suggested by the formula "[w]hoever acts on behalf of the state", it should likely extend to acts with extraterritorial effects, even with regard to their justiciability of individual claims.[18] In sum, the Swiss constitutional framework—at least *implicitly* and *on paper*—recognizes the extraterritorial reach of human rights. What this means *in practice*, however, remains unclear.

Importantly, and *in practice*, such an extraterritorial reach has been confirmed for another constitutional system that parallels the Swiss approach. The German Constitutional Court has recently issued a landmark judgment on the applicability of the German Basic Law. In recognizing human rights as the essential foundation of any human community, of peace, and of justice, the Basic Law asserts in its opening Article that its fundamental rights norms directly bind all three branches of the government. It explicitly declares the respect for and the protection of human dignity as obligations applying to all manifestations of state authority.[19]

According to the Constitutional Court, these foundational principles contain no indication that the state's subjugation to fundamental rights was limited to the German territory. On the contrary, the Court continues, the idea and purpose of having a system of individual rights protection is to comprehensively bind the state. They thus constrain all its organs, on all its levels, and whenever it acts, takes measures, or issues statements—and regardless of the location of the individual addressee. Extraterritorially applied fundamental rights not only amount to an objective legal principle but *per se* include the subjective dimension of rights as individual, justiciable claims.[20] Since the specific question the Court examined concerned extraterritorial surveillance and thus primarily the obligation to *respect* rights, the possibility of extraterritorial duties to protect and fulfill was not explicitly discussed—but neither was it explicitly excluded.[21]

In its reasoning, the Court centrally refers to the foundational nexus between constitutional rights and international human rights, asserting that a limitation of the former to the German territory would contradict the latter's essential and transnational aim of providing protection. Lastly, it emphasized the need for tailoring rights to contemporary threats arising through, for example, technological progress that increases the spatial reach of state measures.[22]

The Swiss and the German Constitution's approaches to the extraterritorial applicability of fundamental rights contrast with other constitutional systems, to one of which the discussion now turns.

2.3 A Restrictive Approach: The Case of the United States

In contrast to the above, there are also domestic legal orders with a continuous tendency to confine the application of fundamental rights norms to their own territories. A prominent example is the United States (US), on which the focus of the current section lies.

The example suggests itself for several reasons. First, the extraterritoriality debate in the US has been intense for a considerable amount of time, *inter alia* because the US Supreme Court, in contrast to many other countries' supreme or constitutional courts, has taken on cases of extraterritorial human rights claims on a more or less regular basis. As a result, an informative body of jurisprudence has evolved.[23]

Second, there is traditionally fierce political opposition in the US to the idea of rights applying extraterritorially, which makes it an interesting case for analysis. In some areas, such as terrorism or economic law (especially antitrust and competition law), US administrations have tended to promote the exercise of extraterritorial *legislative* jurisdiction—and the role often played by courts was to constrain such expansion of federal law abroad. In contrast, regarding *constitutional rights*, both the executive and the legislative branches have hesitated to expand their scope beyond borders.[24] Often, the aim is to restrict their reach to US territory in order to allow more leeway to the state in its actions abroad. This corresponds to the general doctrine of granting the government considerable power in paradigmatic cases of control over noncitizens abroad, such as in the areas of foreign policy, immigration, or military issues.[25]

Third, through its *Alien Tort Statute*,[26] the US in principle allows for filing *civil* suits against perpetrators of human rights violations committed abroad in its domestic courts, thereby providing for an exceptional measure that is barely available elsewhere.[27] While this does not directly concern the question of extraterritorial fundamental rights obligations of the state (but rather the *civil liability* of *foreign agents*), it touches upon the general conception of and the significance assigned to territory within the domestic judicial system of the US.

The following reflections will, in its first section and primarily, address US constitutional jurisprudence. A second section briefly explains the role of extraterritoriality in statutory law but only insofar as it refers to the applicability of fundamental rights, which is mostly the case in relation to the abovementioned *Alien Tort Statute*. The third section concludes.

2.3.1 The Reach of US Constitutional Rights

Contrary to the Swiss Constitution and the German Basic Law, the US Constitution[28] does not contain a general applicability clause for fundamental rights. They are primarily enshrined within constitutional amendments, the wording of which does not yet provide sufficient clarity on the scope of their extraterritorial applicability. On the one hand, most of them do not contain any territorial limitations. Exceptions include, for example, the constitutional protection from slavery, which prohibits slavery "within the United States, or any place subject to their jurisdiction".[29] This absence of territorial limitations does however not yet imply that the corresponding norms are regularly applied abroad. For example, the right to carry arms does not mention territory but has never been recognized abroad.[30]

On the other hand, the Preamble declares the Constitution to be established by its "people",[31] and various constitutional amendments describe particular fundamental rights to be a "right of the people".[32] This terminology mirrors a fundamental background theory on the nature of the Constitution, which has heavily influenced legal and political discourse in the US up until today: In the eyes of many, the Constitution amounts to a *social contract* between the

state and its members. Uniting the community, it constitutes a foundational agreement of reciprocity, empowering the state with the authority to govern by using coercive force in exchange for entitling citizens to protection in the form of constraints upon state action.[33]

In what follows, central elements of the jurisprudence on the extraterritorial application of the Constitution's bill of rights—or, as it is sometimes put, on the question whether 'the Constitution follows the flag'—will be outlined. Before doing so, two aspects relevant to the discussion need to be mentioned: First, the 'state action requirement' refers to the fact that constitutional rights enshrined in the amendments are mostly formulated as constraints upon governmental leeway, not as rights to which individuals are entitled. As a result, claims about violations of rights by private parties must always attest to a corresponding conduct on the part of the government.[34]

Second, the US tends to deny the self-executing status of many *international* human rights treaties.[35] In these cases, in order to be enforceable, the corresponding norms need to be incorporated into domestic law by a legislative act. Thus, when considering the extraterritoriality question, US courts tend to focus on domestic law and typically do not directly consider IHRL unless it has been incorporated into the domestic legal system.[36]

One of the earliest relevant cases, *In re Ross*, stems from 1891. The petitioner was convicted by a US Consular Court in Japan for having committed murder on board of a US vessel, located in Japanese territorial waters at the time of the offence. As a crew member of the US vessel, he was regarded as a *de facto* US citizen.[37] However, the constitutional guarantees against unjust accusation and partial trial, which the petitioner claimed had been violated, were held to "apply only to citizens and others *within the United States* or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad".[38] This reliance on the territoriality principle was explicitly confirmed: "The Constitution can have no operation in another country".[39] The Court described the conditions applying to the exercise of authority abroad as fully dependent on the existence of and the parameters agreed within the corresponding bilateral treaty.

The case already illustrates the susceptibility of issues of extraterritorial jurisdiction to conflations: In the above argumentation, the Court conflated the *conditions of lawful exercise of authority abroad* with the question of what constraints the US and its agents are subjected to *once it has chosen to act abroad*, constraints which would hold irrespective of whether the initial choice to go abroad was lawful or not.[40] Arguably, this susceptibility to conflations, which also surfaces with respect to other judicial bodies, contributes to the general struggle of courts in developing coherent principles on the issue, as the following analysis will repeatedly show.

An important origin of US case law on rights of *noncitizens* abroad lies in a series of Supreme Court cases known as the *Insular Cases*. These date back to the Spanish–American war at the end of the 19th century, during which the US had acquired additional territories, such as Alaska, Guam, Hawaii,

the Philippines, or Puerto Rico. The question to deal with was whether 'the Constitution followed the flag' to these territories. It was not constrained to the issue of constitutional *rights*, but rather pertained to the Constitution in general, originating in controversies over commercial issues.[41]

In *Downes v. Bidwell*,[42] one of the most important *Insular Cases*, the Supreme Court eventually had to address the explicit question of the applicability of the Constitution. It is in this case that it laid the foundation for its further jurisprudence, influencing it up until today.[43] Dealing with the situation in Puerto Rico, the Court introduced the distinction between *incorporated territories* (which the US plans to occupy permanently and absolutely) and *unincorporated territories* (on which it installs a mere provisional and temporarily limited occupation), and combined it with that between *fundamental* and *non-fundamental constitutional norms*, without elaborating on the content of the latter categories.[44] It ruled that in the incorporated territories, constitutional rights shall be *fully* applied. In contrast, in the unincorporated areas, only the most fundamental rights shall be granted. Here, the rest of the Constitution (its 'non-fundamental' norms) applies only partially and conditional upon legislation of Congress.[45] Puerto Rico was defined as "belonging to the United States, but not a part of the United States"[46] and "while *in an international sense* (...) not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States *in a domestic sense*".[47] Based on these arguably rather blurry distinctions, Puerto Rican residents were denied full constitutional protection, even though the territory was under complete US jurisdiction: 'Non-fundamental' constitutional norms would not automatically apply there and bind US state agents, not even vis-à-vis US citizens on Puerto Rican territory.[48]

The majority judgment in *Downes* was harshly criticized in dissenting opinions, which objected that such an interpretation perverts the spirit of the Constitution, because "the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution", as a result of which it should be applied in all the territories subject to complete US authority and jurisdiction.[49]

The Court confirmed its denial of full constitutional protection in the new 'unincorporated' territories in many other *Insular Cases*,[50] which had apparently primarily been decided on the grounds of national interest. The motives behind creating different categories of constitutional protection doubtlessly rooted, *inter alia*, in racial biases: "If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible".[51]

Interpretations vary as to the implications of the *Insular Cases* on the extraterritoriality question. Some authors point out that, by not *entirely* denying constitutional protection to new territories, they provided at least a starting point for constitutional protection in territories abroad, which later

jurisprudence could take up when trying to develop coherent approaches.[52] Others harshly criticize the Court for having "effectively turned on its head the clear and unquestionable basis of US law: legal authority must be derived from the Constitution, and that, when laws or treaties conflict with that supreme document, they cannot stand".[53]

Half a century later, another landmark judgment contributed to setting the grounds for the extraterritoriality debate. In *Johnson v. Eisentrager*,[54] the issue was whether combatants of a foreign enemy party, who were detained in China and imprisoned in Germany by US state agents, shall be protected by various constitutional norms—*inter alia*, whether they have the constitutional right to *habeas corpus* under the Due Process Clause of the Fifth Amendment, i.e., the right to challenge the lawfulness of their detention in court. The Court denied their entitlement to a writ of *habeas corpus*, mainly on the basis of the location of their detention.[55]

This judgment neither succeeded in uniting all Justices behind. In a dissenting opinion, *Justice Black* argued that a right so fundamental as that to a writ of *habeas corpus* should be assigned to every human being and whenever US state agents detain a person, regardless of the location: It was not the intent of the Constitution that executive and military branches are free to handle criminal law by themselves and "completely free from judicial scrutiny".[56] Whereas not every protection enshrined in the Bill of Rights should be applied to territories under temporary US occupation, "that does not mean that the Constitution is wholly inapplicable in foreign territories that we occupy and govern".[57]

It is not entirely apparent how much of a difference it would ultimately have made if the petitioners in *Eisentrager* had been US citizens—thus whether the Court would expand the Constitution on the basis of a principle of *citizenship*, so that it also applies to citizens abroad. Nonetheless, the Court's primary criterion for denying rights was the extraterritorial location of the detainees and not their status as noncitizens—thus, it applied a territorial criterion to the scope of the Constitution.

Some years later, however, *Reid v. Covert* indicated that citizenship can make a difference. The Court held that the constitutional guarantees of the Fifth and Sixth Amendments are applicable to US citizens tried on an extraterritorial US military basis. In doing so, it argued that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution", and criticized the approach taken in *Ross* as misconceived, "obviously erroneous" and "a relict from a different era".[58] It went on to emphasize the risks associated with an approach that gives permission to ignore the Constitution whenever this appears beneficial:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous

> doctrine and, if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our Government.[59]

The Court also confirmed the superior status of the Constitution vis-à-vis international treaties, implicating that the government cannot contract away the Constitution in agreements with other states. Importantly, it also dismissed the *Insular Cases* approach that only the most fundamental constitutional rights apply to nationals abroad, seeing no justification for "picking and choosing" among them.[60] What may sound like the Court referring—for the first time—to universalist considerations on closer scrutiny turns out to be an application of the principle of *citizenship*: While it granted full constitutional protection to citizens and thereby conceded that, in principle, the Constitution can be applicable abroad, this cannot be taken as implying anything regarding the status of noncitizens—it clearly restricted its discussion to the former.[61] Importantly, a concurring opinion by *Justice Harlan* highlighted the need for context-sensitivity in extraterritorial cases, for having regard to practical circumstances and evaluating on a case-by-case basis. Contrary to the majority, he assessed both the *Insular Cases* and *Ross* as supporting such a flexible approach. As he put it in what would later become an influential dictum, there is no rigid requirement that the Constitution fully apply to all exercises of authority over citizens abroad when such application was "*impracticable* and *anomalous*".[62]

This dictum was later explicitly referred to in the important judgment on *United States v. Verdugo-Urquidez*[63]—even though the case dealt with the status of a noncitizen. The Supreme Court held that the Fourth Amendment does not protect noncitizens from unreasonable searches and seizure by US agents of their property located abroad. In this specific case, Mr. Verdugo-Urquidez, a Mexican citizen, was arrested in Mexico and brought to the US, where he was still staying at the time his property was searched and confiscated by US agents in Mexico. Thus, strictly speaking, it did not amount to a case of extraterritoriality, as the victim was not located abroad at the time of the alleged violation.[64] However, according to the arguments brought forward by the Court, this aspect did not make a difference: He was not granted more expansive protection because of his location on US territory, and the case was considered as one of extraterritoriality. Therefore, it is directly pertinent to the question at issue.

The main principle introduced in *Verdugo-Urquidez* alluded to the notion of a both "substantial" and "voluntary" nexus to the US: Only if such a connection exists can an individual be regarded as part of 'the people' the Fourth Amendment intends to protect and which pertains "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community".[65] For Mr. Verdugo-Urquidez, the Court ruled that this nexus does not exist, despite his presence on US territory: As his location was a direct result of his arrest, it did not establish a *voluntary* relation to the US.[66]

Having recourse to the historical precedents of the *Insular Cases* and *Eisentrager*, the Court did not consider itself entitled to fully expand the Constitution to all territories over which the US exerts power:

> The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.[67]

The reasoning behind conditioning constitutional protection on the existence of a nexus between the state and an individual can again be traced back to the idea of the Constitution forming a *social contract* among the state and the members of its community. Membership in this contract does not have to be interpreted as being congruous to citizenship: In that particular case, it was regarded as including all residents with a significant voluntary relation to the state. Due to this underlying social contract conception, Mr. Verdugo-Urquidez could not appeal to *Reid* in defending his claim: As argued above, in *Reid*, constitutional rights were also granted on the basis of membership of the contract (here defined as *citizenship*)—and not on the basis of a universalist principle that governmental action shall always be constrained by the Constitution.[68]

Individual opinions on *Verdugo-Urquidez* brought forward different shades of a social contract view. Concurring, *Justice Stevens* expanded the scope of the compact slightly to *everyone lawfully present on US territory* and thereby included Mr. Verdugo-Urquidez, who was brought to the country as a result of a lawful arrest by US state agents. This conception of membership was explicitly dismissed by the majority.[69]

Dissenting, *Justice Brennan* argued that by having been treated by US state agents the way he had been treated, Mr. Verdugo-Urquidez actually "has become, quite literally, one of the governed"[70] and, thus, should be assigned constitutional rights. While membership of the circle of 'the governed' and a 'significant connection' remained preconditions for constitutional protection, Justice Brennan adopted a less demanding threshold for becoming a member, including those *whom the state enforces its legal rules upon*. The significant connection, in his eyes, can also be established on the part of the government, independent of the individual's behavior. Opposing the majority's narrow conception, he asserted that "[t]he focus of the Fourth Amendment is on *what* the Government can and cannot do, and *how* it may act, not on *against whom* these actions may be taken".[71]

Social contract approaches to the scope of fundamental rights will be returned to when the analysis attends to potential arguments behind the territorial view in the book's second part.[72] For the present discussion, it suffices to keep in mind, first, the central influence of these approaches on US

constitutionalism and, second, that the exact definition of membership of the contract can be (and has been) a matter of debate.

In *Verdugo-Urquidez*, the Court's majority adopted a rather *formalistic* approach, trying to develop formal principles of applicability on the basis of a social compact conception. However, this theoretical underpinning was not the only decisive factor behind the decision—practical and political concerns played a role too. As explicitly spelled out, accepting Fourth Amendment constraints on US state agents acting abroad would "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest" and thus "have significant and deleterious consequences for the United States in conducting activities beyond its boundaries".[73] The Court not only trusted the executive and legislative branches in their obedience to the Constitution but also aimed to protect them from equipping the Constitution with universal reach, suspecting that this would lead to a considerable lack of certainty about what the government can or cannot do abroad: In a world of competing sovereign states, the US must be in a position to respond to threats to its interests in effective ways.[74] Thus, it was also (or even mainly) motivated by the fear of putting too many curbs on the governmental room to maneuver in foreign policy matters—and, respectively, of granting too much power to the judiciary. In foreign policy matters, the judicial branch shall not have too much of a say.[75] Hence, if constitutional restrictions applied abroad, this would need to have been introduced by the legislative branch and based on political interests.

In his concurring opinion, *Justice Kennedy* took a yet different approach. He rejected the social contract idea, deeming it irrelevant whether people had explicitly acceded to the Constitution or not, and regarded the application of specific constitutional provisions as dependent on *circumstances.* Thereby, he had recourse to the dictum developed by Justice Harlan in *Reid*: The Constitution should not apply if this was "impractical and anomalous" to a specific situation at hand. Accordingly, Justice Kennedy favored a more practical, *functionalist* perspective over the majority's formalist one. Nonetheless, while granting that the government must always act in accordance with the Constitution, he at the same time opposed a universalist conception.[76]

As this variety of different lines of reasoning shows, *Verdugo-Urquidez* again failed to establish a consensus on the interpretation of the Constitution's reach, similar to what had been the case in its earlier jurisprudence. The extraterritorial application of fundamental rights appears an issue prone to be approached by a wide range of substantially different solutions.[77]

The tendency to deny constitutional rights to noncitizens abroad has been confirmed in various cases since *Verdugo-Urquidez.*[78] In 2008, however, it was eased by the Supreme Court's decision in *Boumediene v. Bush.*[79]

In order to understand the context of the case, one needs to go back to *Rasul v. Bush*, decided four years earlier.[80] Both cases deal with the status of individuals detained by the US in the course of its 'War on Terror' and

imprisoned in its Guantánamo detention camp. The camp is situated within the US military base in Guantánamo bay, which is part of Cuban territory but under the factual jurisdiction of the US, originating in a century-old lease agreement.[81] *Rasul* concerned the application of *habeas corpus* as enshrined in *statutory* law, which gives the right to allege unlawful detentions in federal courts. The Supreme Court held that this right shall also be assigned to foreign detainees in Guantánamo, thus that federal courts shall have jurisdiction over their *habeas corpus* claims.[82] As the verdict concerned statutory law (and not constitutional law), it left intact the legislative branch's power to change the law. In reaction, Congress enacted the *Detainee Treatment Act* in 2005,[83] denying federal courts jurisdiction over such claims and thus superseding *Rasul*. This was reinforced, partly as a response to further verdicts,[84] by the *Military Commissions Act* one year later.[85] The latter act also denied courts' jurisdiction for pending *habeas corpus* claims of 'enemy combatant' detainees.

It was in 2008 when the Supreme Court accepted the case of *Boumediene v. Bush*,[86] which eventually concerned the application of *constitutional* rights of Guantánamo detainees. In this landmark judgment, the Court declared the provisions of the *Military Commissions Act* unconstitutional. According to its ruling, Guantánamo detainees, even though they are foreigners arrested abroad for conduct abroad, shall be protected by the right to *habeas corpus* as well as the Suspension Clause (which forbids to suspend the right to a writ of *habeas corpus* unless this is necessary for public security in cases of rebellion or invasion).[87]

Interestingly, the majority now applied a *functional* conception of extraterritorial application, similar to Justice Kennedy in *Verdugo-Urquidez*, and explicitly rejected the *formalist* approach of earlier case law.[88] Kennedy, delivering the majority opinion in this case, again maintained that the question must be decided with regard to the circumstances of the specific case and on a pragmatic basis. In developing this functionalist approach, the Court turned to earlier case law, mentioning the *Insular Cases*, *Eisentrager* and *Reid*, to establish that applicability abroad depends on "objective factors and practical concerns, not formalism". Among these concerns are that such application must not be 'impracticable and anomalous', employing once again Justice Harlan's formula in *Reid*. Relying on his own opinion in *Verdugo-Urquidez*, Kennedy argued that these earlier cases did not deny applicability on the basis of a *territoriality* or *citizenship* principle but rather due to practical issues and specific circumstances.[89]

Evaluating the circumstances in *Boumediene*, the Court now introduced three factors to be taken into account for extraterritorial applicability, namely

> (1) the *citizenship* and *status* of the detainee and the adequacy of the process through which that status determination was made; (2) the *nature of the sites* where apprehension and then detention took place; and (3) the *practical obstacles* inherent in resolving the prisoner's entitlement.[90]

In the specific situation of the detained petitioners in Guantánamo and with regard to each of these three factors, circumstances that would render the application of this constitutional norm 'impracticable or anomalous' were, according to the Court's reasoning, not given—most importantly because the specific area of Guantánamo is under full *de facto* control of the US.[91] This *de facto* control mattered: If only *de iure* sovereignty mattered (as the defendants argued), this would open the possibility "for the political branches to govern without legal constraints. Our basic charter cannot be contracted away like this", as, "[e]ven when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution' ".[92] Moreover, the Court asserted that 'sovereignty' in its broad sense is a concept to be defined politically, and hence cannot at the same time function as the decisive and single threshold for the application of rights: The latter's scope cannot ultimately depend on a political choice. It thus also put emphasis on the significance of the separation of powers in relation to the issue of extraterritoriality. With regard to the Suspension Clause, for example, it maintained that "[t]he test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain".[93]

The majority decision in *Boumediene* was again harshly criticized by a dissenting minority, objecting to the broadening of the applicatory scope of the Constitution.[94] *Justice Scalia* strongly disapproved of the idea that the Constitution protects noncitizens abroad, asserting that citizenship not being a sufficient condition of such constitutional protection abroad does not mean that it ceases to be a necessary condition. He further rejected the functional approach adopted by the majority as not objective and based on an "inflated notion of judicial supremacy".[95] While acknowledging the significance of the separation of powers, Scalia interpreted it as rather calling for constraining the power of the *judicial* branch, insofar as, in his view, the Court's illegitimate expansion of the reach of constitutional norms may just as well overstep the legitimate boundaries of its institutional latitude.[96]

In scholarship, some celebrated *Boumediene*'s landmark judgment as a major substantial turn in the Court's dealing with extraterritoriality, first, because of its rejection of the earlier *formalist* approach, based on a *social contract* conception, to the benefit of a *functional* test; and second, because of its first-time assignment of constitutional rights to nonnational and nonresident enemy combatants located abroad during wartime.[97] It was acknowledged that *Boumediene* importantly rejected the unconvincing approach taken in *Verdugo-Urquidez*: "Abducting an innocent foreigner and then denying him all constitutional protection precisely because he was abducted is too perverse a doctrine to maintain in the modern era".[98] In this view, the judgment has moderated the differential treatment of nationals and nonnationals abroad, significantly reducing the risk of 'legal black holes' and taking "an important first step towards reconciling U.S. constitutional doctrine with (…) multifaceted global reality".[99]

While the direct consequences for the petitioners were modest, it still made clear that Guantánamo, the legality and legitimacy of which was highly discussed at the time, did not amount to a "law-free zone".[100] In this sense, *Boumediene* has been regarded as a crucial step toward acknowledging protections of individuals abroad. It at least acknowledged that some constitutional provisions apply beyond territory that is under *de iure* sovereignty and beyond the circle of citizens, rejecting the government's contrary argumentation and thereby expressing disapproval of very strict territorial or citizenship-based approaches to the scope of the Constitution.[101]

At the same time, the judgment has also been criticized for lacking coherence and not offering clear guidelines: While it established that nonresident nonnationals *can* have *some* rights, it left the scope and list of these rights entirely up in the air.[102] Especially, the case was addressing the special location of Guantánamo, which is under complete US control and thus, as confirmed by the Court, "[i]n every practical sense (…) not abroad".[103] In other words, Guantánamo was *quasi-territory*. While the Court's intent to constrain governmental power seemed apparent, it is still unresolved what this entails for other locations that are not under similarly strong control.[104] Thus, even though the Court disapproved of the idea that "the Constitution necessarily stops where de jure sovereignty ends",[105] the territorial paradigm is unlikely to have been overcome. Furthermore, the case dealt with procedural rights, leaving it open whether substantive rights could be assigned extraterritorially, too.[106]

Critics also argued that, contrary to what the Court said, *Boumediene*'s functional approach could also weaken the separation of powers, insofar as the government could start to construct and hide behind 'practical obstacles'. Recourse to practicability must itself be based on principles. If it is not, then this is very much against what constitutional courts are intended for: They may turn to practicability concerns in determining the *level* or *way* of applying a norm but not in determining whether a norm is applicable *in the first place*. Arguably, in taking this functional approach, the Court may have been moved by political considerations, too, aiming to ensure any constraints were *flexible* enough to preserve the executive's room to maneuver in matters of foreign policy.[107]

In its aftermath, lower courts have struggled to provide consistent argumentation on extraterritoriality issues—be it due to *Boumediene*'s lack of clear guidance and explicitness[108] or because they incompletely implemented the approaches developed in *Boumediene*;[109] be it because they dedicatedly tried to decide in conformity with what *Boumediene* stipulates[110] or because they have actually widely ignored its functional approach, falling back to the formalistic principle developed in *Verdugo-Urquidez*.[111]

In *Al Maqaleh v. Gates*,[112] for example, the court alluded to the *Boumediene* test but denied the constitutional right to *habeas corpus* to petitioners detained at Bagram Airfield, a US military base in Afghanistan. According to the court, contrary to what is the case in Guantánamo, US activities in Bagram cannot be regarded as an exercise of *de facto* sovereignty. Plausibly, this decision was

motivated by the fear of otherwise opening the door to claims from detainees of US military bases around the globe.[113] When reviewing the case in 2013, the court additionally highlighted the importance of leaving untouched the executive's powers in foreign policy matters and in war times, introducing an element not yet mentioned in *Boumediene*.[114]

A second example stems from *Arar v. Ashcroft*,[115] which dealt with an extraordinary rendition to Syria and the alleged violation of both the constitutional right to due process and the statutory *Torture Victim Protection Act*.[116] The alleged violations took place before deportation, i.e., while the petitioner was still located on US territory, but the parties' and court's reasoning is still pertinent to the extraterritoriality question: The government party argued that because he is not a citizen, the victim should not be assigned any constitutional rights—thereby, as some scholars maintain, "invoking an explicit and all-too-common double standard".[117] The court dismissed Arar's claim mostly on concerns of national security and secrecy,[118] but seemingly also because of its traditional and either-or concept of sovereignty—"with the result that alleged victims of American mistreatment are left without a remedy".[119]

Third, the court in *Al-Zahrani v. Rumsfeld* maintained a very narrow view of what parts of the Military Commissions Act were invalidated by *Boumediene*. It denied that *Boumediene*'s declaration about the existence of *de facto* sovereignty in Guantánamo affects the scope of the statute under scrutiny, which shall still depend on *de iure* sovereignty.[120]

In conclusion, it seems that the oscillatory and sometimes contradictory jurisprudence on the reach of US constitutional rights will likely continue,[121] not least in light of the fact that in recent years, the Supreme Court has declined many cases touching upon the question.[122] One notable exception was *Hernández v. Mesa*, addressing, *inter alia*, the question of whether the Fourth and Fifth Amendments shall protect a 15-year-old Mexican citizen shot to death on Mexican territory by a US border patrol agent, who was located on and shooting from the US side of the border.[123] Petitioners argued that as a result of the circumstances test developed in *Boumediene*, i.e., the status of the victim (an unarmed minor), the nature of the location (border region), and the practical concerns that would result from the application of the Constitution (constraints upon the use of lethal force by border patrol agents), the Constitution must apply. The defendants rejected this and denied applicability based on the lack of US authority over the area, alluding to *Verdugo-Urquidez*. The Court ultimately decided the case on other grounds, focusing on questions of civil liability and immunity of the border patrol agent, and sent it back to the lower court. It did so without taking a stance on the applicability of the Fourth Amendment to noncitizens abroad, mentioning, however, that the question was "sensitive" and "far reaching".[124] In dissent, *Justice Breyer* strongly criticized the Court's failure to address the issue, arguing that with respect to the status of the perpetrator and the nature of the location, a sufficiently significant nexus to the US had obviously been present and that it would be absurd and indeed "anomalous" to deny constitutional protection,

as it would make this protection dependent on some short distance and some "imaginary mathematical borderline".[125]

When *Hernández* returned to the Supreme Court two years later, it was again solely restricting itself to the question of whether a victim could demand recovery of damages for alleged violations of constitutional rights.[126] It denied this, confirming the verdict of the lower court,[127] again evading the underlying question of whether the incident constituted a violation of constitutional rights in the first place—and thus whether such rights can protect extraterritorially located individuals, too.[128] According to the Court, the evaluation of situations that touch upon foreign affairs is the task of the executive; equipping outsiders with the legal means to bring forward extraterritorial claims would be a matter for the legislative; and fidelity to the principle of separation of powers precludes the judiciary from taking any stance on these issues.[129]

2.3.2 Extraterritoriality and US Statutory Law

Simultaneously, the Supreme Court has also dealt with the extraterritorial reach of *statutory law*. In some cases, this touched upon the applicability of fundamental rights, most significantly in cases involving the *Alien Tort Statute*.[130] Even though they do not, strictly speaking, concern the question of the *state's obligations* stemming from *constitutional* rights of individuals abroad, a brief summary of selected examples will help further elucidate the background of the debate and the relation between US domestic law and IHRL. Moreover, in this field, the exercise of extraterritorial prescriptive jurisdiction (and the question of its lawfulness) and the issue that is at stake here, namely the existence of obligations to obey human rights when acting with extraterritorial effects (lawfully or unlawfully), are typically closely related.

For the application of statutory law, courts have generally developed a 'presumption against extraterritoriality', according to which legislative regulations by Congress do not apply abroad unless there is a clear congressional intent that this shall be the case. Rooted in the beginning of the 20th century,[131] the presumption has since been confirmed on a regular basis, evolving into a "longstanding principle of American Law".[132]

The *Alien Tort Statute*, enacted 1789, is a unique regulation that allows foreigners to file civil suits in US federal courts against alien perpetrators of alleged violations of international law, implicitly including IHRL (but limited to customary international law and treaties to which the US is a State Party).[133] In principle, this can cover violations committed abroad as long as the (necessarily foreign) perpetrator is located on US soil at the time of the legal proceedings. The statute thus offers a rare opportunity to enforce IHRL, which is well-known for its limited enforcing mechanisms, and claims extraterritorial *adjudicative* jurisdiction over human rights violations committed by third parties abroad. By allowing civil law litigation, it is to be distinguished from what is commonly referred to as 'universal jurisdiction' approaches,

which claim jurisdiction based on criminal law.[134] In brief, it concerns the *civil* liability of *foreign* agents for violations of *international* law.

The first modern case that involved alleged violations of IHRL, *Filártiga v. Peña-Irala*, was decided in 1980. The court found a Paraguayan citizen liable for torture and extrajudicial killings committed in Paraguay against Paraguayan citizens: "The prohibition [of torture by state officials] is clear and unambiguous and admits of no distinction between treatment of aliens and citizens".[135] The judgment opened the door to a wave of further cases, including against foreign officials. In some cases, jurisdiction was denied, while in others, it was accepted. In many of the latter, however, the verdicts remained of a rather symbolic nature due to the limited enforcement means regarding foreign assets.[136]

This somewhat generous take on extraterritorial applicability experienced a substantial turn when the first *Alien Tort Statute* case was heard by the Supreme Court. In *Sosa v. Alvarez-Machain*, decided in 2004, the Court rejected the complaint of the petitioners—Mexican citizens and residents—who had been kidnapped in Mexico by Mexican citizens, who were in turn engaged by US state officials. The Court substantially circumscribed the scope of the *Alien Tort Statute*, limiting it to norms *widely recognized* under international law, i.e., to *specific*, *universal*, and *obligatory* norms of the international community, and with regard to human rights, to only *the most serious violations* of them.[137]

Subsequently, the scope of jurisdiction granted under the *Alien Tort Statute* was significantly narrowed.[138] In doing so, courts relied on various argumentative principles, *inter alia* on the concept of the 'act of state doctrine', meaning that domestic courts are not in a position to judge actions of foreign sovereign states committed on their own territory.[139]

A further backlash was triggered when suits increasingly began to target multinational corporations. Here, suddenly, the assets of the defendants often were within reach of US courts, arguably prompting the latter to further restrict the scope of the statute.[140] In the landmark *Kiobel Cases*, the Supreme Court unanimously dismissed the claims of Nigerian nationals suing various non-US TNCs for alleged violations of human rights norms of customary international law. It stressed that absent a strong link to US territory, the 'presumption against extraterritoriality' also holds for the *Alien Tort Statute*, which contains no indication that Congress aimed at applying it abroad.[141] Once more, it alluded to the separation of powers and the importance of avoiding intrusion into foreign policy prerogatives of the executive branch.

The *Kiobel* judgment mirrors the Court's recognition of the changing role of the US in a changing global political landscape and its corresponding inclination to return to territory or nationality as thresholds for adjudicative jurisdiction. It constrained the applicability of the statute to such a degree that it is hard to imagine how it could ever again be applied to any violations of international law committed abroad. As such, the case hints at a more general tendency, which will also have an impact beyond statutory law.[142]

2.3.3 Conclusion: Extraterritorial Fundamental Rights Obligations in US Domestic Law

To conclude, US courts, most importantly the Supreme Court, tend to apply a rather restrictive approach to the scope of constitutional rights protection—which allows for certain but very limited exceptions. At least in earlier case law, this view often appeared to be grounded on the idea of a social contract between the state and its members (sometimes limited to citizens, sometimes including long-term residents and other people with a substantial nexus to the state), from which fundamental rights obligations arise.[143]

Interpreting *Boumediene* as having brought a substantial turn to this jurisprudential approach[144] does not convince. Rather, *Boumediene* is the exception to the rule—an exception that, on closer scrutiny, appears to be of only limited weight. First, the special case of Guantánamo and its status as *quasi*-territory as well as the views defended in later case law all suggest that the Court exceptionally granted some constitutional rights to noncitizens abroad in this particular case without thereby entailing a substantial and general widening of the Constitution's applicability.

Second, later opinions issued by the Supreme Court, such as *Hernández*, do not give the impression that the US judiciary is primarily moved by a willingness to protect individuals from potentially detrimental effects of governmental action.[145] Even when the alleged extraterritorial violations were committed by US state agents, courts have relied on a range of different factors for rejecting constitutional protection abroad.

Third, the growing tendency to set limits on *civil* jurisdiction over human rights violations abroad is noteworthy. Even though these cases do not directly address the *state*'s human rights obligations, the strengthening of the 'presumption against extraterritoriality' further contributes to a "new territorialism", a "renewed emphasis on territory as a limiting principle for legal authority" in the field of fundamental rights.[146]

Fourth, while US courts have widened the scope of constitutional protection for *citizens* located abroad, the same does not hold with respect to *noncitizens* abroad.[147] Generally, reliable protection for noncitizens is still conditioned on them being located on US territory and having a significant relation to the country—if abroad, noncitizens do not have a reliable legal shield against misconduct by US state agents, including extraordinary renditions, targeted killings by drones,[148] or extraterritorial surveillance.

The latter and its impact on fundamental rights offer a particularly interesting case—not only because digital communication technologies bring about new ways of non-physically crossing and transcending borders but also because so far, the Supreme Court has not comprehensively addressed the issue, probably *inter alia* on grounds of military or intelligence secrecy. That said, commentators observe that until today, the paradigm for applying the right to privacy—along with many other rights concerned—remains a territorial one: In surveillance cases, people appear to be entitled to Fourth Amendment

protection only if on US territory but not—and not at all—if abroad. When the CIA spies on a politician in Buenos Aires, it thus would still make a key difference whether it spies by installing equipment on site or by hacking into online communication from its US offices.[149]

To conclude, in contrast to the approach to extraterritorial applicability that constitutional frameworks (or at least their wording) in Switzerland or Germany suggest, the US approach mirrors a restrictive conception. Of course, limited *accountability* mechanisms do not yet imply that the initial *obligation* to respect the rights in question ceases to exist—and if it exists, other governmental branches are still required to comply with it, even if judicial review (which is essentially an ex post instrument) is not reliably available.[150] Still, especially the Supreme Court's understanding of fundamental rights obligations and state responsibility involves "doctrinal anomalies" that are increasingly in tension (and prone to conflict) with that of international human rights bodies—and that result in significant legal black holes for noncitizens abroad affected by US conduct.[151] As one commentator put it, the US courts' "new territorialism looks a lot like the old territorialism, and that is, indeed, unfortunate. At the dawn of a new century, these problems deserve new and better solutions".[152]

Notes

1 Benvenisti, Eyal & Versteeg, Mila, 'The External Dimensions of Constitutions', *GlobalTrust Working Paper*, 2 (2017), http://globaltrust.tau.ac.il/wp-content/uploads/2017/01/17-02-Eyal-Mila.pdf, 2 ff., 8 ff.

2 For example, Art. 1(2) *Grundgesetz für die Bundesrepublik Deutschland (GG)*. Benvenisti & Versteeg, *External Dimensions*, 16; Mahlmann, *Universalism*, para. 7 ff.

3 Neuman, Gerald L., 'Human Rights and Constitutional Rights: Harmony and Dissonance', *Stanford Law Review*, 55/5 (2003), 1863–1900, 1864. However, this does not mean that by enforcing constitutional rights through unilateral steps, states cannot also come in conflict with other fundamental principles of international law, see 'Developments in the Law: Extraterritoriality', *Harvard Law Review*, 124/5 (2011), 1226–1304, 1281.

4 Gardbaum, Stephen, 'Human Rights as International Constitutional Rights', *European Journal of International Law*, 19/4 (2008), 749–768, 762 f. However, other structural aspects of international law weaken this perception, such as the fact that treaties still serve as the main source of a large part of international law in general (and IHRL in particular), which is thus still largely based on state consent. Cf. Kumm, Mattias, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law', *Indiana Journal of Global Legal Studies*, 20/2 (2013), 605–628, 606 f.; on the debate, cf. also e.g., Besson, Samantha, 'Human Rights as Transnational Constitutional Law', in Lang, Anthony F., Jr. & Wiener, Antje (eds.), *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2017), 234–247; Peters, Anne, 'Are We Moving towards Constitutionalization of the World Community?', in Cassese, Antonio (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), 118–135; Habermas,

Jürgen, 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft', *Politische Theorie*, Philosophische Texte, vol. IV (Frankfurt a.M.: Suhrkamp, 2009), 402–424.

5 Besson, Samantha, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation', in Cruft, Rowan; Liao, S. Matthew & Renzo, Massimo (eds.), *Philosophical Foundations of Human Rights* (New York: Oxford University Press, 2015), 279–299.

6 Art. 35(1) *Bundesverfassung der Schweizerischen Eidgenossenschaft*, 18 April 1999, SR 101 (BV), unofficial English translation www.fedlex.admin.ch/eli/cc/1999/404/en.

7 Art. 35(2) *BV*, unofficial English translation.

8 Waldmann, Bernhard, 'Art. 35 BV: Verwirklichung der Grundrechte', in Waldmann, Bernhard; Belser, Eva Maria & Epiney, Astrid (eds.), *Basler Kommentar: Bundesverfassung* (Basel: Helbing Lichtenhahn, 2015), para. 19, 25 f.; Müller, Jörg Paul, *Verwirklichung der Grundrechte nach Art. 35 BV: der Freiheit Chancen geben* (Bern: Stämpfli, 2018), 53 ff., 56 f.; Schweizer, Rainer J., 'Art. 35 BV: Verwirklichung der Grundrechte', in Ehrenzeller, Bernhard et al. (eds.), *Die schweizerische Bundesverfassung: St. Galler Kommentar*, 3rd edn (Zürich: Dike/Schulthess, 2014), para. 34, 39.

9 Müller, *Art. 35 BV*, 90 ff. In Switzerland, due to impossibility of constitutional review of Federal Acts, cf. Art. 190 *BV*, an important aspect of justiciability is missing. Still, fundamental rights immediately bind all exercises of state power, ibid., 95.

10 Schweizer, *St. Galler Kommentar, Art. 35 BV*, para. 6; Waldmann, *Basler Kommentar, Art. 35 BV*, para. 20; Epiney, Astrid, 'Art. 54 BV: Auswärtige Angelegenheiten', in Waldmann, Bernhard; Belser, Eva Maria & Epiney, Astrid (eds.), *Basler Kommentar: Bundesverfassung* (Basel: Helbing Lichtenhahn, 2015), para. 27; Künzli, Jörg, *Vom Umgang des Rechtsstaates mit Unrechtsregimes: Völker- und landesrechtliche Grenzen des Verhaltensspielraums der schweizerischen Aussenpolitik gegenüber Völkerrecht missachtenden Staaten* (Bern: Stämpfli, 2008), 440; Waldmann, *Basler Kommentar, Art. 35 BV*, para. 2, 9, 11, 14; Schefer, Markus, 'Grundrechtliche Schutzpflichten und die Auslagerung staatlicher Aufgaben', *Aktuelle juristische Praxis*, 10 (2002), 1131–1143, 1133 f.; Müller, *Art. 35 BV*, 13 ff., 43 ff., 50 ff.; BGE 126 III 327.

11 Art. 54(2) *BV,* unofficial English translation.

12 Epiney, *Basler Kommentar, Art. 54 BV*, para. 27; Künzli, *Unrechtsregimes*, 435 ff. Cf. also Ehrenzeller, Bernhard & Portmann, Roland, 'Art. 54 BV: Auswärtige Angelegenheiten', in Ehrenzeller, Bernhard et al. (eds.), *Die schweizerische Bundesverfassung: St. Galler Kommentar*, 3rd edn (Zürich: Dike/Schulthess, 2014), para. 36.

13 Art. 1 *Bundesgesetz über den Datenschutz*, 25 September 2020, SR 235.1 (DSG); similarly also Art 1(1) *Bundesgesetz über die Durchsetzung von internationalen Sanktionen*, 22 March 2002, SR 946.231 (Embargogesetz, EmbG); Art. 1 *Bundesgesetz über die im Ausland erbrachten privaten Sicherheitsdienstleistungen*, 27 September 2013, SR 935.41 (BPS); Art. 2(b) *Bundesgesetz über Massnahmen zur zivilen Friedensförderung und Stärkung der Menschenrechte*, 19 December 2003, SR 193.9. Some of these acts refer to 'fundamental rights', some to 'human rights'.

14 Art. 36(3) *Bundesgesetz über den Nachrichtendienst*, 25 September 2015, SR 121 (Nachrichtendienstgesetz, NDG), unofficial English translation www.fedlex.admin.ch/eli/cc/2017/494/en.
15 This applies to companies headquartered, established, based in or operated, managed or controlled from Switzerland, as well as to companies providing services connected to private security services abroad, Art. 2 *BPS*.
16 Art. 9(a)–(c) *BPS*, unofficial English translation.
17 See, e.g., Council of Europe, *Lettre du Commissaire aux droits de l'homme du Conseil de l'Europe, Nils Muižnieks, à M. Ueli Maurer, Conseiller fédéral, au sujet du projet de loi sur le renseignement*, 23 September 2015, https://rm.coe.int/ref/CommDH(2015)24.
18 Künzli, *Unrechtsregimes*, 441 ff.
19 Art. 1(1)-1(3) *GG*.
20 BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, BVerfGE 154, 152–312, para. 88, 89 ff.
21 The Court emphasized the need to tailor rights and obligations according to the situation at hand. The fact of extraterritoriality can be considered and make a difference for the scope of protection granted, the dimensions of obligations, and potential justifications of interferences, BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 104. This indicates (but not yet confirms) that other dimensions could, in principle, also be generated in extraterritorial settings, cf. Reinke, Benedikt, 'Rights Reaching beyond Borders', *Verfassungsblog*, 30 May 2020, https://verfassungsblog.de/rights-reaching-beyond-borders/.
22 BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 93 ff., 105 ff. See also Chapter 9.
23 Putnam, Tonya L., 'U.S. Extraterritoriality and Human Rights: Shaping a Regime from within', *Courts without Borders: Law, Politics, and U.S. Extraterritoriality* (Cambridge: Cambridge University Press, 2016), 202–254, 208.
24 *Developments in the Law: Extraterritoriality*, 1233.
25 Rutherglen, George, 'The Rights of Aliens under the United States Constitution: At the Border and beyond', *Virginia Public Law and Legal Theory Research Paper Series*, 2017–14 (2017), 8 f.
26 *Alien Tort Claims Act*, 28 U.S.C. § 1350.
27 Putnam, *U.S. Extraterritoriality*, 227 f.
28 Constitution of the United States (U.S. Const.).
29 *U.S. Const.* amend. XIII § I. This specific provision could, however, be extraterritorially applicable through its status in federal statutory law and in treaties.
30 *U.S. Const.* amend. II; Rutherglen, *Aliens*, 12 f.
31 *U.S. Const.* Preamble.
32 *U.S. Const.* amend. I; II; IV; also amend. IX; X. Moreover, the provisions granting political rights in the narrow sense are explicitly assigned to citizens, i.e., *U.S. Const.* art. I §§ 2, 3; art. II § 1; amend. XV § 1; XIX; XXVI § 1. However, this corresponds to other constitutions, which typically limit political rights to citizens, cf., e.g., Art. 34(2); Art. 39(2) *BV*.
33 For example, Neuman, Gerald L., 'Whose Constitution?', *The Yale Law Journal*, 100/4 (1991), 909–991, 917 f.; Keitner, Chimène I., 'Rights beyond Borders', *Yale Journal of International Law*, 36/1 (2011), 55–114, 63 f. See Section 7.5.2.
34 'Developments in the Law: State Action and the Public/Private Distinction', *Harvard Law Review*, 123/5 (2010), 1248–1314, 1255.

35 Sometimes in the form of a declaration upon ratification, see United States of America, *Reservations, Understandings, Declarations*, Declarations and Reservations on the ICCPR, 8 June 1992, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec, Declaration (1).
36 Ben-Natan, Smadar, 'Constitutional Mindset: The Interrelations between Constitutional Law and International Law in the Extraterritorial Application of Human Rights', *Israel Law Review*, 50/2 (2017), 139–176, 152 f. However, exceptions include statutory law that is explicitly based on international law, such as the *Alien Tort Claims Act*. See Section 2.3.2.
37 *In re Ross*, 140 U.S. 453, 454 (1891).
38 Ibid., 464 (1891), emphasis added; referring to *Cook v. United States*, 138 U.S. 157, 181 (1891).
39 *In re Ross*, 454.
40 Cleveland, Sarah H., 'Embedded International Law and the Constitution Abroad', *Columbia Law Review*, 110/2 (2010), 225–287, 237 f.
41 Torruella, Juan R., 'Ruling America's Colonies: The Insular Cases', *Yale Law & Policy Review*, 32/1 (2013), 57–95, 65 ff.
42 *Downes v. Bidwell*, 182 U.S. 244 (1901).
43 Martinez, Jenny S., 'New Territorialism and Old Territorialism', *Cornell Law Review*, 99/6 (2014), 1387–1414, 1389 f.; Torruella, *America's Colonies*, 69 f.
44 *Downes v. Bidwell*, 277; cf. Lobel, Jules, 'Fundamental Norms, International Law, and the Extraterritorial Constitution', *Yale Journal of International Law*, 36/2 (2011), 307–369, 324 ff.; Ben-Natan, *Constitutional Mindset*, 153; Fields, Shawn, 'From Guantánamo to Syria: The Extraterritorial Rights of Immigrants in the Age of "Extreme Vetting"', *University of San Diego Law School Research Paper Series*, No. 17–278 (2017), 29.
45 *Downes v. Bidwell*, 280 ff.; see also *Dorr v. United States*, 195 U.S. 138 (1904).
46 *Downes v. Bidwell*, 287.
47 Ibid., 341 (White J., concurring), emphases added.
48 Cleveland, *Constitution Abroad*, 239.
49 *Downes v. Bidwell*, 386, 389 (Harlan J., dissenting).
50 See *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).
51 *Downes v. Bidwell*, 287.
52 Neuman, *Whose Constitution?*, 964.
53 Torruella, *America's Colonies*, 73, references omitted.
54 *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
55 Ibid., 777.
56 Ibid., 797 f. (Black J., dissenting).
57 Ibid., 796 f. (Black J., dissenting); referring to *Downes v. Bidwell*.
58 *Reid v. Covert*, 354 U.S. 1, 5 f.; 12 (1957).
59 Ibid., 14.
60 Ibid, 8 f., also 16 ff.
61 Ibid., 5 f., 12, 14. Neuman, *Whose Constitution?*, 967.
62 *Reid v. Covert*, 74 (Harlan J., dissenting), emphasis added.
63 *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
64 See Section 1.3.1.
65 *US v. Verdugo-Urquidez*, 265, 271, 273.

66 Ibid., 271 f.
67 Ibid., 266, also 268 f.
68 *US v. Verdugo-Urquidez*, 270. In various cases, it has been recognized that noncitizens who reside on US territory are also protected by the Constitution, see, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); see also Neuman, *Whose Constitution?*, 911.
69 *US v. Verdugo-Urquidez*, 279 (Stevens J., concurring); Ibid., 271.
70 Ibid., 284 (Brennan J., dissenting).
71 Ibid., 288, original emphases; also 283 f. (Brennan J., dissenting); cf. Neuman, Gerald L., 'The Extraterritorial Constitution after Boumediene v Bush', *Southern California Law Review*, 82/2 (2009), 259–290, 7 ff.
72 Section 7.5.2.
73 *US v. Verdugo-Urquidez*, 273 f.
74 Ibid., 274 f.
75 Fields, *Guantánamo to Syria*, 50; Lobel, *Fundamental Norms*, 315.
76 *US v. Verdugo-Urquidez*, 277 f. (Kennedy J., concurring); referring to *Reid v. Covert,*74 (Harlan J., dissenting).
77 Neuman, *Whose Constitution?*, 975 f.
78 See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Other courts also confirmed it, see, e.g., *In re Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d 85, 94 ff., 101 (D.D.C. 2007).
79 *Boumediene v. Bush*, 553 U.S. 723 (2008).
80 *Rasul v. Bush*, 542 U.S. 466 (2004).
81 The area had been leased by the United States since 1903. However, since 1959, Cuba has asked for the termination of the lease and has repeatedly asserted that it regards the continuing presence of the United States as an unlawful occupation, see de Zayas, Alfred, 'Guantánamo Naval Base', in Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, 2016.
82 *Rasul v. Bush*; cf. Developments in the Law: Extraterritoriality, 1259.
83 *Detainee Treatment Act of 2005*, Pub. L. No. 109–148, § 1005, repealed by Military Commissions Act of 2006.
84 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
85 *Military Commissions Act of 2006*, Pub. L. No. 109–366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of U.S.C.), invalidated in part by *Boumediene v. Bush*, 553 U.S. 723 (2008).
86 *Boumediene v. Bush.*
87 *U.S. Const.* art. 1, § 9, cl. 2.
88 Lobel, *Fundamental Norms*, 308, 316 ff.; Cleveland, *Constitution Abroad*, 270 ff.
89 *Boumediene v. Bush*, 755 ff., 759, citation on 764; cf. *Reid v. Covert,* 74 (Harlan J., dissenting).
90 *Boumediene v. Bush*, 766, emphasis added.
91 Ibid., 766 ff., 771.
92 Ibid., 765; citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).
93 *Boumediene v. Bush*, 765 f.; Cole, David, 'Rights over Borders: Transnational Constitutionalism and Guantanamo Bay', *Cato Supreme Court Review*, 7 (2008), 47–61, 55.
94 In especially harsh words by Justice Scalia, *Boumediene v. Bush,* 826 ff. (Scalia J., dissenting); but also by Chief Justice Roberts, ibid., 801 ff. (Roberts C.J., dissenting).

95 Ibid., 842 f. (Scalia J., dissenting).
96 Ibid., 834, 840 (Scalia J., dissenting).
97 Fields, *Guantánamo to Syria*, 40. See also Cleveland, *Constitution Abroad*, 270.
98 Neuman, *Extraterritorial Constitution*, 272.
99 Cleveland, *Constitution Abroad*, 287; similarly Neuman, *Extraterritorial Constitution*, 290.
100 Cole, *Rights over Borders*, 47.
101 Cleveland, *Constitution Abroad*, 287; cf. Martinez, *New Territorialism*, 1392. For a similar case, cf. *Munaf v. Geren*, 553 U.S. 674 (2008).
102 Gibney, Mark, *International Human Rights Law: Returning to Universal Principles*, 2nd edn (London: Rowman & Littlefield, 2016), 85 f.; Lobel, *Fundamental Norms*, 308 f.; Neuman, *Extraterritorial Constitution*; Cole, *Rights over Borders*; Posner, Eric A., 'Boumediene and the Uncertain Match of Judicial Cosmopolitanism', *Cato Supreme Court Review*, 7 (2008), 23–46.
103 *Boumediene v. Bush*, 771.
104 *Developments in the Law: Extraterritoriality*, 1258.
105 *Boumediene v. Bush*, 755.
106 Rutherglen, *Aliens*, 18; *Developments in the Law: Extraterritoriality*, 1261.
107 Lobel, *Fundamental Norms*, 317 f., 323; Neuman, *Extraterritorial Constitution*, 115.
108 Cf., e.g., Neuman, *Extraterritorial Constitution*.
109 *Developments in the Law: Extraterritoriality*, 1260 f., 1268.
110 Keitner, *Rights beyond Borders*, 71.
111 Fields, *Guantánamo to Syria*, 40 f.
112 *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).
113 *Developments in the Law: Extraterritoriality*, 1262 f.
114 *Al Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013).
115 *Arar v. Ashcroft*, 585 F.3d 559 (2d. Cir. 2009).
116 *Torture Victim Protection Act of 1991*, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).
117 Cole, David, 'Outsourcing Torture: Extraordinary Rendition and the Necessity for Extraterritorial Protection of Human Rights', in Scheipers, Sibylle (ed.), *Prisoners in War* (Oxford: Oxford University Press, 2010), 281–296, 284, footnote omitted.
118 *Arar v. Ashcroft*, 574 ff.
119 *Developments in the Law: Extraterritoriality*, 1267, footnote omitted at end of sentence; for a discussion, Cole, *Outsourcing Torture*.
120 *Al Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 108 ff., 117 (D.D.C. 2010), concerning the scope of the *Federal Tort Claims Act*, 28 U.S.C. §§ 2671–2680.
121 *Developments in the Law: Extraterritoriality*, 1267 f.
122 Martinez, *New Territorialism*, 1392.
123 *Hernández v. Mesa*, 582 U.S. ___ (2017) (slip. op., at 5).
124 Ibid.
125 Ibid., 5 f. (Breyer J., dissenting).
126 That is, whether the precedent of *Bivens v. Six Un-known Fed. Narcotics Agents*, 403 U. S. 388 (1971) could be extended to this case.
127 *Hernández v. Mesa*., 589 U.S. ___ (2020) (slip. op.).
128 This question was clearly answered in the affirmative in the dissenting opinion issued by Justice Ginsburg, ibid., 14 (Ginsburg J., dissenting).

129 Ibid., 10, 14 ff., 19 f.
130 Other examples of statutory law concerning human rights violations abroad include the *Torture Victim Protection Act*, which allows individuals to sue foreign state agents in US courts for torture or extrajudicial killing committed abroad, e.g., *Arar v. Ashcroft*, also Section 2.3.2.
131 American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).
132 *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); see also *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).
133 *Alien Tort Claims Act*. For an overview, Seibert-Fohr, Anja, 'United States Alien Tort Statute', in Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, 2015.
134 McBeth, Adam, 'What Do Human Rights Require of the Global Economy? Beyond a Narrow Legal View', in Holder, Cindy & Reidy, David (eds.), *Human Rights: The Hard Questions* (New York: Cambridge University Press, 2013), 153–173, 167 f.
135 *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).
136 Gibney, Mark, 'Litigating Transnational Human Rights Obligations', in Vandenhole, Wouter (ed.), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Abingdon/New York: Routledge, 2015), 90–111, 108; Putnam, *U.S. Extraterritoriality*, 211.
137 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 732 (2004); cf. Putnam, *U.S. Extraterritoriality*, 214 ff.
138 *Developments in the Law: Extraterritoriality*, 1229, 1234 ff.
139 Ibid., 1242.
140 Putnam, *U.S. Extraterritoriality*, 253; Gibney, *Litigating*, 108.
141 *Kiobel v. Royal Dutch*, 117, 124 f.
142 Gibney, *Litigating*, 109; Anderson, Kenneth, 'Symposium: After "Universality"—Emphasizing Territory and Nationality in a World of Increasingly Competitive Sovereign Powers', *SCOTUSblog*, 25 July 2017, www.scotusblog.com/2017/07/symposium-universality-emphasizing-territory-nationality-world-increasingly-competitive-sovereign-powers/.
143 Benvenisti & Versteeg, *External Dimensions*, 11 f.; Martinez, *New Territorialism*, 1388 ff.; Keitner, *Rights beyond Borders*, 108; Ben-Natan, *Constitutional Mindset*, 156.
144 Cf., e.g., Cleveland, *Constitution Abroad*, 270 ff.
145 Also Keitner, *Rights beyond Borders*, 108.
146 Martinez, *New Territorialism*, 1388.
147 Cf. Cleveland, *Constitution Abroad*, 247 f. Cleveland agrees with this analysis for the pre-*Boumediene* era but regards *Boumediene* and *Munaf* as introducing a substantial turn for the constitutional protection of noncitizens.
148 Interestingly, a German judgment on US drone attacks mainly operated from the US military base in Ramstein, Germany, reflected that other states' judiciary might take different approaches than the US judiciary does: A German domestic court explicitly recognized the extraterritorial applicability of the right to life and the state's positive obligation to protect individuals abroad. The case was dismissed on the merits but was declared admissible, Verwaltungsgericht Köln,

Urteil vom 27. März 2015, 3 K 5625/14, para. 38 ff. In revision, its take on extraterritorial applicability was confirmed, asserting an obligation on the part of Germany to ensure that the operations carried out by the US from Ramstein military base conform with international law, Oberverwaltungsgericht NRW, *Urteil vom 19. März 2019*, 4 A 1361/15, para. 109 ff., 185 ff., 535 ff.

149 Bignami, Francesca & Resta, Giorgio, 'Human Rights Extraterritoriality: The Right to Privacy and National Security Surveillance', in Benvenisti, Eyal & Nolte, Georg (eds.), *Community Interests across International Law* (Oxford: Oxford University Press, 2018), 357–380, 366.

150 Rutherglen, *Aliens*, 15, 20.

151 Cleveland, *Constitution Abroad*, 247.

152 Martinez, *New Territorialism*, 1414.

3 Fundamental Rights Protection at the Supranational Level

The Case of the European Union

3.1 Sources of Fundamental Rights Protection in the EU

In which way does supranational law generate duties for states to respect, protect, or fulfill fundamental rights vis-à-vis those who are not among their direct legal subjects, i.e., who are not located on their corresponding territory?

The EU provides a particularly interesting and unique case as a supranational institution (i) with its own fundamental rights regime, (ii) as the only non-state institution directly bound by IHRL, and (iii) as it incorporates a variety of national constitutions, which themselves contain fundamental rights norms. Thereby, it constitutes what may be called a "transnational human rights regime", amounting neither to a thorough municipal regime (it does not bind all the institutions of its Member States in all their acts) nor to an international human rights system (it binds not only states but also its own international organization).[1]

The fundamental rights obligations the EU and its Member States are subject to are enshrined, on the one hand, within EU law itself. Originally, the treaties of the *European Communities* (EC) had not contained any thorough bill of rights. At the end of the 1960s, the *Court of Justice of the European Communities* began to include fundamental rights into its conception of *general principles* of EC law and to explicate its responsibility for protecting them.[2] This development was mainly triggered by the opposition of several Member States' constitutional courts to the lack of fundamental rights protection within European law, which was deemed unsatisfactory in light of the supremacy of the latter order.[3] In what followed, the Court sought to enforce fundamental rights obligations of EU institutions and of Member States when implementing EC/EU law, compensating for the legislative gap.[4]

As a step toward codification, the duty to respect fundamental rights was included in the *Treaties on European Union of 1992*, mentioning the general principles of EC law, national constitutions of Member States, and the ECHR as reference points.[5] In 2000, motivated by the wish to strengthen the legitimacy of the European project, the *Charter of Fundamental Rights of the European Union* (CFR)[6] was proclaimed and has become legally binding nine years later through the *Treaty on European Union* (TEU)[7] as reformed

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in Lisbon. According to Article 6(1) TEU, the Charter shall "have the same legal value as the Treaties". Besides, ECHR rights and fundamental rights common to the constitutions of Member States are explicitly classified as *general principles* of EU law, codifying earlier case law.[8]

As a further source, the Treaty declares universal human rights to be *foundational values* of the Union.[9] The duty to "uphold and promote" them—also in external relations—is enshrined in Article 3(5) TEU, one of the common provisions applying to all policy areas. The Article also obliges the Union to foster the evolution of and compliance with international law, including the UN Charter, generating an indirect obligation for the EU to abide by international norms.[10]

On the other hand, next to these obligations based on EU law, international law also *directly* constrains the Union. First, it is a legal person under international law,[11] which entails its being compelled by *international treaties* to which it is a member, *customary international law*, and *general principles* of international law.[12]

In the area of human rights, international treaties are not yet a source of primary significance: As of today, the only thorough multilateral human rights treaty to which the EU is a party is the *Convention on the Rights of Persons with Disabilities* (CRPD).[13] Its accession to the ECHR, though foreseen in the TEU, has not yet been completed.[14] Nonetheless, the *Court of Justice of the European Union* (CJEU) aims to align its interpretations with the jurisprudence of the *European Court of Human Rights* (ECtHR), thereby treating the ECHR as "*de facto* (…) binding".[15] By contrast, *customary international law* (that today includes not only basic rights like the protections from genocide, torture, or slavery but potentially all UDHR rights) obliges the EU in substantial ways. The EU itself classifies the UDHR as general international law and thus considers itself legally bound by it.[16] Furthermore, it is debated whether the EU inherits Member States' obligations via a process of 'functional succession'. At least, IHRL obligations enshrined in Member States' constitutions indirectly bind the Union as *general principles* of EU law.[17]

3.2 Extraterritorial Applicability of Fundamental Rights in EU Law

The debate on extraterritoriality in EU law typically focuses on the scope, reach, and legitimacy of its exercise of *extraterritorial legislative jurisdiction*, i.e., its introduction of legal measures regulating situations or subjects abroad or influencing regulation in third states—sometimes discussed as the "Brussels effect".[18] While the EU has often criticized the expansive use of extraterritorial legislation on the part of the US, it has, in recent years, itself become more active in introducing such measures. This has especially been so in commercial and antitrust regulation,[19] digital policy,[20] or the area of environmental standards.[21] Here, the EU often follows an approach of what has been termed 'territorial extension', i.e., it applies its own laws abroad in cases in which a

relevant territorial connection is given, "but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad".[22] Arguably, its general adherence to the values and norms of the international order in implementing territorial extension categorically distinguishes the EU-approach from the US-approach, lending the former at least *prima facie* greater legitimacy from the viewpoint of international law. Nonetheless, the European approach may also operate "at a number of contested boundaries: between responsibility and hegemony, between interdependence and protectionism".[23] However, this debate on whether and when the EU can regulate matters abroad is not congruous to the question of whether the EU *once its conduct has effects abroad,* is *bound by human rights obligations.* The latter question arises regardless of whether its conduct is of a legislative or enforcing nature and, more importantly, whether it came about in lawful or unlawful ways. That said, some authors go back and forth between the two questions and sometimes risk being insufficiently precise in differentiating them[24]—partly because the practice of territorial extension can and does affect the enjoyment of fundamental rights abroad in a variety of ways, as will be reflected below.

With this important differentiation in mind, the analysis proceeds to the issue of interest here: Do EU fundamental rights obligations reach beyond the territories of its Member States?

First, the *Treaty* generally stipulates universalist human rights as foundational values of the Union.[25] Thereby, it equips them with an inherent indirect extraterritorial component: Any state that aims at joining the EU must adhere to these rights.[26] Further, it specifies the general duty to promote human rights as foundational values and pursue them as general principles in later Articles on *external conduct* (including internal measures with external effects):

> The Union's action *on the international scene* shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[27]

The treaties provide for access to justice by entitling both natural and legal persons to file complaints about fundamental rights violations at EU courts. In principle, individuals can challenge EU acts if these have affected them directly and individually or EU regulation that is of direct concern for them, has legal effects on them, and does not require implementation by Member States. In principle, EU courts are hence also accessible to victims of alleged *extraterritorial* infringements of fundamental rights.[28] In practice, however, there are already for *resident* individuals high practical barriers to file claims at EU courts, thus likely even higher ones for 'outsiders'.[29]

Second, the *Charter* does not contain any specific rule regarding its spatial applicability. In its Preamble, it mentions that the "Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity" and that fundamental rights "entail responsibilities and duties with regard to other persons, to the human community and to future generations".[30] Article 51(1) CFR specifies that its obligations are directed at

i "the institutions, bodies, offices and agencies of the Union" and
ii "to the Member States only when they are implementing Union law",

and that they entail duties to "respect", "observe", and "promote" its provisions. Thus, whenever *EU institutions act* or whenever *Member States act in implementing EU law*, the Charter and the general principles of the Union bind them. In other words, the Charter applies whenever EU law applies.[31] This reading is supported by the basic role the TEU assigns to fundamental rights and has been confirmed not only by scholarship but also by the CJEU:

> Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[32]

In light of this firmly established consensus interpretation, territory cannot function as a threshold for the subjugation to fundamental rights obligations. This is mirrored by the absence of a spatial applicability clause and the lack of reference to the concepts of 'jurisdiction', 'effective control', or 'overall control' in the CFR—in contrast to IHRL, where they function as important thresholds for the application of rights[33]—as well as the rare references to the notion of territoriality in both EU legal documents and case law.[34] For example, in the cases of *Mugraby* and *Zaoui*, both concerning alleged fundamental rights infringements of non-EU nationals living abroad, the extraterritorial location of the alleged victims was not even discussed by the Court (while both cases were eventually dismissed, this was done so on other grounds).[35] In *Salemink*, while alluding to notions of territory and sovereignty, the CJEU did not regard them as conditions of applicability but merely as elements of assessing whether the actual decisive threshold had been reached, i.e., whether EU law had applied.[36] In *Front Polisario v. Council*, a Western Sahara liberation movement sought to annul an international agreement concluded between the EU and Morocco. They argued that the agreement would also be applied to the territory of the Western Sahara, which is in large part occupied by Morocco, and that it would affect fundamental rights of residents there. In a first step, the General Court dismissed their pleas but held that EU institutions are subject to a duty of diligence, requiring them to assess the impact on

fundamental rights prior to entering any agreements. In doing so, it explicitly referred to the extraterritorial reach of a wide catalogue of CFR rights, such as the prohibition of slavery, the protections of dignity, of life, and of integrity, property rights, or the right to fair working conditions.[37] In appeal, the Grand Chamber reversed this judgment and rejected the claims of *Front Polisario* as not admissible due to the fact that the agreement would actually *not* be applicable to Western Sahara territory.[38] Despite the ultimate outcome of the case, the extraterritorial location of the claimants was *not* among the reasons for the dismissal of their claims. Thus, according to what these and other cases imply, EU acts with effects on the fundamental rights situation of non-EU residents abroad can trigger the applicability of the Charter.

A further interesting body of case law on extraterritorial obligations has been developed in the area of the rights to private life and to data protection anchored in Articles 7 and 8 CFR, where the EU takes a leading role, increasingly framing data privacy regulation as a fundamental rights issue and exercising extraterritorial legislative jurisdiction, thus setting norms that have effects abroad. Thereby, this area exemplifies a way in which 'territorial extension' can affect the fundamental rights of people residing abroad. First, if data protection norms are increasingly framed as fundamental rights issues,[39] this makes the scope of the former depend on the scope of the latter—which may be further-reaching than that of data privacy laws in the narrow sense. Second, the more EU policies affect people abroad, the more these policies can potentially have an impact on the latter's fundamental rights, as the *General Data Protection Regulation* (GDPR) illustrates. On the one hand, territorial extension can bring with it an *increased risk* of extraterritorial rights violations. An example concerns the 'right to be forgotten', providing individuals with the right to demand from data-controlling actors, such as search engine operators, the erasure of any personal data. It had been acknowledged by the CJEU and was later codified in the GDPR.[40] Potentially, such erasure or de-referencing of an EU resident's data could entail circumscriptions on the freedom of expression and freedom of information of others. The GDPR explicitly mentions that these two freedoms set constraints on the scope of the 'right to be forgotten', yet, it is not clear whether this also holds in relation to their exercise by *non-EU residents*.[41] Other potentially detrimental effects on fundamental rights that can accompany territorial extension have been pointed out for the areas of environmental policies,[42] migration and asylum law,[43] or trade policies.[44]

On the other hand, the exercise of territorial extension can also result in *improving* human rights situations of people abroad, as the multidimensional extraterritorial effects of the GDPR exemplify. First, the regulation also applies to transfers of data from EU-based companies to non-EU-based companies, regarding which it must be guaranteed that at its destination, the level of data protection remains "essentially equivalent" to that provided within the EU, "read in the light of the Charter".[45] If the EU renegotiates the terms of permissible data transfers with countries the data protection levels of which have

been declared insufficient, this could result in third states' adaptations of their own laws in order to conform to EU requirements.[46] Thereby, the GDPR can have an impact on the human rights situation of people abroad by influencing other states' regulations in the field.

Second, the GDPR explicitly binds non-EU companies if they offer products or services to persons within the EU or if they have access to or store data of individuals on EU territory.[47] As a result, companies may thus be compelled to conform to EU law, even if they have neither their seat nor a branch on EU territory. The regulation thereby indirectly promotes the protection of rights to privacy and data protection of people located abroad: If an EU-based company has to improve its data protection system, this also benefits its customers outside EU-territory. Similarly, many non-EU-based companies that had to adapt their data protection rules for EU customers now apply these more stringent standards to customers elsewhere, too—often for reasons of efficiency or simplicity, i.e., to avoid the need to differ among various data protection regimes.

In other words, a significant extraterritorial effect of the GDPR is that it contributes, in direct and indirect ways, to the improvement of data protection abroad. On the one hand, these effects might be mere *side effects* of EU territorial extension. On the other hand, its choice of such expansive regulations as the GDPR could also indicate that the EU considers itself bound by extraterritorial fundamental rights obligations and regards such measures as one way of conceptualizing and complying with them. In other words, what to some appears as an aggressive approach may, on closer inspection, turn out to be an acknowledgment of its fundamental rights obligations in these fields.[48] By directly and indirectly putting both EU and non-EU corporations under more stringent data protection regimes, the EU, so one could argue, complies with its *obligation to protect* outsiders from infringements by third parties. Likewise, the above-mentioned effects of EU territorial extension on third states' legal frameworks could be interpreted as contributing to discharging the *obligation to ensure* rights abroad. Whether or not this perception of extraterritorial human rights obligations figures among the core motives of the EU's approach in introducing measures with extraterritorial effects cannot be answered in the abstract. At the very least, its choice of such measures helps draw the bigger picture of how it conceptualizes the relationship between human rights and territory.

In sum, at least until recently, the European Union's bill of fundamental rights has appeared to "break(…) with the traditional territorial paradigm"[49] and prevent the possibility of "legal black holes".[50] In line with the dynamic, purposive, and teleological treaty interpretation methods on which the EU legal system relies, following an *effet utile* approach and aiming at the *effectiveness* of its legal provisions,[51] human rights protection should not depend on arbitrary criteria like geographical location—their purpose is to protect individuals. Thus, the intermediate conclusion that can be drawn from this first part of the analysis of EU law is that its fundamental rights obligations

apply whenever EU law applies, irrespective of the territorial location of the individual.

However, the conclusion is an intermediate one. One of the practical consequences of this *prima facie* generous approach, which may be disappointing to some but comes as no surprise given the political issues at stake, is that the center of attention has shifted to the issue of whether EU law indeed applies (which, to recall, binds EU institutions and Member States if they are 'implementing EU law') and, if yes, whether it applies to a sufficient extent to trigger Charter obligations.[52] Until recently, the CJEU opted for a broad reading of when Member States count as 'implementing EU law', covering their conduct whenever they were complying with duties derived from the EU legal order—even in cases in which they are granted wide discretion over how to comply with them.[53] For example, in the *Åklagaren* judgment, it held that criminal proceedings on tax evasion at national levels that include alleged breaches of obligations to pay value-added tax (VAT) are directly linked to the EU budget (through the common EU VAT-system and the fact that EU resources include VAT-revenues). Even if the specific national legislation was not explicitly adopted to implement the corresponding EU norm, it was still seen as implementing the latter if it was *designed in a way that implemented it*. As a result, the Charter fully applied. Thus, even mere congruency of subject areas and of objectives of national measures and EU law counted as instances of 'implementing' Union law.[54]

These expansive approaches to extraterritorial obligations arising from the CFR have, however, suffered a setback in recent jurisprudence. The case of *X and X*, decided in 2017, concerned a Syrian family who had applied for a short-term humanitarian visa under Article 25 of the EU Visa Code at the Consulate of Belgium in Beirut, Lebanon.[55] *Inter alia*, they grounded their visa application on their fundamental rights situation, specifically on the risk of infringements on the prohibition of torture. Belgium rejected their application, holding that their assumed implicit intention was to stay longer than short-term visa would allow, which is why they did not fulfill the humanitarian requirements of this type of visa.

The CJEU agreed with the Belgian Government that the real intent behind the family's application must have been to seek asylum once they arrived in Belgium and thus to stay longer than the visa would be designed for. Since the family's suspected motives, the granting of asylum and long-term visa, are not regulated by the EU Visa Code but by national law, the CJEU declared the case to fall outside the scope of EU law, as a result of which the CFR does not apply.[56] Avoiding to take a stance on whether Belgium was *substantially* correct in denying the visa application, the Court limited itself to stating that the applicants cannot refer to the Charter in establishing their claims. Even though it could also only speculate on the family's motives and in spite of the existence of a clear and formal nexus to EU law (the actual request for the short-term visa was based on the EU Visa Code, the situation thus rooted in an EU regulation, and Belgium denied the request on the basis of the EU Visa

Code), it was held that this does not constitute an instance of a Member State 'implementing' EU law.[57] Thereby, the judgment is in harsh contrast to the previously generous reading of 'implementing'.

Prior to the judgment, the Advocate General published a rich opinion. While he also did not take a stance on whether Belgium was substantially justified in denying the visa request, he based his argument on the fundamental values of the Union and its aim of effective fundamental rights protection. In light of the fact that both the visa application and its rejection were based on EU regulation, he regarded it as evident that the situation cannot fall outside the scope of EU law and thus that the CFR must apply.[58] Alluding to the principle developed in *Åklagaren,*[59] he reminded the Court that the threshold triggering CFR application is the applicability of EU law, not the nexus to EU territory:

> There is, therefore, a parallelism between EU action (…) and application of the Charter. (...) If it were to be considered that the Charter does not apply where an institution or a Member State implementing EU law acts extraterritorially, that would amount to claiming that situations covered by EU law would fall outside the scope of the fundamental rights of the Union, undermining that parallelism.[60]

Interestingly, the Advocate General also explicitly rejected the argument of the Belgian Government that, as a result of the equivalence of the rights enshrined in the ECHR and the CFR, the application limitations of the former (limiting extraterritorial applicability to situations in which a state exercises authority and control over a territory or an individual) should also be adopted for the latter.[61] In its reasoning, Belgium alluded to Article 52(3) CFR, which prescribes that, insofar as CFR norms are congruent with norms listed in the ECHR, their "meaning and scope" should likewise correspond.[62]

Whether Article 52(3) only refers to the substantive scope of norms or also affects the application threshold of the Charter as a whole is a matter of debate. If the latter was the case, the ECtHR's jurisprudence on extraterritorial applicability would indeed be relevant for determining the CFR's applicability abroad, corresponding to what the Belgian Government argued. However, Article 52(3) only applies to provisions that are equivalent in the CFR and the ECHR—and a jurisdictional clause on applicability as in Article 1 ECHR is completely absent from the CFR.[63] As a consequence, the ECHR criteria for extraterritorial applicability cannot be copied to the CFR by means of Article 52(3). Moreover, even if the ECHR applicability rules were relevant, Article 52(3) CFR explicitly adds that EU law may *go beyond* and provide a higher level of protection than the one granted by the ECHR. Thus, the ECtHR's take on extraterritoriality, if it counts at all, "constitutes only the floor and not the ceiling".[64]

Thus, even apart from its humanitarian consequences (which resulted in the family's return to war-ravaged Syria), the judgment appears unsatisfactory

from a formally judicial point of view. Inconsistent with earlier jurisprudence, it neglected both the interpretation of the scope of EU law as well as the principle of effectiveness.[65] While the Court did not deny that the Charter would apply if EU law applied, it took a much more restrictive position at yet an earlier stage, namely on what it means for EU law to apply.

In light of the political situation and the refugee crisis with which EU Member States have been confronted at the time, it comes as no surprise that the CJEU chose not to expand the scope of protection in such a way that it would oblige Member States to grant it to third state nationals who are, at the time of their application for such protection, still abroad.[66] At the same time, asserting the applicability of the CFR would not yet have implied that Belgium was wrong in denying the visa: The question of applicability is to be distinguished from the substantial question at issue. Still, the Court, implicitly and to a certain degree, might have feared the consequences of applying the Charter: It partly admitted to have been moved by some of these political concerns when it mentioned that judging otherwise would go against the fundamental idea of the *Dublin Regulation* and thereby of the *Common European Asylum System*.[67] As some authors claim, this indicates the "great receptiveness of the CJEU to the political demands of the member states".[68]

Similar lines of reasoning surface in other fields of EU migration policy during the refugee crisis. For example, the CJEU interpreted the agreement on refugee resettlement that the EU had concluded with Turkey in 2016 as an agreement between Turkey and Member States only.[69] Notwithstanding the intense involvement of EU institutions in its negotiation and in spite of the fact that its initial statement mentioned the Union as a whole, it was, according to the Court, not concluded under the guise of the EU—neither as the result of actions of EU institutions nor of Member States implementing EU law. Considering that both Member States and EU institutions are actively involved in designing and implementing migration policies and combined with the increasing trend to outsource such policies, these interpretations, which declare the Charter inapplicable, risk leaving an unconvincing and unsatisfactory protection gap.[70]

3.3 Conclusion: Extraterritorial Fundamental Rights Obligations in EU Law

In general, the central role assigned to fundamental rights in EU law supports a generous conception of extraterritorial application: Both EU institutions and Member States (when implementing EU law) are subject to the obligations enshrined in the CFR, regardless of whether their acts take place and/or have effects within or outside EU territory.

However, first, it is unclear how far these extraterritorial obligations go. Some authors argue that they are generated on all dimensions of human rights obligations, including obligations to respect, protect, and fulfill, and extend to both actions and omissions. Others hold a narrower conception of

extraterritorial duties, limiting them to the obligation to respect or to a certain legislative field, such as the Common Foreign and Security Policy of the Union.[71]

Second, it is likely that the Court will, in future cases, need to determine the scope of the relation between the Charter and the ECHR set in Article 52(3) CFR.[72] Though, as it has been argued above, the ECHR rules on spatial applicability cannot directly be made relevant through Article 52(3), an authoritative analysis would shed light and provide legal clarity on this question. As long as such an analysis is missing, it is unclear how the EU could consistently develop its own approach to extraterritorial fundamental rights protection.

Third, a generous approach to extraterritorial applicability would correspond to the increasingly proactive role of the EU in terms of protecting global goods, including human rights, on the legislative level. As the GDPR illustrates, the EU increasingly serves a "global regulator", a "normative power".[73] At the same time, political motives doubtlessly play a key role, and they can speak either for expanding or for restricting the reach of rights abroad. While in the field of digital policy, further expansion is likely in line with political interests, extraterritorial responsibility is often avoided in areas such as migration and refugee policies.

Fourth, it is essential to assess whether the territorial extension on the legislative level is mirrored at the judicial level, i.e., with regard to the access to redress mechanisms and the scope of protection granted.[74] That said, the possibility of challenging extraterritorial effects of EU norms in EU courts is not a precondition for extraterritorial obligations to exist in the first place; rather, it is *vice versa*. Still, judicial enforcement is key. Ultimately, a lack of acceptance of extraterritorial duties at the judicial level likely points to insufficient grounding at other levels, too.

Lastly, it remains to be seen what turn EU jurisprudence will take and whether it will manage to uphold consistency across different policy areas that touch on fundamental rights issues abroad. As many authors suggest, the case of X and X could indicate a significant turning point: "The novelty and potential gravity of breaking the path to 'un-Chartered' territory in EU law is of worrying significance for the future of fundamental rights protection in the EU legal order".[75] It may hint at a fallback to "European 'legal nationalism'" and[76] to "statist notions of sovereignty and territory as litmus tests determining the applicability of Charter protections".[77]

Bearing in mind the nature of the Union as a supranational institution, such a fallback would be incoherent: The very idea behind the CFR was to increase the legitimacy of European integration, precisely by finding a common conception of fundamental rights *that transcends and goes beyond borders*—reflecting common values of a Union that is itself essentially a project that aims at transcending and going beyond borders. If transnational common values of human rights form the backbone of the EU, consisting of 27 states with diverse cultural, historical, and political backgrounds, this should inherently

imply that these very rights also apply to individuals outside the Union—and, correspondingly, that the same obligations hold for the EU vis-à-vis these individuals, too. Similar to what has been observed at domestic levels, it seems as if even modern, supranational legal systems, which on various occasions have proved to be proactively accepting fundamental rights obligations abroad, are not immune to retreating to notions of territoriality and sovereignty—the very concepts that the establishment of supranational institutions was supposed to transcend.

Notes

1 Besson, *Bearers*, 266, also 256 f. See Section 3.2.
2 CJEU, Judgment of 12 November 1969, *Stauder v. City of Ulm*, Case 29–69, EU:C:1969:57.
3 See, e.g., the *Solange I* judgment of the German Constitutional Court, BVerfG, *Beschluss vom 29. Mai 1974*—2 BvL 52/71, BVerfGE 37, 271.
4 De Schutter, Olivier, *International Human Rights Law*, 2nd edn (Cambridge: Cambridge University Press, 2014), 26 f.
5 Art. F(2) *Treaty on European Union*, [1992] O.J. C 224/01, 1.
6 *Charter of Fundamental Rights of the European Union*, [2016] O.J. C 202/02, 389 (CFR).
7 *Consolidated Version of the Treaty on European Union*, [2016] O.J. C 202/01, 13 (TEU).
8 Art 6(3) *TEU*.
9 Art. 2 *TEU*.
10 In addition, the EU is also bound by human rights via specific *clauses* in EU policies or its bilateral treaties, cf. Cerulus, Michael, 'Extraterritorial Human Rights Obligations of the European Union', in Benedek, Wolfgang et al. (eds.), *European Yearbook on Human Rights* (Antwerp et al.: European Academic Press, 2011), 243–254, 250.
11 Art. 47 *TEU*.
12 Art 3(5), Art. 21(1) *TEU*; see, e.g., CJEU, Judgment of 21 December 2011, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Case C-366/10, EU:C:2011:864, para. 101, 123.
13 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (CRPD).
14 Art. 6(2) *TEU*. And, most probably, it will not be completed for some years to come, cf. CJEU, *Opinion 2/13 of 18 December 2014*, EU:C:2014:2454.
15 De Schutter, *International Human Rights Law*, 27, original emphasis. In 2009, following the entry into force of the TEU, the Court of Justice of the European Communities was renamed *Court of Justice of the European Union* (CJEU).
16 Cerulus, *Extraterritorial Human Rights Obligations*, 248. Cf. Section 4.1.
17 Cf. CJEU, *Air Transport Association*, para. 63; Art. 6(3) *TEU*.
18 Bradford, Anu, *The Brussels Effect: How the European Union Rules the World* (New York: Oxford University Press, 2020). Legal acts of the EU include regulations, directives, decisions, opinions, and recommendations, Art. 288 *Consolidated Version of the Treaty on the Functioning of the European Union*, [2016] O.J. C 202/01, 47 (TFEU).

19 Scott, Joanne, 'Extraterritoriality and Territorial Extension in EU Law', *American Journal of Comparative Law*, 62/1 (2014), 87–125, 88.
20 For example, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)*, [2016] O.J. L 119/1 (GDPR); CJEU, Judgment of 3 October 2019, *Eva Glawischnig-Piesczek v. Facebook*, Case C-18/19, EU:C:2019:8216, para. 50 ff. See also the discussions on the Proposal for a *Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM(2021) 206 final; for example, Müller, Angela, 'Der Artificial Intelligence Act der EU: Ein risikobasierter Ansatz zur Regulierung von Künstlicher Intelligenz—mit Auswirkungen auf die Schweiz', *Zeitschrift für Europarecht EuZ*, 01 (2022), A1–A25.
21 CJEU, *Air Transport Association*; see Ganesh, Aravind, 'The European Union's Human Rights Obligations towards Distant Strangers', *Michigan Journal of International Law*, 37/3 (2016), 475–538, 489 ff.
22 Scott, *Extraterritoriality*, 90, also 94 ff.
23 Ibid., 125; Benvenisti, Eyal, 'Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?', in Liivoja, Rain & Petman, Jarna (eds.), *International Law-Making: Essays in Honour of Jan Klabbers* (Abingdon/New York: Routledge, 2014), 3–16.
24 Cf., e.g., Fabbrini, Federico & Celeste, Edoardo, 'The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection beyond Borders', *German Law Journal*, 21 (2020), 55–65; Ganesh, *Distant Strangers*, 485 ff.; Moreno-Lax, Violeta & Costello, Cathryn, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in Peers, Steve et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Oxford/Portland: Hart/Beck/Nomos, 2014), 1657–1683, 1664 ff.
25 Art. 2 *TEU*; Art. 21(1) *TEU*.
26 Wouters, Jan, 'The EU Charter of Fundamental Rights: Some Reflections on Its External Dimension', *Maastricht Journal of European and Comparative Law*, 8/1 (2001), 3–10, 5 f.
27 Art. 21(1) *TEU*, emphasis added; see also Art. 21(2) and 21(3); Art. 23 *TEU* and, for specific policy areas, e.g., Art. 208 *TEU*; Art. 212 *TEU*. Bartels, Lorand, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *European Journal of International Law*, 25/4 (2014), 1071–1091, 1072, 1074.
28 Art. 19(3)(a) *TEU*; Art. 263 *TFEU*. CJEU, Judgment of 10 December 2015, *Front Polisario v. Council*, Case T-512/12, EU:T:2015:953.
29 Hadjiyianni, Ioanna, 'The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors', *European Papers*, 2/2 (2017), 519–542, 523.
30 Preamble *CFR*.
31 See, e.g., CJEU, Opinion of AG Mengozzi, *X and X v. État belge,* Case C-638/16 PPU, EU:C:2017:93, para. 89. Of course, outside the scope of Union law, Member States remain obliged by their own constitutional and international legal obligations.

32 CJEU, Judgment of 26 February 2013, *Åklagaren v. Åkerberg Fransson*, Case C-617/10, EU:C:2013:105, para 21; see also, e.g., CJEU, Judgment of 17 January 2013, *Zakaria*, Case C-23/12, EU:C:2013:24, para. 39 ff. By contrast, the applicability of the CFR has been denied in cases beyond the competences of the EU or of Member States derived from EU law, such as with regard to the establishment of a stability mechanism for Euro countries, CJEU, Judgment of 27 November 2012, *Pringle v. Government of Ireland and Others*, Case C-370/12, EU:C:2012:756, para. 179 ff.
33 On these concepts and thresholds in IHRL Section 4.3.
34 Moreno-Lax & Costello, *Extraterritorial Application*, 1663.
35 CJEU, Order of 12 July 2012, *Mugraby v. Council and Commission*, Case C-580/11 P, EU:C:2012:466; CJEU, Order of 14 October 2004, *Zaoui and Others v. Commission*, Case C-288/03 P, EU:C:2004:633.
36 In this case, the Court regarded the degree of the Netherlands' control over a continental shelf as a manifestation of "functional and limited sovereignty", and thus considered their activities in the area as equivalent to activities on their own territory "for the purposes of applying EU law", CJEU, Judgment of 17 January 2012, *Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen,* Case C-347/10, EU:C:2012:17, para. 35, also para. 36.
37 CJEU, *Front Polisario v. Council,* para. 227 f.
38 CJEU, Judgment of 21 December 2016, *Council v. Front Polisario*, Case C-104/16 P, EU:C:2016:973.
39 For example, CJEU, Judgment of 8 April 2014, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources* and Others and Kärntner Landesregierung and Others, Joined Cases C-293/12 and C-594/12, EU:C:2014:238; CJEU, Judgment of 13 May 2014, *Google Spain SL v. Agencia Española de Protección de Datos*, Case C-131/12, EU:C:2014:317; CJEU, Judgment of 6 October 2015, *Schrems v. Data Protection Commissionner*, Case C-362/14, EU:C:2015:650.
40 CJEU, *Google Spain*; Art. 17 *GDPR*.
41 Art. 17(3)(a) *GDPR*. In *Google v. CNIL*, the CJEU denied that an EU citizen's right to be forgotten requires a search engine operator to carry out such de-referencing on all its domains worldwide (and thus also outside the EU). In doing so, it mentioned the potential circumscriptions on the rights to freedom of expression and information, implying that this could include rights of people located outside the EU, CJEU, Judgment of 24 September 2019, *Google LLC v. Commission nationale de l'informatique et des libertés (CNIL)*, Case C-507/17, EU:C:2019:772, para. 59 ff. This denial of the right to *worldwide* de-referencing is partly in contrast with another recent case, which concerned the demand for erasure of defaming online content about an Austrian politician on Facebook. Here, the CJEU acknowledged the possibility of worldwide effects, i.e., that the erasure could be carried out on a global scale, CJEU, *Glawischnig-Piesczek*.
42 Hadjiyianni, *Extraterritorial Reach*; Augenstein, Daniel, 'Paradise Lost: Sovereign State Interest, Global Resource Exploitation and the Politics of Human Rights', *European Journal of International Law*, 27/3 (2016), 669–691.
43 Rijpma, Jorrit J., 'External Migration and Asylum Management: Accountability for Executive Action outside EU-territory', *European Papers*, 2/2 (2017), 571–596.
44 Kube, Vivian, *The EU's Human Rights Obligations towards the Wider World and the International Investment Regime: Making the Promise Enforceable*, Dissertation European University Institute (Florence, 2018).

45 CJEU, Judgment of 16 July 2020, *Data Protection Commissioner v. Facebook Ireland Ltd, Maximillian Schrems*, Case C-311/18, EU:C:2020:559, para. 94.
46 Following CJEU, *Schrems v. Data Protection Commissioner*, the EU declared the level of data protection in the US as insufficient and the Safe-Harbor-agreement as invalid. Its successor agreement on the adequacy of the level of data protection in the US, the 'Privacy Shield Decision', *Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the EU–U.S. Privacy Shield (Privacy Shield Decision)*, [2016] O.J. L 207/1., was again invalidated by the CJEU, declaring the level of data protection US domestic law offers as not equivalent, CJEU, *Data Protection Commissioner v. Facebook Ireland Ltd, Maximillian Schrems*, para. 163 ff. In July 2023, the European Commission once again concluded that the US offers an adequate level of data protection, European Commission, *Adequacy Decision for the EU-US Data Privacy Framework*, 10 July 2023, https://commission.europa.eu/document/fa09cbad-dd7d-4684-ae60-be03fcb0fddf_en.
47 Art. 3 *GDPR*.
48 Taylor, Mistale, 'The EU's Human Rights Obligations in Relation to Its Data Protection Laws with Extraterritorial Effect', *International Data Privacy Law*, 5/4 (2015), 246–256, 247 f., 254 ff., mentioning also that this does not exclude the possibility of other political motives.
49 Kube, *EU's Human Rights Obligations*, 32.
50 Moreno-Lax & Costello, *Extraterritorial Application*, 1682.
51 Ganesh, *Distant Strangers*, 476, fn. 3.
52 Ovádek, Michal, '"Un-Chartered" Territory and Formal Links in EU Law', in Benedek, Wolfgang et al. (eds.), *European Yearbook on Human Rights*, 2017, 213–222, 217, original emphasis.
53 Cf. CJEU, Judgment of 21 December 2011, N.S. v. Secretary of State for the Home Department, M.E. and Others v. Refugee Applications Commissioner and Others, Joined Cases C-411/10 and C-493-10, EU:C:2011:865, para. 68.
54 CJEU, *Åklagaren,* para 25 ff., 28. On when Member States can be regarded as implementing EU law, CJEU, Judgment of 6 March 2014, *Siragusa v. Regione Sicilia*, Case C-206/13, EU:C:2014:126, para. 25. Moreno-Lax & Costello, *Extraterritorial Application*, 1681.
55 CJEU, Judgment of 7 March 2017, *X and X v. État belge*, Case C-638/17 PPU, EU:C:2017:173.
56 Ibid., para. 43 ff.
57 See Ovádek, *'Un-Chartered' Territory*, 218 ff.
58 CJEU, *X and X* (Opinion of AG Mengozzi), para. 77 ff., 158, 165 ff.
59 CJEU, *Åklagaren,* para 21.
60 CJEU, *X and X* (Opinion of AG Mengozzi), para. 91 f., also 89 ff.
61 Section 4.5.1.
62 Art. 52(3) *CFR*; CJEU, *X and X* (Opinion of AG Mengozzi), para. 94 ff.
63 Art. 1 ECHR reads: "The High Contracting Parties shall secure *to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention", emphasis added. For a detailed discussion, Section 4.5.1.
64 Kube, *EU's Human Rights Obligations*, 23; CJEU, *X and X* (Opinion of AG Mengozzi), para. 97 ff.

65 In its reasoning on *X and X*, the CJEU omitted to mention the similar cases of CJEU, *N. S., M.E.*, para. 94, 98; cf. also CJEU, *X and X* (Opinion of AG Mengozzi), para. 82, 137; Ovádek, *'Un-Chartered' Territory*, 214 ff., 221; Brouwer, Evelien, 'AG Mengozzi's Conclusion in X and X v. Belgium on the Positive Obligation to Issue Humanitarian Visas: A Legitimate Plea to Ensure Safe Journeys for Refugees', *CEPS Policy Insights: Thinking Ahead for Europe*, 2017/09 (2017), www.ceps.eu/system/files/PI2017-09_EB_VisaCode.pdf, 4; Moreno-Lax, Violeta, 'Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part II)', *EU Immigration and Asylum Law and Policy*, 21 February 2017, http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/.

66 Müller, Kristina, 'Kein legaler Zugangsweg in die EU durch humanitäre Visa: Einordnung des Verfahrens "X und X gegen Belgien" in die Europäische Migrations- und Flüchtlingspolitik', *Zeitschrift für europarechtliche Studien*, 20/2 (2017), 161–184, 184.

67 CJEU, *X and X*, para. 48 f.; *Regulation (EU) 2013/604 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-country National or a Stateless Person*, [2013] O.J. L 180/31 (Dublin Regulation).

68 Ovádek, *'Un-Chartered' Territory*, 221.

69 European Council, *EU-Turkey Statement*, Press Release 144/16, 18 March 2016, www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf; CJEU, Order of 27 February 2017, *NF v. Council*, Case T-192/16, EU:T:2017:128; CJEU, Order of 27 February 2017, *NG v. Council*, Case T-193/16, EU:T:2017:129; CJEU, Order of 27 February 2017, *NM v. Council*, Case T-257/16, EU:T:2017:130; cf. the appeal in CJEU, Order of 12 September 2018, *NF and Others v. Council*, Joined Cases 208/17 to 210/17, CLI:EU:C:2018:705, para. 23 f. This interpretation has also been adopted by the ECtHR in ECtHR, *J.R. and Others v. Greece*, 22696/16, 25 January 2018, para. 7, 39.

70 Rijpma, *External Migration*, 582 ff., 594.

71 Cf. Taylor, *EU's Human Rights Obligations*, 251; Moreno-Lax & Costello, *Extraterritorial Application*, 1682; Bartels, *The EU's Human Rights Obligations*; Cannizzaro, Enzo, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels', *European Journal of International Law*, 25/4 (2014), 1093–1099, 1098 f.

72 Rhimes, Michael, 'The Extraterritorial Application of the EU Charter in Syria: To the Union and beyond?', *UK Human Rights Blog*, 10 March 2017, https://ukhumanrightsblog.com/2017/03/10/the-extraterritorial-application-of-the-eu-charter-in-syria-to-the-union-and-beyond-michael-rhimes/

73 Kube, *EU's Human Rights Obligations*, 15.

74 Hadjiyianni, *Extraterritorial Reach*.

75 Ovádek, *'Un-Chartered' Territory*, 214.

76 De Sena, Pasquale, 'Still Three Different Status for Aliens, Citizens and Human Persons?', *Global Justice, Human Rights and the Modernization of International Law* (Cham: Springer, 2018), 239–254, 249.

77 Moreno-Lax, *Asylum Visas*.

4 International Human Rights Law

4.1 Evolution and Structure of International Human Rights Law

As argued above, approaches to extraterritorial applicability at domestic levels constitute the minimal baseline for regulating the issue in IHRL. This chapter will give a detailed overview over the latter. To contextualize the discussion, it will start by explaining, first, the evolution and structure of IHRL, and second, the relation between state sovereignty and human rights, which are both directly relevant to the question at issue.

Traditionally, international law had only assigned rights and obligations to states but not to individuals. First traces of transnational rights conceptions could be found in the protection granted to minorities in Europe by the *League of Nations* and to workers by the *International Labour Organization* after the First World War. Yet, as mentioned in the introduction, the modern IHRL system has its main roots in the developments following the Second World War. After having been confronted with such unconceivable atrocities, it no longer seemed sufficient to compel states vis-à-vis each other. Rather, they were to promise to honor the intrinsic value of every human being and to endorse principles of common humanity—and to make this promise not only to other states but also *directly* to individual human beings as well as to the global community. While national constitutions had laid the foundation for this development—and have not since ceased to play the primary role in guaranteeing individual rights—it had turned out they were simply not enough. The inegalitarian and collectivist underpinnings of fascism had put on display the need to enshrine these principles also *internationally*.[1]

The efforts undertaken at the time have incrementally resulted in an impressive legal structure. Above all, they led to the establishment of the UN in 1945, the Charter of which confirms the important role of human rights, even though it does not contain an actual bill of rights.[2] In 1948, the proclamation of the UDHR introduced a legally non-binding but politically uniquely influential and universal bill of rights.[3] Shortly before, the *Organization of American States* (OAS) had adopted the *American Declaration on the Rights and Duties of Man* (ADRD).[4] In 1950, Member States of the *Council of*

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Europe adopted the ECHR, which later became the first binding international contract allowing individual persons to take legal actions against a State Party for its human rights violations before an international court, the ECtHR. Concurrently, parallel endeavors to adopt binding human rights instruments were undertaken at the global level. The—by virtue of the political landscape—arduous negotiations took place under the framework of the UN and finally, in 1966, led to the adoption of the two primary treaties of today's global human rights regime: The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[5] They entered into force ten years later and have today obtained almost universal coverage, having been ratified by 173 and 171 states respectively.[6]

A series of treaties that address specific fields of human rights protection and have reached similar levels of ratifications has supplemented this regime, being concerned with the prevention and prohibition of genocide,[7] racial discrimination,[8] torture,[9] and discrimination of women,[10] as well as with the protection of the rights of children[11] and persons with disabilities.[12] In addition, further regional conventions were concluded, including the binding *American Convention on Human Rights* (ACHR),[13] the *African Charter on Humans and People's Rights* (AfCHPR),[14] the *Arab Charter on Human Rights* (ArCHR)[15] or the *European Social Charter* (ESC).[16] In other words, in the decades after 1945, the idea of individual human rights has become widely acknowledged, mirrored in their manifold implementation through conventions—but also in them becoming the subject of policies, practices, public discourse, political agendas, activism, and academic research.

As these developments reflect, the contemporary IHRL regime is mainly a *treaty-based* system. While ratification levels tend to be high and, in some cases, reach almost universal coverage, this type of legal sources only subjects states to norms if and as far as they *consent* to this. However, not least by virtue of the almost universal support of the treaties, human rights have also become firmly grounded in other sources of international law. Most importantly, based on state practice and *opinio iuris*, a considerable part of human rights have irrefutably developed into *customary international law*,[17] including (at the least) the prohibitions of genocide, slavery, arbitrary killings, torture and inhuman treatment, arbitrary and long detention, forced disappearance, contributing to or committing apartheid, and crimes against humanity; the common Article 3 of the *Geneva Conventions*,[18] providing minimal protection to civilians and persons 'hors de combat' in armed conflicts; and the prohibition of serious and systematic violations of any human right.[19] Today, there is growing—though not yet full—consensus that the list has become longer, potentially including all UDHR rights (or at least their *core* and the obligation to *respect* them).[20] Recognized in customary international law, human rights norms bind states independently of their consent. Here, states are unable to escape obligations—or, if at all, then only by a persistent effort of expressing their objection.

In addition, human rights arguably form *general principles* of international law, which complement or guide the application of norms of other sources, illustrated by the references of the *International Court of Justice* (ICJ) to UDHR rights as foundational principles of humanity.[21]

Furthermore, human rights are grounded in various elements of so-called *soft law*. Strictly speaking, the UDHR itself is a non-binding declaration that does not directly generate 'hard' legal obligations—though it not only has likely (at least partly) developed into customary law but also often serves as a reference point for the interpretation of positive law. The category soft law also includes resolutions adopted in international fora (most importantly the UN), general comments and observations by treaty bodies or other international organizations, and recommendations developed by scholars, experts, and practitioners. While not legally binding, these documents can still be authoritative to varying degrees (not least because many of them stem from the very bodies installed to interpret the corresponding treaties—which in turn are *binding* treaties), reflect consensus, contribute to, and influence the interpretation of human rights norms. Thereby, they also serve as potential starting points for the evolution of IHRL.[22]

Lastly, *case law* by global, regional, and domestic courts factually has a considerable impact on the evolution of legal norms. The interactions among these judicial bodies and the increasing position-taking of the ICJ in matters of human rights law have triggered a significant body of case law, which will be among the foci of the analysis to come.[23]

Independent of what legal source they stem from, two further important classifications that can pertain to specific human rights norms are relevant for the discussion. First, some core rights classify as *ius cogens*,[24] i.e., as norms of an absolute and non-derogable nature, which annul contradictory treaty provisions, reservations, derogations, or other measures and constitute a precondition for the legitimacy of domestic norms. The list includes the prohibitions of genocide, slavery, torture, systematic racial discrimination, arbitrary killings, arbitrary deprivations of liberty, and the imposition of collective punishments as well as the basic rules of *International Humanitarian Law* (IHL), together with the prohibition of aggression and the right to self-determination. Further candidates exist[25] but are contested, mostly because the criteria for assigning *ius cogens* status are not clearly determined.[26]

Second, human rights can correspond to *erga omnes* obligations, i.e., obligations the general compliance with which lies in the interest of the international community as a whole and can be demanded by every state. Consequently, their violation affects the position of all states, entitling them to launch countermeasures. While this category is certainly more expansive than *ius cogens*, a fix list of rights cannot be stipulated either. It certainly includes the prohibitions of torture, genocide, slavery and racial discrimination, the core norms of IHL, and the collective right to self-determination, but it may even go further, incorporating all basic international human rights.[27]

Overall, an impressive system of IHRL has to date been developed, which also has considerable impact on other fields of international law. Arguably, it has "humanized international law"[28] as a whole—which may not necessarily be reflected in their practical realization, but which is decisive for the question of their extraterritorial applicability.

4.2 The Role of State Sovereignty

In order to comprehend the foundational issue at hand, it is necessary to start by briefly contextualizing the central role the concept of *state sovereignty* plays in international law and its relation to human rights—which is directly pertinent when analyzing extraterritorial human rights obligations from both a legal and moral perspective.

Sovereignty is traditionally the essential attribute that entitles a population on a given territory to self-determination. Rooted in the Westphalian system and its division of the world into modern, geographically identifiable, and delimited states, it has been understood in a territorial sense, linked to and necessarily exercised on a specific territory. 'Territorial sovereignty' describes the idea of supreme authority and the exclusive entitlement to decide, to set rules, and to be obeyed in this territory and over the population located therein. It is among the main pillars upon which international law had been built and through which international relations have been structured, and it brings with it a clear division of responsibilities among states.

Sovereignty has both an internal and an external dimension: The former concerns the relationship of the sovereign state to its residents, the latter its relationship to the external world and to other subjects of international law. External sovereignty is said to consist in certain privileges and rights, such as self-determination and self-regulation, noninterference, and exclusive control over the *domain réservé* of domestic affairs, territorial integrity and jurisdiction, including the entitlements to regulate membership and to control borders, as well as legal personality and diplomatic immunity.[29]

There are factual, normative, and political dimensions to the notion of sovereignty, in all of which it has been a contested concept. Among the normative questions most pertinent to the present discussion is whether there are any (inherent) material constraints on sovereignty. Some early scholars have conceptualized sovereignty as nearly unbound, unconstrained by any human-made law. *Jean Bodin* describes sovereignty as power that is temporarily unlimited and independent of the consent of those subjected.[30] In the eyes of *Thomas Hobbes*, the sovereign state functions as the ultimate decider, whose decisions are the grounds on which law becomes law.[31] Both scholars declare sovereign entities as externally unbound.[32] *Carl Schmitt* then put forward a prominent conception of *absolute* sovereignty, regarding the *ex nihilo* created sovereign as the superior authority and the ultimate source of the legal order itself: In his decisionist theory, the sovereign decides on the state of exception and has the monopoly on making that decision, free from *any* material constraints.[33] Such

and similar strong and absolutist conceptions often provide the impetuses for a nihilist position on international law: If being sovereign means being the ultimate source of law, it means not being subject to any laws. A phenomenon like international law claiming authority would be incompatible with the very concept of sovereignty.[34]

This idea of absolute sovereignty, multifaceted as it has been presented, has also been countered in manifold ways, and several types of constraints have come to be accepted. First, and generally recognized even by those advocating for strong concepts of sovereignty, the concern for the sovereign equality of other states must curtail *external* sovereignty: If sovereignty is a key factor in enabling coexistence in a world of competing states, then sovereignty must end where the sovereignty of others begins. For instrumental reasons of effectiveness, it must then be international law that defines and assigns sovereignty to states.[35]

Second, thinkers like *Hugo Grotius*,[36] *John Locke*,[37] *Immanuel Kant*,[38] or *Emer de Vattel*[39] have put forward accounts that set intrinsic constraints to the legitimate exercise of sovereignty, constraints that go beyond instrumental concerns and arise from the natural, subjective rights of the human beings composing the state. Following this tradition, sovereignty exhibits not only a factual dimension of enforcing authority but also a substantive normative one: It comes with the responsibility for protecting fundamental rights. Lastly, *de facto*, skeptics diagnose a certain tension between sovereignty on the one hand and increasing processes of transnational integration and the accompanying shift of competences to supranational or international institutions on the other. While many of these processes are ultimately authorized by states' consent, they underline that they do not flow from democratic decision-making and lack its legitimacy-conferring consent.

International law reflects the evolution of the concept of sovereignty, which is relevant to the question at issue. On the one hand, modern international law has been developed on Westphalian-inspired guarantees of territorial sovereignty, which today still powerfully inform the foundations of the international legal system. Historically, the concept allowed for an unambiguous distribution of responsibilities that helped provide the conditions for the pacification and institutionalization of the state on a given territory. The UN Charter mirrors the important role assigned to sovereignty by centrally acknowledging the sovereign equality of states and prohibits attacks on their integrity as well as interventions in their *domain réservé*, the areas which are "essentially within the domestic jurisdiction".[40] The prohibition of intervention by force is part of customary international law,[41] and some even categorize the principle of sovereignty as having *ius cogens* status.[42] Generally speaking, sovereignty—and with it its link to territoriality—remains of central importance in many fields of international law, and allows for a clear division of responsibilities among states in an increasingly interdependent world.

On the other hand, the post-war evolvement of IHRL has led to the general acknowledgment that a state's sovereignty comes with the responsibility for protecting its territorial population and their basic rights.[43] The idea of a

R2P later reflected this change of perspective from sovereignty as a *right* to sovereignty as a *responsibility*.[44] It is today widely acknowledged that a contemporary notion of sovereignty is not only constrained by the sovereignty of other states but also by individual human rights. At the same time and due to the important role it plays in distributing responsibilities, sovereignty remains a principle of tremendous significance at the political and the legal level. Sovereign state consent largely continues to condition the evolution of international law—and thus also of IHRL. From its very beginnings, the IHRL regime was conceptualized as part of public international law, which itself had been strongly founded upon Westphalian principles of exclusive territorial sovereignty. In light of these underpinnings, the territorial paradigm was also transposed to the reach of human rights obligations. Evolving after the Second World War in which many non-citizens had been exposed to unspeakably cruel violations of dignity, it served as a modern guarantee against nationalist, ethnicist, or racist ideologies. Protection should no longer be granted along these lines but to everyone on a state's territory, including foreign citizens. Thereby, not only has the concept of territorial sovereignty helped to divide and clearly assign responsibilities among states but also has its underpinning of IHRL importantly contributed to the protection of non-citizens, a category that has before enjoyed little to no legal protection.[45]

While the UN Charter assigns a universal reach to human rights,[46] the territorial paradigm is still reflected in contemporary IHRL—epitomized by the fact that the enshrinement of human rights mostly takes the form of *treaties among territorial states*, to which states can choose to (or not to) commit themselves and where, even if they choose to sign, states' noncompliance often has few consequences. It also manifests itself in the applicatory thresholds that typically figure in these treaties, as shall later be seen. Thus, what is less clear is whether the normative constraints to the exercise of sovereignty that have come to be accepted are limited to human rights of residents or go beyond the state's population, concerning the core of the question spotlighted here.

Today and at the political level, references to the notion (or sometimes the word) of sovereignty abound—as some say, the world might even observe a 'sovereigntist turn'.[47] Nationalist movements across the world mirror a backlash to the idea of sovereignty as a necessary tool for protecting national interests. Popular decisions to leave supranational or international organizations or political initiatives to grant domestic law superiority over international law reflect this tendency.[48] That said, sovereignty has remained a crucial instrument for furthering often legitimate claims to self-determination of communities or to territorial integrity of states, the importance of which has conspicuously been demonstrated in the course of decolonization processes, but which today continues to provide grounds for efforts against oppressive tendencies or illegal invasions, as not least the Russian war against Ukraine has demonstrated. In sum, clearly, sovereignty has not yet been "dethroned".[49] As a result, and by virtue of it being essentially linked to territoriality, it remains directly pertinent to the applicability of IHRL, to which the discussion now turns.

4.3 Applicability Conditions and the Concept of Jurisdiction

Prima facie, one could assume that the very idea of enshrining human rights in international law reflects the recognition that the interests behind these rights cut across borders, that their moral and legal bases somehow transcend national boundaries. Thereby, it could be taken to exceed the minimal baseline that the extraterritorial application of domestic fundamental rights stipulates, and to essentially put states under obligations to all individuals on the globe, regardless of territory. On the other hand, the strong territorial underpinning of IHRL as part of public international law could imply that its norms do not oblige states to respect, protect, and fulfill human rights of those located *outside* their territories. With the enormous globalization processes and technological developments of the last decades, this, however, would create a vacuum: There are countless ways in which states can now affect individuals in other states; various new, potential and actual diagonal relationships between states and persons outside their territories have been established. How can and does IHRL deal with these phenomena of cross-border relations?

In what follows, this question will be analyzed in various steps. First, treaties' *textual* approach shall be outlined: What does their wording suggest regarding criteria for spatial applicability? Second, since treaties' wording often refers to the notion of *jurisdiction*, what is the concept behind it, how does it differ from its counterpart in general public international law and from the notion of state responsibility, and how does it relate to territory? Finally, third, when and how has the applicability of IHRL been affirmed or denied in *extraterritorial* situations?

4.3.1 The Wording of Human Rights Treaties

According to the *Vienna Convention on the Law of Treaties* (VCLT), international treaties must primarily be interpreted *in good faith*, in line with the *ordinary meaning* of their terms, their *systematic context*, as well as their *object and purpose*. Of subsidiary significance for treaty interpretation is the *historical method*, referring to the *travaux préparatoires* and the context in which a treaty had been adopted.[50]

While human rights law forms part of international law, they may call for specific, differentiated interpretation methods that pay tribute to their special character as (quasi-)constitutional norms that protect individuals. Though enshrined in multilateral treaties, IHRL norms are not norms of a contractual, reciprocal nature. When interpreting them, the *object and purpose* should be assigned more weight than other interpretative methods. This entails a degree of flexibility and enables dynamic and contemporary solutions of human rights treaties as "living instruments" in reacting to actual present challenges, which is required for an effective realization of what these rights are intended for—in the world as it presents itself today.[51]

As a consequence, the historical method, including the consideration of the *travaux préparatoires* of treaties, must be employed with caution: Some phenomena that are highly relevant to the enjoyment of human rights today, such as those that accompany the processes of globalization or new technologies, were simply not yet on the horizon during the drafting of the central human rights treaties. This is of particular relevance when considering their extraterritorial applicability. At the time the essential treaties were being drafted, states' means to kill or surveil individuals abroad or to influence processes in foreign countries without having to step foot on their territories were not yet as numerous and as accessible as today. Though states have long had the capacity to carry out airstrikes and bomb people abroad, today's world equips them with numerous more subtle and less resource-intense methods, for example, through Unmanned Aerial Vehicles, automated weapon systems, surveillance systems based on AI, cyberattacks, or online platforms. These new phenomena have immensely increased the likelihood and dimensions of extraterritorial violations. In that sense, as foreseen in Article 32 VCLT, *travaux préparatoires* can give important hints but not by themselves conclusive proofs about the intended applicatory scope of human rights treaties.

To start with, the wording of treaties, i.e., the terms by which they refer to the scope of their applicability, varies. Some human rights treaties do not explicitly address it, while others do—in a general applicability clause defining the area in and/or the persons to which states' obligations arise, in the framework of specific norms, or by both general and rights-specific references. The following sections will introduce these varying textual approaches.

4.3.1.1 The Wording of the International Covenant on Civil and Political Rights

Illustrating the crux of the issue, the general applicability clause of the ICCPR has been central to the discussion on extraterritorial applicability. According to its Article 2(1):

> Each State Party to the present Covenant undertakes to respect and to ensure *to all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[52]

The ordinary meaning of the Article for the scope of applicability is ambiguous and has given rise to intense debates.[53] In principle, there are two ways of interpreting it: According to interpretation (i), rights must be respected and ensured to all individuals who are both within a state's territory *and* under its jurisdiction. According to this view, its 'and' sets a cumulative requirement, declaring *both* territory and jurisdiction as necessary conditions for a state to be subject to treaty obligations. As a result, this approach denies the existence

of human rights obligations in extraterritorial settings, i.e., in areas that are not formally part of states' territories.[54]

Interpretation (ii), in contrast, maintains that a state must respect and ensure rights to all individuals who are within its territory and to all individuals who are subject to its jurisdiction. The 'and' should be interpreted disjunctively, in the sense of 'and/or', implying that a state is obliged toward a person if she is either on its territory or under its jurisdiction (or both). Territory and jurisdiction are both separately sufficient conditions in order to trigger the spatial applicability of the treaty.

The formulation of Article 2(1) had already been debated in the *travaux préparatoires* of the treaty. However, the core of these discussions, mostly led between the US and France, concerned the question of whether states shall also be obligated vis-à-vis *nationals* in occupied territories abroad (as France suggested) or only vis-à-vis those on the state's territory (as the US argued).[55] It thus appears that the final wording of the Article was not a result of states seeking to generally exclude *extraterritorial* human rights obligations but rather a compromise arising from concerns about the status and the difficulty of protecting *citizens living abroad*. This illustrates the secondary significance of historical treaty interpretation for human rights treaties—drafters might just not have been aware of the increasing risk of states violating rights of people beyond their borders.

The authoritative conclusions in respect to the interpretation of Article 2(1) were issued by the ICJ and the *Human Rights Committee* (CCPR). Both bodies have confirmed the validity of interpretation (ii), i.e., that the Article must be construed as containing two separately sufficient conditions: The treaty binds states both to individuals on their territories as well as to individuals subject to their jurisdiction. Despite some strands of continuing criticism, this position is nowadays the primary and certified one.[56]

4.3.1.2 The Wording of the European Convention on Human Rights

As the *travaux préparatoires* of the ECHR reveal, the formulation of Article 1 and the choice between territory and jurisdiction had also been among the issues discussed, referring to the simultaneous negotiations on the UN conventions. However, the mainly debated issue here was the notion of 'residence': The aim of opting for an inclusive approach that protects as many people as possible led to the replacement of the initial formulation of 'all persons residing within the territories' by 'everyone within their jurisdiction', emphasizing that actual permanent *residence* might be too high a criterion for the existence of state duties. Rather, these duties should also be triggered vis-à-vis persons who are merely temporarily located on a state's territory.[57] The formulation finally adopted for the opening Article of the Convention, titled "Obligation to Respect Human Rights", holds:

> The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.[58]

According to this wording, states' *jurisdiction* serves as the decisive criterion for the applicability of the ECHR, while territory is not even mentioned. However, the *travaux préparatoires* indicate that drafters were not particularly occupied with shielding people from violations occurring beyond states' territories but rather implicitly assumed the almost coextensive scope of jurisdiction and territory.[59] References to territory also appear in the Convention's Articles on colonialized territories, providing for states to declare to extend their obligations to such territories,[60] but this must be viewed in relation to the then-existing colonial relationships. Moreover, the Articles do not *a contrario* imply that without such declarations, states are only obligated on their own territory: If applicability *ratione loci* on a foreign territory has not been established by giving such a declaration, this cannot preclude the Court from analyzing whether the state had still exercised jurisdiction and *thereby* triggered applicability.[61] Hence, these Articles are not pertinent to the general issue of extraterritorial applicability.

4.3.1.3 The Wording of Further International Human Rights Treaties

The ACHR, adopted almost two decades after the ECHR, contains similar wording:

> The States Parties to this Convention 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 for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[62]

This is supplemented by the clarification that "'person' means every human being".[63]

A general applicability clause referring to 'jurisdiction' is also contained in the *Convention on the Rights of the Child* (CRC), which obliges states toward "every child within their jurisdiction", and does not contain any references to territory.[64] Interestingly, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* uses a similar formulation to that of the ICCPR but replaces the much-debated 'and' with an 'or', unambiguously opting for a disjunctive reading of the two criteria and putting states under obligations toward migrant workers and their families "within their territory or subject to their jurisdiction".[65] Arguably, the formulations in these two more recently adopted conventions can be interpreted as standing for the wish to clarify that their applicability does not necessarily depend on territory but can go beyond it.

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) similarly refers to territories under jurisdiction[66] and to individuals under jurisdiction[67] for defining its applicatory scope, which can also go beyond the state's own territory. These references, however, are

not part of a general jurisdictional clause but rather introduced in relation to specific Articles. Likewise, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) alludes to applicability in territories under jurisdiction, both in a general clause as well as in specific substantial Articles.[68]

In contrast, conventions like the AfCHPR, the ICESCR, the CRPD, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG), and the *Optional Protocol to the CRC on the Involvement of Children in Armed Conflict* (OPAC)[69] do not contain any explicit references regarding applicability. Interestingly, a general jurisdictional Article is also absent from the UDHR. While it alludes to jurisdiction in its Preamble and in Article 2, the absence of such a clause exhibits its status as a *universal* and *declaratory, non-binding* bill of rights. This lack of explicit limitations on the applicatory scope can be read in various ways. On the one hand, it could be taken as an indication that these treaties are essentially territorially applicable.[70] On the other hand, it might mean that they apply without any strict territorial boundaries. Most actual interpretations lie somewhere in between.

To a certain extent, in the ICESCR, the latter reading is supported by the fact that its introductory Article 2(1) explicitly compels states to aim at the "full realization of the rights" through individual measures as well as through "international assistance and co-operation", a formula repeated in other Articles.[71] It implies that states should refrain from violating rights abroad, as this would essentially be non-cooperative conduct.[72] Moreover, the right to free primary education enshrined in the ICESCR is explicitly limited to territories under jurisdiction,[73] suggesting that other Articles that lack this qualification also lack the corresponding limitation, i.e., that they generally do apply extraterritorially.[74] A similar approach can be found in the CRPD, which also lacks a general jurisdictional clause but contains references to obligations of international cooperation.[75] The approach is characteristic for the domain of economic and social rights, mirroring the essential role assigned to international cooperation in the UN Charter, which holds that Member States are required to take both separate and cooperative steps to achieve universal respect for human rights.[76]

However, in general, treaties without a jurisdictional clause have not been interpreted in a categorically different way than those containing such a clause. Often, an implicit jurisdictional threshold, similar to that of the ICCPR or ECHR, is read into them: The *Inter-American Commission on Human Rights* (IACHR) did so with regard to the ADRD, the ICJ arguably did so in relation to the ICESCR, the AfCHPR, and the *Optional Protocol to the CRC* (OPAC-CRC).[77] Lastly, many of the optional protocols that set up complaint mechanisms for treaties include jurisdictional clauses, regardless of whether their parent treaties possess them or not. Thereby, these clauses limit the possibility to file complaints to a certain group of individuals, typically to 'individuals

under jurisdiction', without thereby affecting the general applicatory reach of the treaty itself.[78]

In sum, while there is some variance as to the textual approaches in addressing the issue of applicability in human rights treaties, there is also considerable overlap. As an intermediate conclusion it appears justified to assert that starting from the wording, the thesis of treaties being essentially limited to territory is difficult to uphold. While some allude to territory, it is *jurisdiction* that provides the decisive criterion for determining the spatial reach of many (or most) IHRL treaties.[79] As a result, it is also on the basis of *jurisdiction* on which extraterritorial obligations would arise: They hinge on the ascription of *extraterritorial jurisdiction*. Strictly judicially speaking, the research focus of the analysis could be restated: Arguments for limiting human rights duties to states' territories would need to rely on the assumption that *jurisdiction* is an *essentially territorial concept*. Thus, at this stage, it is called for casting further light on the concept behind this central notion.

4.3.2 Jurisdiction in General Public International Law

Jurisdiction is not a straightforward concept—rather, different usages give rise to different meanings and must thus be differentiated. In *general* international law, jurisdiction can denote the authority of a *court* or *an institution* regarding a particular situation, triggered by a spatial (*ratione loci*), temporal (*ratione temporis*), material (*ratione materiae*), or personal (*ratione personae*) nexus. It entails the competence of the body to hear claims about alleged violations of legal norms. More relevant for the present discussion, jurisdiction is also used for describing the *legal competence, authority, and entitlement* of a *legal entity* to set rules for natural and legal persons, to enforce these rules, and to adjudicate breaches of such regulation. It is then construed as a *de iure* notion, a legal title that delimits national legal orders and describes the sphere over which a state has authoritative decision-making power and in which it can set the rules.[80] It is a concept of international law, based on and derived from the ascription of sovereignty. Thus, it is a manifestation of sovereignty but at the same time limited by the sovereignty of other states.[81] In what follows, it is not the jurisdiction of *courts* but this latter understanding of jurisdiction of *states* that is at issue.

Prior to the Peace of Westphalia, a community-based conception of jurisdiction had prevailed, in which authority was exerted over the people belonging to the community of the ruler. In the late 16th century, the Westphalian system replaced this with a foremost territorial conception, in which the principles of exclusive territorial sovereignty and nonintervention function as foundational pillars of the international system. Jurisdiction was now conceptualized as essentially linked to and limited by territory. On their territories, states were assigned exclusive sovereignty and jurisdiction, and others were not allowed to interfere.[82] Yet, while the two concepts are linked, they are not commensurate.

Sovereignty denotes the legal personality and competence of states, and the principle of territorial sovereignty sets the right to independent state activities on this territory as well as the duty to respect other states' sovereignty. *Jurisdiction* describes the *authority to regulate conduct*. In that sense, sovereignty constitutes the grounds on which jurisdiction is ascribed, i.e., generates the right and duty to exercise jurisdiction.

In international law, it is typically distinguished between *legislative* (or *prescriptive*) jurisdiction (the entitlement to prescribe rules), *enforcement* jurisdiction (the entitlement to enforce rules), and *adjudicative* jurisdiction (the entitlement to establish procedures for and adjudicate breaches of rules).[83] This distinction is especially relevant to the regulation of extraterritorial jurisdiction in *general* public international law, as opposed to its regulation in IHRL, which will be the subject of the next section.

Prescriptive jurisdiction is typically exercised on a state's territory but, in principle, permitted in extraterritorial circumstances on conditions (i) that a nexus between the relevant situation and the state exists and (ii) that there is no explicit prohibition to regulate the former. Moreover, regulating extraterritorially must not force people to violate norms in the other, their territorial state, and is always subsidiary to the latter's norms. As discussed in relation to the EU, a distinction can be drawn between the *legislation* of extraterritorial rules on the one hand and the practice of endowing domestic laws with extraterritorial reach ('*territorial extension*') on the other.[84]

A nexus between the state and the situation at issue is also required for the exercise of *adjudicative* jurisdiction abroad. For both prescriptive and adjudicative jurisdiction, this nexus can be provided on different grounds:[85] according to the *nationality* (or *active personality*) *principle*, a state is entitled to exert such authority extraterritorially if the individuals thereby controlled are its citizens; according to the *passive personality principle* if those thereby protected are its own nationals; and according to the *protective principle* in cases where central national interests are at stake. These three principles are today more or less beyond dispute. On slightly less firm ground—but still widely accepted today—stand the entitlements to exercise jurisdiction on the basis of the *effects doctrine*, i.e., regarding conduct of foreign parties that have effects on a state's territory,[86] or on the basis of the *universality principle*. To recall, the latter principle asserts that there are certain basic norms of humanity, especially those recognized as *ius cogens*, the respect of which concerns the entire global community. Accordingly, breaches of these fundamental norms trigger a nexus to all states.[87]

In contrast, the exercise of extraterritorial *enforcement* jurisdiction is generally not allowed—except if the other state consents (*ad-hoc* or through a bilateral treaty). Absent such consent, any action by state A aiming at enforcing its legal rules or at otherwise furthering its interests on the territory of state B, is prohibited. Paramount examples include targeted killings, kidnappings, or detentions of people on foreign soil.[88]

4.3.3 Jurisdiction in International Human Rights Law

Human rights law forms part of international law but call for specific and carefully selected means of interpretation. While jurisdiction in general public international law is a concept of legal entitlement, this notion does not seem to sufficiently and adequately cover the context of human rights. In IHRL treaties, it is used as an applicability threshold, a necessary condition that must be met in order to compel states accordingly. The question of legal entitlement, the *de iure* notion of jurisdiction in general international law described in the previous section, should not be the primary decisive factor in this regard: States can violate human rights, irrespective of whether they lawfully or unlawfully exercised jurisdiction over the person or area in question, i.e., of whether they are entitled to exercise such jurisdiction according to the rules of general international law. The question of *whether a state acts lawfully by regulating, enforcing, or adjudicating matters abroad* is categorically distinct from the question *whether a state is subject to human rights obligations when its actions have effects abroad* (regardless of whether its actions having such extraterritorial effects is lawful or unlawful in the first place).[89] A *de iure* notion of jurisdiction as an applicability threshold for human rights obligations would lead to absurd results: In situations where a state (according to general public international law) *unlawfully* acts abroad, or acts domestically with effects abroad, the entitlement to *de iure* jurisdiction is not given, and, thus, the threshold would not be reached. As a result, such unlawfully acting states would not be subject to human rights obligations, turning the purpose of human rights protection on its head. In the context of human rights, the question of jurisdiction must hence primarily be analyzed by looking at the *factual* control, power, or authority a state exercises: Here, a state has jurisdiction over a person, area, or situation if it *de facto* controls it.[90]

This also means that, in human rights law, jurisdiction alludes to the relationship *between the state and the individual* and asks whether this relationship is of such a nature or degree that it triggers human rights obligations. It does not, as its *de iure* counterpart, refer to a reciprocal relationship among states grounded in the mutual acceptance of each other's legal entitlement to rule. Thus, it also does not function as a way to delimit competing spheres of authority: For the purposes of human rights protection, *de facto* jurisdiction of one state over an area does not in itself exclude the simultaneous exercise of another state's *de facto* jurisdiction over a specific person located in that area. For example, if Cambodia exercises jurisdiction over its territory, this does not yet exclude the possibility of Laos' *de facto* jurisdiction over person A who is located on Cambodian territory.

Even though it is not always carefully drawn, the distinction between *de iure* and *de facto* concepts is crucial. It provides a way to overcome one of the first hurdles of extraterritoriality or, correspondingly, to contest one of the first arguments for a territorial limitation of human rights duties:[91] Were jurisdiction

understood in the manner of general public international law, it would be inherently linked to territory, because the principle of territorial sovereignty essentially links the entitlement to regulate—thus *de iure* jurisdiction—to a state's territory. In contrast, if it is interpreted as a *factual* concept, this constraint no longer necessarily exists: Factually, states have the capacity to exercise control outside their territorial borders.

Having said that, and while the two notions are conceptually distinct, the phenomena are of course interrelated in complex ways—first and foremost in practice: In times of globalization, the tendency of states to exercise or claim *de iure* legislative, adjudicative, or enforcement jurisdiction abroad has increased.[92] The question of what responsibilities states are subject to when they choose to do so directly leads to the question of extraterritorial human rights obligations, for the applicability of which *de facto* jurisdiction is relevant. Both concepts of jurisdiction are linked to complex questions on the distribution and sharing of responsibilities and responsibility spheres, triggering real legal problems in international law. Hence, it is important to emphasize that the concept of *de iure* jurisdiction is *not at all* irrelevant to the question pursued here, and the analysis below will shed light on how this is the case. Nevertheless, it is equally important to stress that the current analysis focuses on IHRL, and that a general analysis of extraterritorial jurisdiction in general international law goes beyond it.

Similarly, it is essential to differentiate the concept of state jurisdiction from that of *state responsibility*. In international law, the latter consists of two essential elements: a particular instance of a *breach* of an international legal norm and the *attributability* of the relevant conduct to a particular state. It essentially requires a retrospective analysis on when to ascribe responsibility for a prior and specific violation of law. In the context of IHRL, it is about assessing whether there was a violation of human rights and whether the perpetrator counts as an agent of a given state (as a result of which the conduct in question can thus be attributed to that state), determined by the rules of public international law as enshrined in the *Draft Articles on State Responsibility*.[93] In contrast, *state jurisdiction* in human rights treaties operates as a threshold: If and only if this condition is fulfilled are the corresponding legal norms applicable, i.e., is the state subject to the corresponding obligations. In principle, it is a prospective notion, concerning the question of whether a legal norm applies and binds the state in the first place, which is also relevant independent of actual, particular breaches of the norm. Jurisdiction in IHRL is not an independent but a specific concept that suits this specific domain of law.[94]

While there cannot be any state responsibility for human rights violations without jurisdiction—a state can only be responsible for the breach of a norm it was subject to at a given moment—jurisdiction does not necessarily entail state responsibility. First, it is not the case that every act occurring in a particular situation is attributable to the main jurisdiction-exercising state. Second, when a state exercises jurisdiction, it does not automatically commit

any human rights violations. Not every state action or omission touches the enjoyment of fundamental rights—many state acts takes place in domains in which fundamental rights issues are paradigmatically not concerned. Moreover, when they *are* concerned, in many cases, state acts will be in conformity with their duties: Many states take the task of protecting individuals and their legal commitments seriously. Third, not every interference amounts to a rights violation and sometimes, they can be justified by countervailing considerations. Law is intended to regulate specific real-world situations, which are often marked by conflicts of interests that need to be carefully weighed against each other.[95] Lastly, courts generally analyze the question of jurisdiction at a preliminary stage, i.e., when evaluating the formal *admissibility* of complaints, and not as part of the merits—thus at a stage at which it is not yet examined whether violations of norms have indeed occurred or not and if so whether they are attributable to the state concerned. That said, the two concepts are again strongly related in practice. In particular, the *attributability* of some conduct (as one element of *state responsibility*) can be crucial in establishing jurisdiction for the purposes of IHRL: The exercise of *de facto* jurisdiction is necessarily linked to some manifestation of agency on the part of the state. The assignment of attributability can thereby hint at the holder of jurisdiction, making it also relevant to the determination of state jurisdiction. In the case of *Loizidou v. Turkey*, for example, the ECtHR had to allude to actions attributable to Turkey in order to prove that Turkey exercised jurisdiction over the northern part of Cyprus. At the same time, the attributability of the norm-violating conduct (committed by the 'Turkish Republic of Northern Cyprus' [TRNC]) to Turkey also served as a condition of ascribing state responsibility.[96] This is also mirrored in cases in which courts link the question of applicability to the merits, assuming that the circumstances of the case and the type of the allegedly infringed norms are relevant to the determination of jurisdiction and thus admissibility.[97] However, while the specific *substantiations* of attributability on the one hand and applicability on the other are related in concrete cases, the *concepts* as such are still to be distinguished. The distinction and the relation between them will again be discussed when turning to the legal implementation of the account developed below.

In sum, for most IHRL treaties, the decisive threshold for triggering applicability is the exercise of *jurisdiction* on the part of States Parties. While some treaties already refer to the concept in the treaty text, others are interpreted as containing a jurisdictional threshold. In contrast to general public international law, jurisdiction is construed as a *de facto* notion, denoting the factual control or authority of a state.

However, whether it includes an explicit applicability clause or not and what its exact wording is do not yet determine the treaty's spatial reach. What jurisdiction means, how far it goes, and how it can be established in the *extraterritorial* context is a controversial question that must be determined with regard to further methods of interpretation.

4.4 Territorial Applicability of International Human Rights Law

What are the principles guiding applicability of IHRL treaties *on states' territories*, and can they be a starting point for extraterritorial applicability?

In principle, according to the VCLT and as explicitly mentioned in IHRL treaties, their norms apply throughout the entire territory of a State Party and for every person located on it.[98] A qualification and a specification pertain. First, while courts like the ECtHR generally start from a "presumption of competence"[99] of a State Party over its territory, the scope or level of its obligations may be reduced if it loses jurisdictional control over a part of its territory as a result of an occupation by a foreign state or an insurgent movement. In *Ilaşcu v. Moldova and Russia*, the ECtHR confirmed that Moldovan jurisdiction in the Transdniestrian region was reduced due to its loss of control over the area to Russia, and it hence limited Moldova's obligations under the Convention to *positive obligations to take all measures available* for securing ECHR rights in the area.[100] Further exceptions to the principle of territory-wide applicability arise, for example, on the premises of international organizations located on the host state's territory.[101]

Second, while the territorial approach to the applicability of IHRL meant a departure from citizenship as an applicability condition for assigning rights, and while it thus has been essential in closing protection gaps for non-citizens on state territories,[102] differentiating on the basis of citizenship is not fully prohibited. It remains allowed if such a differentiation is legitimate, reasonable, and objective, i.e., if it aims at a legitimate goal, is a suitable means to reach this goal, and is proportionate—and the burden of proof rests with the state drawing such a distinction. It is only generally accepted for some limited categories of rights, above all the rights to vote and to run for office, which may be applied exclusively to citizens.[103]

What this suggests is that the modern exclusion of the citizenship criterion had been an impetus for including jurisdictional clauses into modern human rights treaties: In spite of all the controversies they give rise to, what these clauses undoubtedly make evident is that citizenship no longer functions as a primary threshold for the *general* ascription of human rights, mirroring the modern turn that the territorial approach had (at least partly) brought about.[104] However, as it turned out, the new threshold may also come with protection gaps—especially when it comes to protecting those beyond a state's borders.

4.5 Extraterritorial Applicability of International Human Rights Law

The fact that territory is normally a sufficient condition for treaty norms to apply does not allow for the contrary conclusion that territory functions as a *necessary* condition of applicability. What are the criteria by which *extraterritorial jurisdiction* is ascribed to states in the context of IHRL—which has

a different normative basis than domestic constitutions and is not directly a manifestation of self-imposed law?

After having portrayed the textual approaches of IHRL treaties and the concept of jurisdiction, the following will outline judicial bodies' approaches to interpreting this applicatory threshold in cases involving alleged extraterritorial violations. How have courts construed the applicability of human rights treaties when considering situations that took place outside the respondent state's territory? The analysis focuses on the ECHR and the ICCPR, which serve to illustrate the problem at hand due to the magnitude and significance of case law on the topic, but it will be supplemented by a look at other relevant treaties.

4.5.1 European Convention on Human Rights

The case law on the interpretation of "everyone within their jurisdiction" in Article 1 ECHR and on the possibility of its extraterritorial application has its origins in the 1970s. Since then, a considerable body of case law has developed—which has, however, not become particularly known for its principled approach. Rather, it has been criticized in manifold ways, above all for its lack of consistency in addressing the extraterritoriality question.

The first cases explicitly addressing the issue concerned the Turkish occupation of the Northern part of Cyprus. In its first decision, the *European Commission of Human Rights* (EComHR) held:

> In Art. 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone 'within their jurisdiction' (in the French text: 'relevant de leur juridiction'). The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.[105]

The possibility of extraterritorial jurisdiction was thus allowed for, hinting at the universal foundation of the Convention, and the relevant criterion of its assignment was seen as lying in the *authority exercised by state agents*.

In a later case concerning the same circumstances, the ECtHR again ascribed jurisdiction to Turkey but on a somewhat different basis: In *Loizidou v. Turkey*, a Cypriot citizen claimed she had lost access to her property located in the northern part of Cyprus due to the Turkish occupation of the area and its subsequent separation from Cyprus. She had been forced to flee the area and since then, so she asserted, Turkish forces had repeatedly hindered her

from returning. In response to Turkey's denial of jurisdiction over the region (and thus its denial of applicability of the ECHR to the case), the ECtHR confirmed:

> Bearing in mind the object and purpose of the Convention, the 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.[106]

The statement incorporates various noteworthy elements. First of all, like the Commission, the Court also explicitly alluded to its teleological method of interpretation by mentioning the object and purpose of the Convention. Second, it defined the control that is indicative of such jurisdiction as a *de facto* notion, mentioning both the irrelevance of its legality ("whether lawful or unlawful") and the relevance of its factual manifestation ("derives from the *fact* of such control").

Third, contrary to the decision in *Cyprus v. Turkey*, the Court discerned the grounds for ascribing jurisdiction not in the authority of state agents but rather in the exercise of "effective control of an *area*",[107] manifested in the large number of Turkish troops present. By virtue of this being effective *overall* control, it was not seen necessary to attribute every single act to Turkey: Its control was of such kind and degree that the conduct of the TRNC, which had been proclaimed in the occupied area but not been recognized by the international community, falls under its scope of responsibility, to which the ECHR pertains.[108] Hence, in these early cases already, two possible grounds for establishing extraterritorial jurisdiction were identified: (i) a spatial or geographical concept of jurisdiction grounded on *effective overall control* exercised over an *area* and (ii) a personal or state agent concept of jurisdiction as *state agent authority or control* exercised over an *individual person*.[109]

The above were cases dealing with situations involving a substantial level of control, exercised in the framework of a military occupation. However, the approach was also confirmed in other categories of situations. In *X and Y v. Switzerland*, the EComHR confirmed Swiss jurisdiction vis-à-vis a German national, who had been disentitled by Swiss authorities to reenter Liechtenstein, where part of his family resided, and vis-à-vis his partner in Liechtenstein. While the acts that constituted the alleged violations were committed on Swiss territory, their effects were felt by individuals in Germany and Liechtenstein. Through these effects, they were brought under Swiss jurisdiction, regardless of their location abroad.[110] The Commission also declared admissible the case of *Stocké v. Germany*, concerning the kidnapping of a German citizen by German state agents in France (where he was tricked into boarding an airplane that brought him to Germany), by explaining that obligations are

owed to every individual subject to jurisdiction, the exercise of which is not constrained to territory. It again referred to the personal concept of jurisdiction as state agent authority over individuals.[111] As this case concerned Germany's obligations to one of its citizens abroad, the Court further added that a state's own nationals always remain under its jurisdiction, regardless of their location.[112] This personal mode of jurisdiction was also identified in extraterritorial detention cases. *Ramirez Sánchez v. France* concerned an arrest by French police officers on Sudanese territory. Though the application was ultimately declared inadmissible, the Commission held that "from the time of being handed over to those officers, the applicant was effectively under the authority, and therefore the jurisdiction, of France, even if this authority was, in the circumstances, being exercised abroad".[113] Other cases confirmed the possibility of extraterritorial jurisdiction both as spatial control over an area as well as personal control over an individual.[114]

On the one hand, this initial approach (put forward mostly by the Commission) suggests that States Parties must ensure conformity with the Convention whenever their agents act, as it is the effects of their acts that can bring persons under their jurisdiction. If persons are affected to a substantial degree, they are potentially subject to jurisdiction. For example, "[t]he Commission is of the opinion that there is *in principle, from a legal point of view,* no reason why acts of the British authorities in Berlin should *not* entail the liability of the United Kingdom under the Convention".[115] On the other hand, the concepts of territory and territorial sovereignty have continued to play an essential role. In its landmark judgment on *Soering v. United Kingdom*, the Court emphasized that Article 1 "sets a limit, notably territorial, on the reach of the Convention".[116] However, while *Soering* has often been referred to in the debate on extraterritorial obligations, it does not, strictly speaking, deal with extraterritorial application: It concerned alleged infringements stemming from an extradition decision of the United Kingdom (UK) to expel the applicant to the US, where he was likely to face the death penalty. The applicant was, at the time of the alleged violation (i.e., the extradition decision) still located *on the territory* of the UK.[117] The above dictum of the Court must be read in light of this constellation, in which the Court strived to be explicit about excluding any responsibility of a non-contracting State (in this case the US). Moreover, it added that the Convention must be interpreted "so as to make its safeguards practical and effective".[118]

Nonetheless, the approach employed up until that point reflected a rather generous view on extraterritorial applicability. It experienced a substantial setback in late 2001, when the Court issued its landmark admissibility decision on *Banković v. Belgium*.[119] The case concerned NATO states' bombing of a radio and television station building in Belgrade in 1999. Those injured during the attack and the relatives of those killed claimed to have had their Convention rights infringed by the 17 European NATO Member States. The ECtHR dismissed the complaint as inadmissible on grounds of a lack of jurisdiction on the part of the accused states in Belgrade at the given time.

The Court based its analysis on the premise that the rules of treaty interpretation as enshrined in the VCLT are also applicable to the ECHR. Accordingly, and as Article 31(1) VCLT demands, the interpretation of the term 'jurisdiction' must correspond to the ordinary meaning of the term. This meaning was taken to be found in how it is interpreted in the realm of general public international law, where jurisdiction, as discussed above, denotes a *de iure* concept, i.e., a legal entitlement of states that is foremost territorial, necessarily limited by the jurisdiction of other states and allowing for extraterritorial expansion only if there is a substantial nexus present.[120] According to the Court, Article 1 ECHR "reflect[s] this ordinary and *essentially territorial* notion of jurisdiction, other bases of jurisdiction being *exceptional* and requiring special justification",[121] referring *inter alia* to its reasoning in the *Soering* case.[122] The primarily territorial nature of jurisdiction was also seen as reflected in the practice of states, which do not tend to derogate from the Convention when involved in conflicts abroad, implying that they do not consider themselves bound by it in these circumstances.[123]

The Court found further support for its position in the *travaux préparatoires* of the treaty, asserting that the drafters' intention behind using the phrase 'within their jurisdiction' instead of the initially proposed 'residing within their territories' was to include *non-residents* on a state's territory—but not to expand the Convention's reach to individuals *beyond territory*.[124] It also interpreted the fact that the drafters had ultimately opted for the jurisdiction-phrase and not for the alternative formulation contained in the common Article 1 of the *Geneva Conventions*, which binds states "in all circumstances", as confirming their perception of the essentially restricted nature of the Convention's reach.[125] In sum, *Banković* had significantly limited the potential grounds for jurisdiction abroad to situations in which a state

> through the *effective control of the relevant territory* and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises *all or some of the public powers* normally to be exercised by that Government.[126]

Next to this, only conduct of diplomatic and consular officers or situations on board ships and airplanes under a state's flag were mentioned as potential triggers of extraterritorial jurisdiction. The Court thereby implicitly rejected the previously adopted personal, state agent authority model and opted for a highly restrictive *spatial* concept of jurisdiction. In extraterritorial situations, this concept was apparently limited to situations of strong and long-term occupation. In conclusion, the NATO air strikes were not regarded as having reached this threshold of effective control and thus had not brought the applicants within the jurisdiction of the respective states.[127] In other words, bombing people was not regarded as sufficient for exercising effective control and for subjecting them to a state's jurisdiction.

Three further elements of the decision are noteworthy. First, the Court rejected a "cause-and-effect"[128] conception of jurisdiction, which would bring any individual affected by an action that is attributable to a state automatically under the latter's jurisdiction. In the eyes of the Court, following such a conception would render the differentiation between attributability and jurisdiction obsolete. Second, the applicants did not suggest that the NATO states would have been obliged to secure *all* Convention rights. Rather, they proposed a context-specific range of obligations, which should be in proportion to the degree of control exercised. Again, the Court objected. In its view, Article 1 postulates an absolute either-or threshold: A state either has jurisdiction or it does not—in the former case, it is responsible for guaranteeing all Convention rights, whereas in the latter, it does not have any obligations under the Convention at all. As the Court put it, the ECHR cannot be "divided and tailored".[129] Third, the ECtHR emphasized the essentially regional, European character of the Convention and introduced the idea of its *espace juridique*: To deny its application outside of this legal space, thus to the territory of a non-state party such as the Former Republic of Yugoslavia, would not entail a vacuum in the legal protection the treaty provides (contrary to what had been the case in the Turkish occupied northern part of Cyprus). In the words of the Court, "[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States".[130] In the words of its then president, "the Convention was never intended to cure all the planet's ills and indeed cannot effectively do so".[131]

The *Banković* decision has had wide reverberations in scholarship and significantly contributed to stimulating the academic debate on extraterritorial obligations. Some scholars commend the Court for its reasoning on Article 1. *Sarah Miller*, for example, welcomes the Court's choice of interpreting jurisdiction according to general public international law and agrees that it requires a substantial and strong nexus to territory. She applauds the *espace juridique* argument as an illustration of the regional values behind the ECHR, which the States Parties decided to adhere to without intending to accept it as a constraint on *all* aspects of their conduct.[132] In a similar vein, others underlined the adequacy of the Court's differentiation between state responsibility and jurisdiction as well as of its references to the *travaux préparatoires* and to its own case law. In this spirit, *Banković* was seen as "a hard case which made good law".[133]

The restrictive approach employed in *Banković* has, however, also triggered widespread criticism, which is widely shared here.[134] First of all, at various stages of its argumentation, the methods of interpretation deployed appear unconvincing. The equation of jurisdiction in human rights law with its meaning in general public international law is untenable for the reasons outlined above, leading to the absurd result that states would not be bound by the Convention if their presence or control exerted abroad was unlawful in the first place.[135] Second, it is questionable whether the Court's reference

to state practice, i.e., states' mere omission to derogate from the ECHR in armed conflicts, can already be read as a positive statement on extraterritorial inapplicability.[136] The fact that states do not go abroad and violate human rights proactively on a daily basis, even if this served their interests, could also be taken as manifestations of a practice—a state practice that reflects the opinion that human rights obligations do follow them abroad. Interestingly, debates about the need to derogate from the ECHR in cases of armed conflicts have intensified.[137]

Third, the conclusiveness of the *travaux préparatoires* is and should be limited. Above all, what they show is that drafters had intended to *widen* the circle of those protected, rejecting the restriction to *formal residents* and expanding it to everyone *located* on a particular territory.[138] From this it cannot yet be concluded that this is the point where they wanted the Convention's reach to end. Moreover, again, possibilities of extraterritorial interventions have increased immensely with technological progress, and their future omnipresence might just not have been on the drafters' agendas. Considering the principle to interpret human rights treaties in dynamic ways so as to render them effective in light of contemporary challenges—treating the Convention as a "living instrument"[139]—such far-reaching conclusions should not be drawn from the drafters' supposed intent regarding extraterritorial application.

Yet, it is not only the methods but also the outcomes of *Banković* that appear barely tenable as well as inconsistent with earlier case law. First, its restrictive spatial notion of jurisdiction completely ignored the previously introduced alternative model of jurisdiction through state agent authority exercised over *persons*. It seemed to entail that the ECHR would normally not bind States Parties in their conduct abroad unless in cases of stable military occupation and other exceptional situations and thus, that there would not necessarily be a problem with killing people abroad as long as the state does not control the area they are located on in an effective and overall way. This would be significant with respect to security interventions enabled by modern technologies, such as airstrikes and drones, which typically do not require such spatial control. Would it have made a difference if there had been 'boots on the ground'? Would it have made a difference if people had not been killed but detained? As *Martin Scheinin* puts it: "I am troubled by the idea that the choice of method of warfare could result in an advantage for a state resorting to military force as to the non-applicability of human rights law".[140]

Second, the Court's notion of a European *espace juridique* runs counter to the assumption of the universality of the Convention rights. Considering the essential role the *Preamble* of the ECHR assigns to the UDHR, which "aims at securing the universal and effective recognition and observance of the Rights therein declared", and the object and purpose of the Convention rather suggest that the Convention does not only aim at protecting people on European soil but at protecting everyone affected by states that promised to obey it.

Two replies could be made. On the one hand, it could be argued that the *espace juridique* argument only contended that the consideration of *Cyprus v. Turkey*, namely the need to avoid a vacuum in legal protection, can only be brought forward with regard to territories belonging to this European legal space, but that one cannot yet conclude from this that the Court aimed at thoroughly denying the general possibility of applicability beyond its *espace juridique*.[141] Indeed, the Court cautiously refrained from blatantly making the latter statement. However, in generally alluding to the idea of a European legal space, it still decided to draw a line, i.e., to introduce a differentiation between inside and outside territories. It implied that, were states not obligated to respect ECHR rights in territories outside this legal space, this could *not* be considered a gap in how people in these territories are legally protected.

On the other hand, one could reply that ECHR rights have never been intended to mirror or reach universal status: Had the drafters indeed based it on an underlying notion of universality, they would not have inserted an explicit threshold like the criterion of jurisdiction into its applicability clause. However, a brief look at its Preamble clarifies that this runs counter to its object and purpose. Not least according to the VCLT, teleological methods of treaty interpretation clearly take priority over historical methods—especially (but not only) with respect to human rights treaties, which are expected to meet the challenges contemporary individuals have to deal with. What is more, the *travaux préparatoires* precisely reveal that the drafters deliberately avoided the threshold 'territory'. While the reason for choosing jurisdiction over territory might not have lied in concerns of extraterritoriality, it still shows that a manifest territorial restriction of the Convention was not among their intentions.

In sum, in *Banković*, the Court embraced an essentially territorial conception of human rights obligations, derived from a highly technical and partly unconvincing argumentation strategy. As a result, the decision leaves many questions unanswered. Some commentators explain the outcome of the case by putting it into context: In the sensitive political environment shortly after the terrorist attacks of September 11, 2001, the Court may just have feared the consequences (as well as its own overload) of opening doors to people from all over the world claiming rights violations by ECHR states involved in the then launching 'War on Terror'.[142] Furthermore, allowing this case to proceed to an analysis of the merits would have compelled the Court to address the politically sensitive issues of determining the legal personality of the NATO and the attributability of its conduct to its Member States, as well as the contentious question of the relationship between IHL and IHRL, which posed itself in this situation of armed conflict.[143] As a former ECtHR judge (who had not taken part in the *Banković* decision) put it,

> seeking to explain the wrongfulness of the judgment through legal analysis (…) only leaves me with the feeling that the effort is misconceived as the judgment is not explicable in terms of a legal approach but as an effort to avoid engaging in a politically sensitive area.[144]

This reading is also supported by the fact that, in the aftermath of *Banković*, the Court has increasingly broadened its interpretation of Article 1 and its threshold of jurisdiction, arguably returning to pre-*Banković* approaches.[145] Various cases indicated that its restrictive territorial model of jurisdiction and the limitation to a European *espace juridique* might not yet be the end of the story. In *Ilaşcu v. Moldova and Russia*, the Court concluded that while the Transdniestrian region is located on the territory of Moldova, it is subject to Russian jurisdiction in light of the latter's "effective authority, or at the very least (…) the decisive influence"[146] established by its essential political and economic support of local authorities. This already mirrors a slightly wider approach to extraterritorial applicability established through *spatial* control, insofar as it can include situations in which a foreign state upholds a local government.[147] As explained above, Moldova, which had lost effective control over Transdniestria to Russia, was no longer held to be under the full range of Convention obligations in the region but still under a *positive obligation to protect* individuals in the area from human rights violations by all means available.[148] What is noteworthy about this approach is that it directly runs counter to the dictum in *Banković*, according to which the nature of the ECHR does not allow for 'dividing and tailoring' rights.[149] While *de iure* jurisdiction of Moldova was still in place, its *de facto* jurisdiction was inhibited and *therefore* Moldova's obligations under the Convention were reduced—but not fully erased. The Court thus also implicitly embraced a *factual* notion of jurisdiction as the one decisive for applicability according to Article 1, again contrary to *Banković*.[150] *Ilaşcu* implies that the finding of extraterritorial jurisdiction of state A (here Russia) on the territory of state B (Moldova) is not only relevant in analyzing A's responsibilities but might also bring with it a reduced responsibility to guarantee Convention rights on the part of state B.[151]

Öcalan v. Turkey dealt with the detention of the Kurdish PKK-leader Abdullah Öcalan at Nairobi airport. In passing, the Court held that from the moment Öcalan had been handed over to the Turkish officers, he was under their authority und thus subject to Turkish jurisdiction, despite this happening on Kenyan territory—a finding it described as "common ground".[152] The aspect of extraterritoriality did not even spark intense debates; applicability was regarded as evident. While this might partly have resulted from the fact that not even the respondent government denied jurisdiction, it is still noteworthy, reintroducing the pre-*Banković* personal state agent authority model of jurisdiction, which was now even established in the absence of any territorial control.

Similarly, in *Issa v. Turkey*, alleged killings of shepherds on Iraqi territory by Turkish state agents were estimated as triggering Turkish jurisdiction and thus the applicability of the ECHR. Here, the Court explicitly reconfirmed the two possible and alternative grounds for jurisdiction: On the one hand, *effective control of an area*, on the other hand, *authority or control exercised by state agents over persons*.[153] In arguing for this 'personal model', it drew inspiration from a dictum previously used by the CCPR and held 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.[154]

While in this particular situation, the exercise of such personal authority could not be established, the case still contributed to firming this model as a separate and by itself sufficient criterion of jurisdiction—which, *nota bene*, could even trigger applicability in Iraq and thus outside the European legal space.

In 2006, *El Mahi v. Denmark* dealt with caricatures of the Muslim Prophet Mohammed published in a Danish newspaper.[155] The applicants, who resided in Morocco (and had done so at the time of the publications), claimed that these publications had violated several ECHR rights. In particular, so they argued, Denmark had failed to comply with its obligation to secure their respective rights to freedom of religion and non-discrimination and to avoid the abuse of rights in connection with granting the right to freedom of expression.[156] The ECtHR declared the case inadmissible, basing its decision on the absence of a "jurisdictional link" between the plaintiffs and the Danish state.[157] While the decision raises complex questions, some of which will be returned to later, it appears that the Court was justified in declaring a jurisdictional link to be absent. The concept of jurisdiction cannot be regarded in a vacuum, and the case points to the additional practical function that jurisdiction performs as a factual threshold for granting access to justice. This reflects the limits of separating jurisdiction as a question of admissibility from the analysis of the merits. As a concept enshrined in legal treaties and in order to be effective it must be, in a principled way, responsive to practical aspects, to the context of a case, the relation between a state and the claimants, the nature of the rights at issue, and the acts behind the alleged violation, too.[158]

It is interesting to compare *El Mahi* with the case of *Kovačić v. Slovenia*, Croatian residents had been prevented from withdrawing money from their accounts at a Slovenian bank located on Croatian territory, and the reasons for this had at least partially lain in newly introduced Slovenian legislative measures. The ECtHR only discussed the jurisdictional threshold in passing and did not hesitate to find it fulfilled: "[T]he Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged".[159] While the ultimate outcomes of both admissibility decisions are convincing—denying jurisdiction in *El Mahi* and asserting it in *Kovačić*—it is hard to see how the difference between the two cases could reside in jurisdictional matters *if jurisdiction could only arise from a spatial or a personal model*. In both cases, neither of these models could reasonably be said to have been present. If only these grounds for jurisdiction exist, then the Court was right in dismissing *El Mahi* on the grounds of lacking jurisdiction—but then it is not clear why it should not have done the same in *Kovačic*. The comparison, first, indicates that there may be further factors relevant to the assignment of jurisdiction and, second, lends credence to the suspicion that the Court is not

thoroughly consistent in its interpretation of the jurisdictional threshold. If this confusion were to be avoided, it would have been more convincing to *at least discuss* the admissibility of *Kovačić*, too, and to be explicit about the relevant factors and the underlying model on which jurisdiction was found. There is indeed a meaningful difference between the two cases—but the Court failed to explicate it in relation to the question of jurisdiction.[160]

As a further example, *Andreou v. Turkey* dealt with an applicant who, while located on Greek-Cypriot territory, had been shot by Turkish soldiers located on TRNC-territory (over which Turkey had been exercising effective overall control). The apparently decisive factor for finding jurisdiction was that the violation had been a "direct and immediate cause"[161] of acts of the respondent state's agents, regardless of the victim's location. Similarly, in *Pad v. Turkey*, the ECtHR also confirmed jurisdiction on the part of Turkey, evidently due to the fact that the violation was a direct result of state action (the whole situation had started by the claimants being shot from Turkish helicopters), regardless of their location on Iranian territory.[162] Interestingly, in this case that began with an extraterritorial aerial shooting, the issue of jurisdiction was confirmed almost parenthetically, suggesting that the Court might have at least partially realized the inconsistencies in *Banković*, in which aerial shooting was not regarded as a manifestation of jurisdiction.[163]

An important step in the so far rather volatile case law on extraterritorial applicability was taken when the ECtHR—ten years after *Banković*—pronounced another landmark judgment: *Al-Skeini v. United Kingdom*. The case concerned alleged violations of the right to life through lacking or insufficient independent investigations into killings of Iraqi citizens committed by UK soldiers on Iraqi territory.

The Court seized the opportunity to thoroughly explicate its two alternative approaches to jurisdiction: *Spatial control* as *effective control over an area* can be exerted directly or indirectly, such as through the core support of a local administration. If overall control over the area has been established, it is no longer necessary to prove control over every single act: In these cases, the state is responsible for guaranteeing all ECHR rights. Importantly, the Court adds it is a question of *de facto* control, which can result from both lawful and unlawful operations, again rejecting the *de iure* notion of jurisdiction as applied in public international law.[164] In explaining the *personal model* of state agent authority over an individual, the Court introduced three subcategories. It could be exercised (i) through authority of diplomatic and consular personnel, (ii) in situations where a state has taken over all or some of the public powers and done so with the consent, invitation, or acquiescence of the home state, or (iii) when state agents use physical force and control abroad, such as in cases of detention.[165] Applying this to the situation at hand, the Court derived jurisdiction from *state agent authority and control* exercised over *individuals* in this context in which the state (UK) exerted *at least some public powers* over the specific *territory* (in Iraq). It thus introduced a hybrid approach in which both spatial and personal control played a role.[166] The Court thereby also

qualified its earlier *espace juridique* argument by explaining that it had been intended to underline the importance of avoiding protection vacuums in territories initially covered by the ECHR, but that it should not be taken to imply that the Convention can never be applied outside this legal space.[167] Another shift concerned the scope of extraterritorial obligations recognized: Whereas the whole list of rights applies in the case of overall control over an area, in situations of personal authority of state agents, the Court in *Al-Skeini* limited obligations to rights "that are relevant to the situation of that individual", thereby acknowledging that ECHR rights can be "divided and tailored".[168] Based on this reasoning, the Court held that a jurisdictional link had been present with regard to all applicants.[169] On the merits, it found Article 2 violated for five of the six of them.[170]

On the one hand, *Al-Skeini* is seen as a substantial step forward in the recognition of extraterritorial ECHR obligations, mainly because of its explicit acceptance and detailed outline of the personal, state agent authority model. However, as indicated above, this model was not really new, having already been implemented in pre-*Banković* cases.[171] What is new about *Al-Skeini* is its clarification on the details of these models, its recognition of the possibility of dividing and tailoring rights, and its partial rejection of the *espace juridique* argument. In these respects, it at least partly overruled *Banković*.[172]

On the other hand, despite some progress and clarifications, *Al-Skeini* consolidated the Court's approach to extraterritoriality only to a limited extent. It still held on to some form of territorial control (here referred to as the exercise of 'public powers'), which is somewhat irritating because it is again derived from (or at least linked to) *de iure* jurisdiction as a legal capacity.[173] Furthermore, the Court combined the two models to a hybrid approach, leaving open whether authority exercised by a state agent over a person abroad could also trigger applicability in situations where *no* public powers were exercised in the area, where no diplomatic or consular personnel is involved, or where it is not a case of detention. Limiting the personal model to the abovementioned three subcategories could have the absurd consequence that instantaneous acts of *killings* abroad (in the absence of any previous control exercised and in situations where there is no control over the area) would *per se* not suffice to establish jurisdiction—while *detaining* someone abroad does.[174] By itself, *Al-Skeini* leaves these questions unanswered. Moreover, while the road taken in *Al-Skeini* appears more generous than *Banković*, one must be mindful of the fact that it still dealt with an occupation-like situation.[175]

The motives behind opting for a hybrid solution might be explained by the Court's striving for consistency: By the 'public powers' element, it incorporated a condition of territorial authority and thereby "reintroduced *Bankovic* through the back door",[176] reconciling the two cases at least regarding their outcomes. The Court apparently aimed at widening its approach without thoroughly overruling previous case law. Still, while *Al-Skeini* was a step forward in clarifying extraterritorial jurisdiction, the Court again availed itself of "compromise formulations [that] (…) leave all stakeholders and interests at

stake partly unsatisfied".[177] In a concurring opinion, *Judge Bonello* criticized the Court's pre-*Al-Skeini* approach to extraterritorial jurisdiction as incoherent "patchwork case-law at best".[178] While agreeing with the overall outcome of *Al-Skeini*, he emphasized the need to develop informed and consistent principles:

> My guileless plea is to return to the drawing board. To stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlie the fundamental functions of the Convention.[179]

In Judge Bonello's view, these principles should be in line with the ECHR's overall aim: universal respect for human rights, which do not depend on geographical coordinates but bind states whenever they are in a position to be so bound. In the functional test he proposes, jurisdiction is generated by the mere facts of being subject to these obligations and having the capacity to comply.[180]

Yet another hybrid variant of jurisdiction resulted from *Jaloud v. the Netherlands*. The case concerned the fatal shooting of an Iraqi citizen driving through a checkpoint that was being manned at the time, *inter alia*, by Dutch soldiers, one of whom fired the deadly bullet. Similar to *Al-Skeini*, the applicant claimed a violation of the duty to conduct independent investigations into the killing of his son arising from Article 2 ECHR. As the Netherlands did not exert effective overall control over the region, which was at the time occupied by the UK, the ECtHR also based its finding of jurisdiction on a combination of authority and control over a person (established through the shooting) with the exercise of some form of territorial control. Again, the Court confirmed that shooting and killing people do not by themselves establish jurisdiction—some further element of territorial control needs to be present. Here, the latter form of control (what in *Al-Skeini* has been the 'public powers' requirement) was viewed as already manifested in the operation of *check points*.[181] However, *Jaloud* still did not shed light on whether (and if yes, to what degree) personal authority can by itself establish jurisdiction when there is no control over the area. By introducing the check point criterion, the Court confirmed that some form of spatial control over territory is still always necessary in order for jurisdiction to arise (in this respect, *Jaloud* could as well be conceived as a new variant of a spatial model).[182] It is also unclear how to reconcile such a requirement of simultaneous spatial control in these cases of killings abroad with the fact that no such spatial control was required to establish jurisdiction in cases of physical custody abroad.[183]

What this outline of the ECtHR's case law on extraterritorial applicability suggests is that, while the Court has incrementally tended to grant a more expansive approach to the issue, it continues to struggle with constructing a *principled* approach. Next to the still nebulous relation between the personal and spatial models, various further aspects are yet to be clarified. First, the

notion of jurisdiction and the relation to its parallel in general public international law have not yet been settled. Even though the Court repeatedly underlined that jurisdiction must be a matter of *facts*,[184] it sometimes—but only sometimes—still emphasizes the importance of aligning the concept to its meaning in public international law.[185] For example, in a recent decision, it clearly stated that whether or not Russia has had *de iure* sovereignty over Crimea after 2014 and if yes, whether it lawfully occupied it, is not relevant to the applicability of the Convention. Yet, it then went on to stress the need to interpret jurisdiction according to public international law—and thus as a primarily territorial concept—and that it cannot ignore that such *de iure* jurisdiction seemed not to be given in this particular case.[186] This suggests that there being *de iure* jurisdiction would indeed be relevant in terms of ECHR obligations, i.e., that there is a substantial difference between territorial and extraterritorial jurisdiction.[187]

Second, the Court has specified various details but is not always explicit about which qualifications pertain to which jurisdictional model. This is reflected in its reasoning in *Hirsi Jamaa v. Italy*, decided shortly after *Al-Skeini*, where the Court confirmed its well-established principle that jurisdiction is also given on board ships on the high seas or airplanes registered under a state's flag. This was affirmed regarding Italian vessels on the high seas, entailing that the 'push-back' of boat migrants to Libya violated the *non-refoulement* principle and the prohibition of collective expulsion.[188] At the same time, the Court mentioned that jurisdiction cannot be established through "only an instantaneous extraterritorial act", alluding to *Banković*.[189] While this qualification was introduced in relation to the spatial model of jurisdiction, the Court went on to say that "the wording of Article 1 does not accommodate such an approach to 'jurisdiction' ",[190] suggesting that the qualification was valid in general, i.e., also in cases of personal, state agent authority. While this is in line with one of the conclusions drawn above, namely that the ECtHR still requires at least some element of territorial control, it is in conflict with case law in which it recognized jurisdiction by what were clearly instantaneous uses of force.[191]

Another criterion recently introduced stemmed from the Court assigning relevance to whether an applicant *freely* chose to enter a relation to the respondent state. In a situation similar to the case of *X and X* before the CJEU, the ECtHR *denied* jurisdiction by virtue of the fact that it had been the applicants who had *voluntarily* chosen to enter a relation with the Belgian state by applying for visa and by later bringing proceedings against it in its national courts.[192] Thereby, it added *involuntariness* on the part of alleged victims to its list of criteria relevant to triggering a jurisdiction-establishing relationship. Whether or not the Court's position in this case is convincing, it leaves unanswered how far this criterion goes and in which way it would relate to the models developed so far.

A third confusion arises from the distinction between *acts committed extraterritorially* and *territorial acts with extraterritorial effects*.[193] In *Al-Skeini*, it broadly introduced the personal model in relation to acts *with*

effects abroad but, when it later described its three subcategories, it constantly limited it to acts *committed by state agents abroad*.[194] The same holds for *Hirsi Jamaa*, where the Court introduced extraterritorial application for "acts of the Contracting States *performed, or producing effects,* outside their territories",[195] it later only alluded to acts *committed abroad*.[196] In the admissibility guide to the ECHR, it is implied that *responsibility* can stem from control over an area by *acts with extraterritorial effects*, performed at home or abroad, whereas *accountability* derives from state agent authority over an individual and is limited to *acts committed extraterritorially*.[197] Contributing to these ambiguities, jurisdiction was found without even having been discussed in recent cases on territorial acts with effects abroad—in different fields and with regard to different rights. In a recent landmark judgment on extraterritorial surveillance, jurisdiction was confirmed in passing, referring to the fact that in its argumentation, the defendant government had not denied it.[198] *Big Brother Watch and Others v. UK* concerned the bulk interception of cross-border communication through intelligence agencies. By not discussing the jurisdictional issue in a principled way in its otherwise extensive analysis, the Court missed a key opportunity to set clear standards for the protection of online privacy in today's world—contrary to what the German Constitutional Court did the year before.[199] It failed to further develop and apply its jurisdictional models, suggesting that the applicability of the Convention in this case was not an issue of principles and leaving unanswered who would actually be protected by the ECHR when states use—or misuse—digital surveillance tools.

In relation to the right to life, *Gray v. Germany* concerned Germany's alleged violation of Article 2 by failing to conduct adequate criminal proceedings into a killing committed on UK territory. The case was declared admissible, in spite of the fact that the applicants (i.e., the killed person's relatives) had always been located abroad.[200] Even though the only nexus to Germany was the perpetrator's later presence on its territory, Germany was held to have exercised jurisdiction over the applicants simply by the fact of its territorial acts (i.e., its alleged failure to conduct satisfactory criminal proceedings) having had effects on them abroad. This surprisingly generous assignment of extraterritorial jurisdiction was confirmed in other cases concerning the state's procedural obligation arising from Article 2. In one of them, Belgium's jurisdiction over the applicant, residing in Spain, was confirmed by virtue of Belgium's failure to extradite the alleged murderer of the applicant's father to Spain, where she would face criminal proceedings.[201]

With these cases, the Court implicitly introduces a new strand of exceptions to the primarily territorial applicability of the Convention in relation to the procedural obligation of Article 2—yet, it

> does not consider that it has to define *in abstracto* which 'special features' trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2, since these features will necessarily

> depend on the particular circumstances of each case and may vary considerably from one case to the other.[202]

As a result of this failure to develop a comprehensive principle, 'special features' remain a vague and nebulous concept. It is not entirely clear how the—at times even undiscussed—generous findings of jurisdiction in the abovementioned cases are compatible with the denial of jurisdiction in other situations dealing with the procedural obligation of Article 2 of a foreign state[203] or in other types of extraterritorial cases, such as, again, in cases of state agents killing someone abroad.[204] Yet again, this does not contribute to increasing consistency in the Court's approach.

Not only in the above but in various cases, the Court explicitly maintained that the extraterritorial question is to be decided on a case-by-case basis and according to the facts at issue.[205] It is also mirrored in its increasing tendency to join the question of jurisdiction to the merits rather than analyze it at the preliminary stage of admissibility.[206] In general, this seems reasonable: The jurisdictional question cannot be decided in a complete vacuum and dealt with as a merely abstract matter. Yet, while a careful analysis of specific circumstances is critical, this does not mean that consistent principles cannot or should not be established. The above inconsistencies suggest that the Court might not yet have been able to solve this—undoubtedly complex and difficult—task. As Judge Bonello put it, it appears as if principles are still designed to accommodate facts rather than that facts are assessed according to underlying principles.[207]

The need to introduce such coherent principles is especially critical considering that opportunities to affect individuals abroad will likely increase rather than decrease, especially those that do not require any form of territorial authority. It seems an unpromising route to take to address these challenges by simply stretching the spatial or personal models or by continuing to make exceptions case-by-case. The hope is that the Court takes the chance further cases will offer to shed light on these questions and to develop theoretically informed and justified principles. While such principles should doubtlessly allow for a certain degree of flexibility, especially considering the often highly uncommon situations in extraterritorial contexts, they should still aim to realize, in a principled, coherent, and consistent way, the object and purpose of the Convention.

At the same time, despite these inconsistencies and the arguably insufficient level of theoretical foundation, there is one red thread detectable in the ECtHR's case law on extraterritoriality. While it has incrementally allowed for loosening the link between jurisdiction and territoriality on a case-by-case basis, the Court has not departed from the *territorial paradigm*. A recent drawback to more generous approaches to extraterritoriality illustrates this. In the inter-state case *Georgia v. Russia* concerning the armed conflict between the two states in August 2008 and its aftermath, the Court confirmed Russian jurisdiction through its spatial model for the time *after* the active phase of the

conflict. In this period, Russia exercised effective control over the relevant areas (Abkhazia, South Ossetia, and the 'buffer zone').[208] However, the Court partially denied Russian jurisdiction for the active phase (i.e., five days) of the hostilities: While Russia's jurisdiction during this phase was confirmed in relation to *some* rights, it was denied in relation to the substantial obligations under the right to life. In reaching this conclusion, the Court analyzed both the spatial and personal model of jurisdiction. It explicitly stated that, in the "context of chaos" that characterizes international armed conflicts, neither of the two could be established.[209] While the personal model could manifest itself through "isolated and specific acts involving an element of proximity"[210] (like in *Issa*), this cannot be the case for bombing in the framework of international armed conflicts. By this surprising—and unconvincing—turn, the Court thus revived *Banković*, a case that has long been regarded as undermined by later case law. It again confirmed that not all killings abroad are covered by the ECHR—suggesting that an isolated shooting from close distance should be more relevant than a mass shooting from a greater distance, a claim that can hardly be regarded as anything but arbitrary, and that will leave the victims with little but bewilderment and despair.[211]

That said, what is welcome—but equally irritating—is the Court's confirmation of jurisdiction for (i) the *procedural obligations* arising from Article 2 (confirmed regardless of whether the killing happened during or after the active conflict phase) and for (ii) *detentions* committed during or after the active phase of the conflict. Surprisingly, jurisdiction for the latter was not derived by referring to the state agent authority model. Rather, it was based on the facts that detainees were "mostly" (in the case of civilians) or "*inter alia*" (for prisoners of war) detained *after* the active conflict phase,[212] thus during the phase in which 'effective control' of Russia and thus its spatial jurisdiction had already been confirmed, and that *thereby*, such jurisdiction should be assumed with regard to *all* detainees—including those detained during the active conflict phase. In doing so, the Court established jurisdiction where no jurisdiction can, according to the Court, be established (namely in a 'context of chaos').

The Court's reasoning in *Georgia v. Russia* not only involves internal contradictions but also is highly problematic with a view to effective human rights protection. It leaves the victims of international armed conflicts with insufficient protection against lethal attacks committed by the foreign state, reviving its initial idea that at least in some fields, there is a categorical difference between the territorial and the extraterritorial exercise of jurisdiction—here, between killing people at home or abroad. Instead of carefully addressing the complex legal questions the situation doubtlessly raised on the merits, the Court decided to use the ECHR's jurisdictional threshold to block a more substantial analysis on the right to life in international armed conflicts already at the admissibility stage—and thereby, to block a wave of similar cases brought to Strasbourg. As in *Banković*, the Court was again motivated at least partly by political concerns. Contrary to *Banković*, it openly confessed to be so.[213]

To conclude, the Court upholds a conservative "presumption against the extraterritorial application" of the Convention,[214] reflected by ubiquitous citations of *Banković* as the core precedent on extraterritorial applicability,[215] regular references to the *espace juridique* of the Convention,[216] and a standard formula repeated in almost all cases touching upon the issue that confirms the essentially territorial nature of jurisdiction and the exceptional status of extraterritorial application.[217] When selected cases reflect a more expansive approach, they appear exceptions to the rule. In other words, *Banković* has not yet been overruled. It still provides the background against which extraterritorial applicability is approached. In the recent case of *Georgia v. Russia*, *Banković* and its essential reference to territoriality was even brought to the foreground.

4.5.2 International Covenant on Civil and Political Rights

So far, the extraterritorial application of rights as enshrined in domestic law, supranational law, and regional international law has been analyzed by means of three main examples of legal regimes. This section discusses the issue in relation to one of the main treaties of *global* IHRL: the ICCPR.[218] As its content parallels that of the ECHR, it will be interesting to see in which way its approach to extraterritoriality differs from the latter.

The position of the treaty body to the Covenant, the CCPR, on the issue has been developed in the framework of General Comments, Concluding Observations, and its individual complaint mechanism. While all these sources are, strictly speaking, legally non-binding, they importantly reflect authoritative reference points for the interpretation of the treaty.

The origins of the CCPR's position date back to the early 1980s. First, a series of 'Uruguayan Passport Cases' concerned the denial on the part of Uruguay of consular services, including the issuance of passports, to citizens living abroad. The CCPR declared the Covenant applicable by asserting that such consular matters paradigmatically subject individuals to a state's jurisdiction.[219] However, the overall conclusions to be drawn from the Passport Cases and their potential implications for future cases on extraterritorial applicability remained ambiguous: It was not entirely clear what role the applicants' *nationality* played in the finding of jurisdiction and what it meant for other types of actions and omissions (i.e., beyond consular services). Nonetheless, the CCPR choosing to apply the Convention outside the territory of the State Party in question by itself amounted to a noteworthy first step.

Second, concurrently, the Committee addressed the case of *Lopez Burgos v. Uruguay*, concerning the kidnapping of a Uruguayan citizen by Uruguayan state agents on the territory of Argentina, followed by his being transported to Uruguay, where he had not only been held incommunicado but also tortured. The CCPR confirmed admissibility by what has become a prominent and influential dictum in the debate on extraterritorial human rights obligations:

> [I]t 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.[220]

As early as 1981, the Committee thus declared its reading of Article 2(1) as including both people on territory and people under jurisdiction, clarifying that the treaty binds states whenever and wherever they exercise such jurisdiction.[221] In an individual opinion, Committee member *Christian Tomuschat* opposed this dictum by emphasizing the essential restrictedness of the ICCPR's territorial scope, stemming from the exceptional challenges that situations abroad pose: States are typically incapable of realizing human rights for their citizens living in foreign states. At the same time, he confirmed the "utterly absurd results"[222] it would have if states were *generally* free to violate rights of citizens abroad. Accordingly, the fact that the case concerned a Uruguayan *citizen* led him to agree with the overall outcome of the case.

The CCPR confirmed its in *Celiberti de Casariego v. Uruguay*.[223] Like in *Lopez Burgos*, it further noted that extraterritorial applicability may arise regardless of whether a state acted on the territory of another with the acquiescence of the territorial state or not, implying that it construed jurisdiction not as a *de iure* but a *de facto* notion, which manifests itself independently of the lawfulness of state conduct.[224]

The CCPR's generous and differentiated stance on extraterritorial applicability was also reflected in *Gueye v. France*, decided in 1989. The CCPR regarded 743 retired former members of the French army living in Senegal as subject to French jurisdiction *regarding their pension:* In this field and vis-à-vis these individuals, the obligations of the Covenant apply.[225] Thus, in these early cases already, the CCPR confirmed not only applicability as a result of extraterritorial jurisdiction exercised in the form of control over *individuals* abroad but also that ICCPR norms can be 'divided and tailored', i.e., that applicability can be granted in connection with a particular situation, aspect, or right—notably more than 20 years before the ECtHR changed its position and acknowledged this in relation to the ECHR.[226]

Concurrently, extraterritorial applicability of the ICCPR was also confirmed in situations of control over an *area*: During Iraq's occupation of Kuwait, the Committee assumed that the former state had a "clear responsibility under international law for the observance of human rights during its occupation of that country".[227] In a similar vein, it repeatedly criticized Israel for its position, which it has maintained until today, that it is not under an obligation to apply the ICCPR in the Occupied Palestinian Territories—at least not with regard to the Palestinian population. For over 20 years, the Committee has remained "deeply concerned" about this denial of responsibility. It also continuously objected to the Israeli argument that the situation in the occupied territories shall not be regulated by IHRL but exclusively by IHL (as *lex specialis* in

circumstances of armed conflicts), asserting that the applicability of IHL "does not by itself impede the application of the Covenant".[228]

Comparable to the ECtHR in *Ilaşcu*, the CCPR further specified that the Covenant does not bind states in areas of their *de iure* territory that are no longer under their *de facto* jurisdiction.[229]

The ICCPR was also applied to the conduct of military personnel abroad, such as to that of Belgian soldiers in Somalia, Dutch soldiers in Srebrenica, or Polish soldiers in any peacekeeping mission abroad.[230] Notably, vis-à-vis Belgium, it implicitly referred to the ECtHR's *Banković* decision by expressing its being

> concerned at the fact that the State party is unable to affirm, in the absence of a finding by an international body that it has failed to honour its obligations, that the Covenant automatically applies when it exercises power or effective control over a person outside its territory[231]

and by asking it to respect the Covenant, "for example in the case of peacekeeping missions or NATO military missions".[232]

The CCPR outlined its general position on extraterritoriality in 1995 in its *Concluding Observations* on the country report of the US, which thoroughly denied the extraterritorial applicability of the Covenant,[233] and later cemented in its *General Comment 31* adopted in 2004. Emphasizing the *erga omnes* nature of human rights obligations and their standing in the UN Charter, the Committee there confirmed the disjunctive interpretation of 'and' in Article 2(1), obliging States Parties toward everyone on territory *and* everyone subject to their jurisdiction, i.e., to "*anyone within the power or effective control* of that State Party" and regardless of citizenship. This explicitly includes individuals subject to the power or control of a state's military forces, irrespective of how the state had established this control.[234]

Shortly after the issuance of the CCPR's General Comment, the ICJ communicated its *Wall Opinion*, i.e., its *Advisory Opinion* on Israel's building of a wall in the Occupied Palestinian Territories. It seized the opportunity to analyze the applicability of various instruments of IHRL and IHL, including the ICCPR, to Israel in the context of the occupation. Confirming the disjunctive interpretation of Article 2(1) ICCPR, it asserted:

> The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.[235]

Alluding also to the *travaux préparatoires* and the preceding practice of the CCPR, the Committee stressed that the object and purpose of the treaty was

to protect human beings, irrespective of where they are located, finding it applicable whenever a state exercises jurisdiction abroad. In the same spirit, the Court confirmed the applicability of the ICESCR and the CRC, and thus broadly objected to Israel's refusal to consider itself bound by human rights of Palestinians in the Occupied Territories. It also denied that the context of armed conflicts and their being regulated by IHL rule out the simultaneous applicability of IHRL.[236]

Though the *Wall Opinion* does not amount to a legally binding judgment and dealt with the specific situation of a long and intense occupation, in which extraterritorial application tends to be less disputed, it has been highly influential in the further debate. One year after, the ICJ confirmed its position, this time in a binding judgment: In *Democratic Republic of Congo v. Uganda*, by referring to the *Wall Opinion*, it asserted that Uganda was not only bound by IHL norms but also by the ICCPR, AfCHR, CRC, and the OPAC-CRC during its occupation of the DRC—and not only in the occupied areas but also in other areas of the DRC in which Ugandan agents had been acting.[237] On the merits, it found Uganda responsible for violations of various provisions of these treaties.[238]

This positioning of the ICJ was "consolidating and supplementing a critical mass of authoritative interpretation" on the question of extraterritorial obligations, as *Ralph Wilde* put it.[239] At the same time, the ICJ continued to emphasize the "primarily territorial"[240] nature of jurisdiction and the exceptional status of its extraterritorial exercise. However, according to Wilde, these statements shall not be interpreted as mirroring a 'doctrine' of exceptionalism, contrary to what he suggests is the case for the ECtHR. Rather, the ICJ categorized extraterritorial jurisdiction as exceptional not by virtue of the *nature* of the phenomenon but in light of the *frequency* of such state action abroad. Understood this way, the position of the ICJ appears closer to the position of the CCPR than to that of the ECtHR.[241]

Since the issuance of these landmark statements, the extraterritorial applicability of the Covenant has continuously been confirmed in various contexts. Today, the position of the CCPR is firmly accepted by various UN human rights bodies, *inter alia* by Special Rapporteurs. For example, the latter confirmed that the conduct of Israel on Lebanese territory during the armed conflict in 2006 involved acts that constituted human rights violations.[242] Special Rapporteurs also pointed to the fact that various states still reject the idea of extraterritorial human rights obligations, emphasizing that the latter are "inherent" in IHRL.[243] Likewise, *Special Rapporteurs on Extrajudicial, Summary, or Arbitrary Executions* have repeatedly confirmed extraterritorial obligations toward anyone subject to states' "jurisdiction, power or effective control, whether these are within or outside a territory under their control".[244] Accordingly, control over the *area* concerned is not a necessary precondition for jurisdiction to arise: Power or control exercised over an individual is sufficient for triggering at least an obligation to respect human rights—the latter holds whenever a state acts. This covers, for example, states' operation of

drones.[245] In discussing the use of drones, other remotely controlled aircraft, or automated weapons, another report points to the risks entailed by the enormous "[l]egal uncertainty" in this area,[246] and it is evident (though not explicitly mentioned) that the still contested status of extraterritorial applicability constitutes one of the main factors contributing to this uncertainty.

Similar positions were issued with regard to the right to privacy, where Special Rapporteurs equally underlined the significance of its being respected on a global scale.[247] As the UN High Commissioner for Human Rights explicated, a state is under human rights obligations when it "exercises its power or effective control in relation to digital communication infrastructure, wherever located" or when it "exercises regulatory jurisdiction over a third party that controls a person's information (for example, a cloud service provider)".[248] Physical control is thus not required: Applicability is triggered by states' effective control over the infrastructure on which individual data is stored or through which it is accessible, as it is for example exercised in cases of "direct tapping or penetration of communications infrastructure located outside the territory".[249] Moreover, states' duties to *protect* from abuses of privacy rights by third parties also have extraterritorial reach. *Inter alia*, this should be reflected in the introduction of export control regimes for surveillance technology.[250]

Such obligations to protect from violations by non-state actors, which are established on the territory of a State Party but act extraterritorially or with extraterritorial effects, are also emphasized by other Rapporteurs, for example with regard to private security companies.[251] Likewise, the CCPR has increasingly asked States Parties to encourage TNCs subject to their jurisdiction to respect the Covenant provisions when acting with effects abroad.[252] Recently, it reinforced its wording, no longer only 'encouraging' states to do so but asserting they 'should' do so, indicating a potential home state obligation to install a regulatory framework for the conduct of TNCs abroad.[253]

Lastly, though not an independent body and regularly criticized for being highly politicized, extraterritorial duties were recognized by the *Human Rights Council* (HRC), expressing concerns over human rights violations Israel committed in the Occupied Palestinian Territories and in Lebanon.[254]

Taken together, these examples underline the interpretation shared by UN bodies and experts that the territorial paradigm should not be the starting point. They construe jurisdiction as *power or effective control exercised over individuals* and identify the decisive factor for applicability in the relation between the state and the individual concerned—and not in the former's relation to the corresponding territory. Considering the material cited above, this includes instantaneous extraterritorial acts in cases in which neither territorial control nor public powers were exercised, and where no prior detention has occurred—contrary to what the ECtHR held.[255]

Unsurprisingly, this position is not uncontested in scholarship. Critics argue that it stands in contradiction to the wording of Article 2(1) and the *travaux préparatoires* of the ICCPR—and thus of the VCLT's rules on

treaty interpretation—which reflect that 'territory' and 'jurisdiction' ought to function as two separately necessary conditions that need to be fulfilled cumulatively.[256] In their view, a disjunctive interpretation of 'and' would be unjustifiable from a dogmatic perspective, especially if generalized as in the CCPR's *General Comments*.[257] It is further argued that states are not yet ready (and not required) to accept a disjunctive interpretation, which is mirrored in state practice: Were they to deem the ICCPR applicable on foreign territories, they would for example derogate from it in armed conflicts abroad, given the likelihood of human rights violations in these contexts.[258] According to this view, the ICJ's position in the *Wall Opinion* sprang from the fact that the Occupied Territories were actually regarded as *de facto* Israeli territory and that *therefore* the ICCPR was held to apply. Following these critics, it cannot be the intention of the treaty to apply abroad, which would produce legal uncertainty, depart from state practice, "produce confusion rather than clarity and increase the gap between legal theory and state practice", and not only be judicially incorrect but also have undesirable consequences, for example, by reducing states' willingness to contribute to international peacekeeping missions.[259]

Likewise, former CCPR member Tomuschat contends that a broad interpretation of the applicability threshold "may give rise to serious doubts as to the proper role of the HRCee [CCPR]. Is it authorized to interpret the [I]CCPR in an authentic fashion?".[260] He emphasizes the practical challenges states face in complying with human rights obligations abroad, where they usually do not have any institutions at their disposal, and suggests to limit the extraterritorial applicability of the treaty to situations of territorial control and to exceptional situations where a state has taken on "a special duty of care".[261]

However, these lines of reasoning are not only at odds with the case law outlined above but also with the position of many other scholars in the field.[262] Still, critics' adherence to territory arguably stands for a position that is widespread in political reality. There are still considerable and persistent objections to extraterritorial obligations on the part of many states, including of some that are intensely involved in various activities abroad. For example, Turkey asserts the "complete non-applicability"[263] of the ICCPR outside its territory. The UK holds that the Covenant would only exceptionally protect persons detained by British forces abroad,[264] and Malta denies jurisdiction over migrants rescued on the high seas.[265] The US has always held that the ICCPR does not apply abroad—and the CCPR has repeatedly taken issue with this position, asserting that it contradicts the Committee's own jurisprudence, that of the ICJ, and state practice.[266] Next to its general remarks, the CCPR expressed specific concern about the US' use of drones in the exercise of targeted killings abroad, about the lack of procedural justice guarantees of Guantánamo detainees, and about its extraterritorial surveillance programs.[267]

States also reflected their resistance in their comments on *General Comment 36* on the right to life. In its draft version, the comment suggested a functional approach to extraterritorial jurisdiction, established, *inter alia*, by the

fact of people abroad are "impacted (…) in a [direct], foreseeable and significant manner" by state activities.[268] Many states reacted to this proposal, with varying degrees of rejection. For example, Austria objected it goes "far beyond the established interpretation of the extraterritorial application of the Covenant",[269] similarly to what Norway held.[270] To illustrate, the Netherlands asserted:

> '[I]mpacted' potentially has a very broad meaning, covering situations, which in our view do not fall within the scope of the Covenant, while 'jurisdiction' is an *essentially territorial notion*. Consequently, conduct performed or producing effects outside of a State party's territory can only constitute an exercise of jurisdiction *in exceptional cases*. For example, *the mere fact that a bullet hits an individual, missile, or rocket fired by armed forces does not bring that individual within the power or effective control of the State party*. We believe that in this regard the case law of the European Court of Human Rights, and in particular Bankovic and others v. Belgium and 16 other States, should be taken into account (…) The fact that conduct that affected an individual can be attributed because that conduct was under the effective control of a State party, does not necessarily mean that the individual affected by that conduct was within the jurisdiction of that State party.[271]

The statement is noteworthy. Explicitly, the Netherlands are of the opinion that sometimes, a state's potentially rights-violating conduct is not *per se* problematic from the viewpoint of the Covenant: Even if an act that otherwise constituted a human rights violation was attributable to a state, it would not necessarily constitute a violation of the ICCPR, given that jurisdiction could not be assigned.

Similarly, France rejects the CCPR's broad approach and underlines that attributability does not yet imply extraterritorial applicability.[272] Canada joins the critique by adding that *territorial control* is necessary for reaching the threshold of extraterritorial jurisdiction and that the approach opted for in the draft version "would impinge on well-established principles of sovereignty".[273] Unsurprisingly, the US expresses its even more restrictive view that the treaty is only applicable on the country's territory, and "urge the Committee to refrain from any characterization of the jurisdictional and territorial scope of ICCPR obligations that deviates from the express treaty text".[274]

In its final version, the General Comment confirmed its functional approach to jurisdiction:

> In light of article 2 (1), of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons *over whose enjoyment of the right to life* it exercises *power or effective control*. This includes *persons located outside any territory effectively controlled by the State*

> whose right to life is nonetheless *affected* by its military or other activities in a *direct and reasonably foreseeable* manner.[275]

Thus, whenever a state affects a person's enjoyment of the right to life directly and in a reasonably foreseeable way, it is bound by the ICCPR. In addition, it mentions the prohibition of aiding or assisting other states in violating the right to life as well as states' obligations to respect and protect the right in territories under their effective control, on their vessels or aircrafts, of individuals in distress at sea, and of individuals detained by them—be it at home or abroad.[276]

Many states refrained from submitting an official observation on this final version and its view on extraterritorial applicability. This is not uncommon but might still imply that they are increasingly coming to accept it and/or that the CCPR convinced them with its functional approach of jurisdiction as power or control over the enjoyment of a right, including *directness* and *reasonable foreseeability* of the impact on individuals' rights as relevant factors.[277] However, their above-cited objections to the draft version indicate that at least a far-reaching view on extraterritorial applicability is likely to continue to face resistance. The position of France, commenting on the final version, illustrates this resistance, again criticizing it for its too broad view, for conforming neither to the wording and spirit of the Covenant nor to the case law of the ECtHR, and for employing vague criteria that result in legal uncertainty.[278] These and similar objections are of crucial significance—with regard to evaluating the chances of a thorough acceptance of the CCPR's take on extraterritoriality, with regard to the status of extraterritorial human rights obligations in the framework of customary international law, and with regard to the general intention behind this very analysis.

Recently, the CCPR had the chance to apply its approach into practice. In October 2013, migrants on board a ship in the Mediterranean Sea found themselves in distress at sea and contacted both Italian and Maltese authorities in emergency calls. While their ship was located in the Maltese search and rescue area, Italian vessels were closer to the scene. Both states dramatically failed to come to their rescue before the ship sank, resulting in the death of over 200 individuals. In two separate cases, the concurrent jurisdiction of both states was confirmed, based on the functional approach adopted in General Comment 36, which explicitly mentions the obligation to respect and protect the right to life of people in distress at sea. While the case against Malta was declared inadmissible on other grounds, Italy was found responsible for its failure to protect the right to life of the applicants' relatives.

However, in both cases, the Committee's reasoning was not free from inconsistencies. In the case against Malta, it considered the fact that the migrants in distress were located within the Maltese search and rescue area, for which it has—through international treaties—taken on the responsibility of coordinating rescue missions, that Malta formally assumed the coordination of the rescue mission, and that therefore, it had effective control over the operation.

The CCPR added that it was this effective control *over the operation* that was "potentially resulting in a direct and reasonably foreseeable causal relationship between the States parties' acts and omissions and the outcome of the operation".[279] While the reference to the search and rescue area is understandable to the extent that it is taken to prove Malta's sheer capability of acting (since its ships are in proximity), it is irritating in light of the fact that human rights obligations depend on *de facto* jurisdiction. Equally irritating is the reference to Malta's formal acceptance of the operation's coordination. Again, this could be taken as a proof of Malta's capability to act or of its affecting the respective person's enjoyment of the right to life in a direct and reasonably foreseeable way, but the Committee's reasoning made it sound as if such formal acceptance would count as such. Thus, it is not entirely clear why the Committee did not apply its functional approach in a much more straightforward way but chose to refer to *de iure* responsibilities and the state's formal acceptance of responsibilities.[280]

The second case against Italy implemented the functional approach in a much more straightforward way, insofar as the finding of its jurisdiction was primarily based on factual elements (such as the *proximity* of Italian vessels and Italy's early *knowledge* of and access to information about the situation, *inter alia* through emergency calls).[281] That said, what was confusing was that the CCPR now referred to a 'special responsibility of dependency' between Italy and the migrants in distress as decisive for the finding of jurisdiction, and that it departed from one of the main characteristics of General Comment 36, where it was the state's power or control over the *right* in question that triggered jurisdiction, not over the *person* as such.[282] In this case, the Committee now constantly referred to the latter. Still, in its outcome, the case continued the path toward a broad approach on extraterritorial applicability of the ICCPR. Interestingly, its finding of Italian jurisdiction was criticized in dissenting opinions, *inter alia* by the main authors behind General Comment 36.[283] Thus, it remains to be seen whether this approach will carry the day in practice and in relation to politically sensitive issues like the one under consideration in the latter two A.S. cases, and whether it will provide sufficient clarity in order to become the lodestar of extraterritorial applicability of the ICCPR—on and beyond the right to life.

4.5.3 International Covenant on Economic, Social, and Cultural Rights

The extraterritorial applicability of economic, social, and cultural rights has recently become one of the main foci of the debate on extraterritorial human rights obligations.[284] To a considerable degree, extraterritorial issues in this field concern *territorial* acts, policies, or measures with effects on the enjoyment of rights abroad, such as in the fields of development aid, environmental protection, agriculture, trade, sanctions, or intellectual property. For example, a donor country reducing its official development aid can indirectly influence living standards and entail restrictions on the right to food abroad; strict

intellectual property regimes for drug patents at domestic levels can affect the enjoyment of the right to health in low-income countries; trade policies protective of a state's own agricultural sector may have detrimental impacts on farmers abroad. Even more complicated are situations where international organizations, composed of many states, take measures that affect human rights enjoyment, such as by imposing sanctions or introducing trade regimes. In contrast to civil and political rights, one of the main challenges is that perpetrators and victims of violations are often difficult to identify, especially when policies of one (or various) states have diverse and multidimensional impact on large groups of people abroad.[285] Adding to the complexity of the issue, when states introduce measures, they may initially be motivated by a concern for human rights, too, such as when strict intellectual property regimes are (at least partially) grounded on concerns for fulfilling Article 15 ICESCR. Thus, in trying to comply with some human rights obligations, states might (willingly or unwillingly; unconsciously, negligently, or consciously) violate other, often *extraterritorial* human rights obligations.

Though lacking a jurisdictional clause, the ICESCR has been interpreted as being conditioned upon an applicatory threshold similar to that of the ICCPR and thus as potentially applicable abroad.[286] The ICJ confirmed this in its *Wall Opinion*, providing an authoritative and influential interpretation on the general possibility of extraterritorial applicability of the ICESCR but without specifying the exact trigger, content, and scope of extraterritorial obligations.[287] It buttressed its position with the reasoning of the *Committee on Economic, Social and Cultural Rights* (CESCR),[288] which had previously held "that the State party's obligations under the Covenant apply to all territories and populations under its effective control".[289] In the case of Israel, the ICJ held that, first, Israel is under a duty to guarantee ICESCR rights "[i]n the exercise of the powers available to it" and, second, that it must not prevent their realization "in those fields where competence has been transferred to Palestinian authorities".[290] Up until today, Israel has maintained that the Covenant does not bind it toward the Palestinian population in the Occupied Territories, and it has continuously been criticized by the CESCR for doing so.[291]

Further developing its position on extraterritorial applicability, the CESCR unambiguously asserted that both obligations *to respect* and *to protect* bind states abroad. They should not only avoid to directly or indirectly infringe the enjoyment of the right to water abroad[292] but also assess the extraterritorial impacts of their development aid[293] or the design of their sanctions.[294] Furthermore, they should protect the right to food abroad[295] and prevent non-state actors from interfering with the right to health,[296] the right to water,[297] the right to social security,[298] or the right to favorable and just working conditions.[299] The Committee also emphasizes the importance of 'international assistance and co-operation', and reads Article 2(1) as generating obligations on all states to strive for the full realization of the treaty—which is "particularly incumbent upon those States which are *in a position to assist* others in this regard".[300] At least to a certain degree, states are thus also

under extraterritorial obligations *to fulfill* ICESCR rights, depending on their *capability* to do so.[301] In relation to development aid, this has even been quantified: The CESCR regularly "recommends"[302] or "encourages"[303] states to increase official development aid to "the internationally agreed target of 0.7 per cent of gross national product".[304] While so far avoiding more stringent terminology (like 'urges' or 'should'), it appears that the Committee regards this as a quantifiable *duty* to provide aid.[305] This multidimensionality of extraterritorial obligations, including obligations to respect, protect, and fulfill, was also affirmed for specific rights in the framework of General Comments.[306] Special Rapporteurs support the CESCR's position, mentioning states' "extranational obligations" to respect, protect, and facilitate the right to food,[307] stating that "[a]ny regression in the level of aid provided that is not fully justified should be treated, presumptively, as a violation of States' obligations under international law".[308] In the domain of environmental protection and for territorial acts with effects abroad, experts have advocated for the general recognition of corresponding extraterritorial duties, while acknowledging that their legal status has not yet been clarified.[309]

Extraterritorial obligations are also intensely discussed in the debate on 'Business and Human Rights', concerning potential human rights duties of TNCs acting abroad as well as duties of home states regarding the conduct of TNCs abroad. Here, a fundamental doctrinal problem looms in the background: IHRL is directed at states as primary duty-bearers, and duties of private actors such as TNCs cannot be integrated into the IHRL framework without addressing this doctrinal hurdle. Whereas indirect horizontal effects of human rights law on the relations between private entities (subjecting states to obligations to protect people from violations by private actors subject to their juriscition) are well recognized, the question is whether private actors could themselves be directly subject to human rights obligations.[310] In 2011, the 'Ruggie Principles' developed by the *UN Special Representative on Business and Human Rights* introduced a comprehensive guideline on how to construe such duties, based on (i) a non-binding due diligence 'responsibility' of TNCs (avoiding the term 'obligation'), (ii) securing access to effective remedies, and (iii) the home state obligations to protect. In order to comply with the latter, it allows states—but does not obligate them—to regulate extraterritorial activities of TNCs under their jurisdiction.[311]

The recently adopted *General Comment 24* on the ICESCR comprehensively dealt with the topic of 'Business and Human Rights'. It generally emphasized that states' obligations extend beyond their territories and that this derives, *inter alia*, from the absence of a restrictive jurisdictional clause in the Covenant, the reference to 'international assistance and cooperation' in its Article 2(1), the absence in Article 14 of a reference to territory, the call to collective action enshrined in Article 55 UN Charter, the position of the ICJ in its *Wall Opinion*, the acceptance in customary international law of a prohibition to allow one's territory to be used for conduct with detrimental effects in other states' territories, and the applicability of this latter

prohibition to IHRL.[312] This generates multidimensional duties for states in relation to TNCs "domiciled in their territory and/or jurisdiction", including duties to respect, protect, and fulfill.[313] While it goes beyond the 'Ruggie Principles' in that it explicitly "*requires* State parties to take steps to prevent and redress infringements of Covenant rights"[314] by TNCs acting abroad, it leaves open whether states comply with this by regulating TNCs or through other measures. Whether such a duty to regulate exists or not is one of the foci of the current Business and Human Rights debate.[315]

Various states expressed their opposition to the draft version of this General Comment and its position on extraterritorial applicability, contending that the latter remains disputed. For example, Switzerland pointed to the absence of a unified doctrine on the legal status of extraterritorial obligations, which would require further examination in general as well as for every specific treaty separately.[316] Norway asserted the "primarily territorial"[317] nature of the Covenant and limits its extraterritorial application to exceptional situations in which "a state exercises *effective control over the territory* (…), or where a State exercises a *high degree of authority or control over the activity* in question affecting human rights abroad".[318] In even more explicit terms, the UK expressed its view that "obligations under the Covenant are primarily territorial and do not have extra-territorial effect".[319]

In 2011, a consortium of human rights experts, academics, and practitioners issued the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, providing guidance on the nature, content, and scope of states' extraterritorial obligations in international law.[320] Though the principles focus on economic, social, and cultural rights, they assert as a general principle that

> [s]tates have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extra-territorially.[321]

Explicating the content of extraterritorial obligations in all their dimensions, the principles take a broad view on their scope. *Inter alia*, they regard states as required to avoid harm and to avoid direct or indirect extraterritorial violations of rights; to conduct prior impact assessment of their policies; to protect them abroad when they are in a position to exert influence; to uphold human rights as members of international organizations and other international agreements; to create an international environment conducive to the realization of these rights; and to coordinate, cooperate, and provide international assistance.[322] The principles take a state's *jurisdiction*—and thus the applicability of human rights obligations—as arising in

i "situations over which it exercises *authority or effective control*" (lawfully or not),

ii "situations over which State *acts or omissions bring about foreseeable effects* on the enjoyment of economic, social and cultural rights", at home or abroad,
iii "situations in which the State (…) is *in a position to exercise decisive influence* or *to take measures to realize* economic, social and cultural rights extraterritorially", through separate or collective action.[323]

Though non-binding recommendations, the Maastricht Principles reflect academic and practical expertise that is increasingly being referred to, such as in the recent General Comment on the ICESCR. Hence, they not only provide guidance for practical implementation but also could be relevant to the evolution of customary international law.[324]

To conclude, with the extraterritorial applicability of economic, social, and cultural rights having come into focus over the last two decades, the CESCR has not only interpreted it broadly but also proactively promoted the debate on the issue in relation to specific rights. Systematically, it has so far only be addressed for the issue of 'Business and Human Rights', and further work is certainly required in order to determine the legal status and scope of extraterritorial obligations in the field in general,[325] not least because the CESCR's position sharply contrasts to that of States Parties, many of which still advocate for limiting Covenant obligations to their territories. Ultimately, while most states allocate some resources to development aid, probably *all* of them would ultimately deny that they do so to comply with a *legal* duty.[326]

4.5.4 American Convention on Human Rights

Whether their norms bind states also extraterritorially is an issue of concern in other regional human rights regimes, too, which will briefly be outlined in the following sections. In its Article 1(1), the ACHR compels states in relation to "all persons subject to their jurisdiction". In one of its first cases addressing the issue, *Saldaño v. Argentina*, the IACHR clarified that jurisdiction is *not* limited to territory, alluding to the reasoning of the ECtHR in *Cyprus v. Turkey*.[327] In the particular situation at hand, however, the applicant, an Argentinian citizen sentenced to death in the US and claiming that Argentina was obliged to file an inter-state complaint against the US, was not considered to be under Argentinian authority or control, and thus not subject to its jurisdiction. The IACHR explicitly stated that the relationship of nationality does not by itself establish such jurisdiction.[328]

A substantial part of the Commission's case law on extraterritoriality dealt with the applicability of the American *Declaration*, the ADRD, as a result of the respondent state not being a party to the ACHR. Strictly speaking, the ADRD is not legally binding, but it constitutes "a source of international obligations" for members of the OAS.[329] The Declaration does not contain an explicit applicability clause. In interpreting its territorial scope in

Coard v. United States, dealing with the detention and alleged mistreatment of residents of Grenada by US agents on Grenadian soil, the Commission held:

> Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of *any person subject to its jurisdiction*. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but *subject to the control of another state*—usually through the acts of the latter's agents abroad. In principle, the inquiry turns *not* on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person *subject to its authority and control*.[330]

Similarly, it confirmed applicability of the ADRD to Cuba's shooting of a civilian airplane in international airspace.[331] Interestingly, it again relied on the jurisprudence of the ECtHR,[332] unaware that its judgment would eventually come in tension with the latter's *Banković* decision issued two years later, in which projectiles fired from an airplane were not regarded as manifestations of jurisdiction.

Reading a jurisdictional clause into the ADRD,[333] the Commission indicated in these early cases that it treats the applicability of the Declaration and the Convention analogously. It also confirmed its conception of jurisdiction in relation to the *Convention* in an inter-state petition, addressing a military operation during which Colombian state agents committed an extrajudicial execution of an Ecuadorian citizen on the territory of neighboring Ecuador. Colombia argued that jurisdiction was a territorial concept and the ACHR "characterized by territorial application". In its reasoning, exceptions to this were themselves highly exceptional, limited to situations of military occupation or military action resulting in a takeover of territorial control, and to actions of diplomatic and consular personnel.[334] The Commission rejected this line of reasoning, outlining the relevant methods of interpretation and referring to its own jurisprudence, that of the CCPR, the ICJ, and the ECtHR,[335] and held:

> Thus, although jurisdiction usually refers to authority over persons who are within the territory of a State, human rights are inherent in all human beings and are not based on their citizenship or location. Under Inter-American human rights law, each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents.[336]

The decisive criteria for the finding of jurisdiction lied in the "*exercise of authority over persons* by agents of a State" and the existence of a "*causal nexus* between the extraterritorial conduct of the State and the alleged

violation", whereas a "formal, structured and prolonged legal relation" was not required.[337] Similarly to other human rights bodies, the Commission regarded extraterritorial application as crucial to avoid "a legal *lacuna*"[338] in the protection the ACHR seeks to provide.

Overall, IACHR reflects a more generous approach to extraterritorial application than the one of the ECtHR. Most importantly, control over *territory* does not in any form appear to be required.[339]

For the first time, the *Inter-American Court of Human Rights* (IACtHR) comprehensively explicated its interpretation of the extraterritorial applicability of the ACHR in its recent landmark *Advisory Opinion* on human rights obligations in relation to environmental protection. It recognized jurisdiction on grounds of a State Party *exercising authority or effective control over a person*, be it on its territory or outside. Importantly, the Convention also applies when a state exercises effective control over *the activities that result in the particular human rights violations*—understood as a 'causal nexus' between the action and the violation.[340] It did not draw a substantial distinction between actions and omissions, and clarified that there are also positive extraterritorial obligations, i.e., obligations to protect from infringements abroad that originate in a state's own territory. This centrally includes a due diligence duty, which is breached if the risk of harm on individuals was or could have been known by the state, there was a causal nexus between this harm and the violation, and none of the countermeasures available at reasonable costs were taken. Furthermore, the Court underlined the *erga omnes* character of human rights obligations.[341]

Even though it still emphasizes the exceptional nature of extraterritorial application,[342] the IACtHR's take on jurisdiction is surprisingly expansive, at least in relation to environmental protection. It was described as establishing a new, third kind of jurisdictional model, as a "quantum leap",[343] which is not only likely to inspire further litigation to have an impact on other institutions. While by many praised for its timely and courageous approach, the Court was also criticized for failing to provide principled guidance by leaving open, in a somewhat blurry fashion, whether its jurisdictional model pertains to all Convention rights or only to those at issue in the Opinion, whether it is restrained to environmental harms or not, and what scope of obligations arise from it.[344]

4.5.5 Further International Human Rights Treaties

Other regional and global IHRL regimes confirm this trend: Treaty bodies responsible for overviewing a treaty's implementation tend to accept a wider stance on extraterritorial application than States Parties do.

The *African Commission on Human and Peoples' Rights* has never alluded to a jurisdictional or territorial threshold for the applicability of the AfCHPR. In relation to the right to life, it explicitly clarified that the Charter gives rise to extraterritorial obligations to respect and protect.[345] Various other

extraterritorial dimensions of the Charter have been identified in scholarship, in which a debate on the issue has recently been initiated.[346]

In relation to global thematic treaties, the *Committee against Torture* confirmed the application of the CAT to everyone subject to a state's *de iure* or *de facto* jurisdiction.[347] The CEDAW was read by its Committee as broadly binding states on their territories and when exercising effective control, clarifying that "States parties are responsible for all their actions affecting human rights".[348] According to the ICJ, extraterritorial duties also arise from the Genocide Convention, the CRC, and the ICERD.[349] A recent case on the applicability of the CRC with regard to children of French nationality in camps in Syria confirmed a broad take on extraterritoriality, including positive obligations to protect. However, the CRC's argumentation was surprising insofar as French jurisdiction was found on grounds neither of spatial nor of personal control but of the respective children's nationality and the related capability of France to repatriate and help the children.[350]

While these positions continue to encounter resistance on the part of states and while many of them do not stem from directly legally binding sources, they are significant, not least for the status of extraterritorial human rights obligations in the framework of customary international law.

4.5.6 Customary International Law

While a core part of human rights law can be regarded as having evolved into customary international law,[351] this does not yet imply anything about the acceptance of *extraterritorial* obligations in this sphere. First, the 'effects doctrine', which prohibits states to use or to allow the use of their territories in ways that produce harm in other states' territories, is widely accepted in general international law[352] but not yet established as customary law *in the sphere of IHRL*—though references to it by various human rights bodies are increasing.[353] Moreover, many states question the legitimacy of applying the doctrine to IHRL, which does not hinder it from evolving into customary law in the future but indicates that it does not yet have this status as of today. Second, as the previous sections have testified to, especially UN bodies increasingly tend to treat human rights as extraterritorially applicable—fully applicable regarding obligations to respect, and at least partially applicable regarding obligations to protect and fulfill. Further traces of this broad position can be found in soft law documents and in civil society initiatives, such as the *Maastricht Principles*,[354] the *ETO Consortium*,[355] and the *Bangkok Declaration on Extraterritorial Human Rights Obligations*.[356] Lastly, such a view is also shared in scholarship, though the debate on the issue remains controversial.

In light of these developments, some authors are confident that a corresponding customary norm, stipulating at least some types of extraterritorial obligations, is evolving.[357] They suggest that, if there is any dispute, it does not concern the general extraterritorial applicability but rather the scope of obligations arising abroad. Since most states do not deny extraterritorial

obligations in principle but only on occasions, denier states like the US and Israel alone cannot prevent the evolution of a customary norm—at most, they might amount to *persistent objectors*, which would still be conditioned upon the acceptance of this very objection by others.[358] Other authors assume that at least the duty to respect human rights abroad has developed into customary law,[359] though perhaps limited to rights themselves recognized in customary international law.[360]

Taking into account the status of extraterritorial obligations in IHRL as outlined above, these views, however, appear too optimistic. It is not only the objections of Israel and the US that stand in the way of such obligations becoming customary law.[361] It is true that some states increasingly, tacitly or explicitly, recognize some degree of extraterritorial applicability—but even if they do so, they do so in a qualified and often hesitant way. Even among states that do not reject it *under all circumstances*, many emphasize that there is no unified doctrine regarding extraterritoriality,[362] that jurisdiction remains primarily territorial,[363] and that human rights obligations only bind them abroad in highly exceptional circumstances.[364] Some do not have a consolidated position on extraterritoriality, resulting in somewhat inconsistent argumentation.[365] Moreover, in their practice, various states do not seem to consider themselves obliged to respect, protect, and fulfill human rights of individuals abroad: They not only surveil, kill, or torture people abroad but also regard humanitarian and development aid as charity rather than as a way of complying with stringent legal obligations. Thus, while expert opinions signal a growing acceptance of extraterritorial obligations, the positions of states suggest, at least to a certain degree, otherwise.

An empirical study on the issue found that a quarter of the states that issued a statement during a recent debate on the *Universal Periodic Review* (UPR) of the US in the Human Rights Council referred to extraterritorial duties. It concluded that this reflects a slow but steady departure from the traditional territorial view toward an increasing acceptance of extraterritorial applicability of human rights law. At the same time, it also found that, when compared to obligations that bind the state on its territory, extraterritorial duties are still assigned considerably less importance—the territorial view is still the prevalent one. Moreover, the acceptance of duties to individuals abroad is generally limited to negative obligations.[366]

While these results are significant and hint at future developments, such as that, as the author rightly suggests,[367] states will increasingly be confronted with criticism for and be put under pressure to provide justifications in cases of extraterritorial violations, they are of somewhat restricted generality. Above all, statements issued during a debate on human rights obligations of *another* state are only to a limited degree conclusive indicators of states' actual positions: In general, they are much more willing to accept extraterritorial obligations of other states—but much less when it comes to their own conduct.[368] Moreover, the UPR does not constrain itself to a specific treaty but is of a more comprehensive nature. In that sense, states' statements are often vague about whether

they would genuinely accept hard legal obligations with regard to specific norms of IHRL.

Other empirical observations lead to ambiguous conclusions. To illustrate, the UK, which has repeatedly objected to the extraterritorial applicability of IHRL, is contemplating the option of derogating from the ECHR in cases of international armed conflicts. Its considering such derogation is, explicitly, a reaction to ECtHR judgments finding violations committed by the UK abroad, motivated by the wish to shield troops from similar future legal claims.[369] However, it is apparent that the UK considers itself neither morally nor legally bound by ECHR rights extraterritorially.

Generally speaking, political tendencies like the increasing fallback to nationalist ideologies in many states across the world suggest that the degree to which states recognize extraterritorial human rights obligations is much more likely to decline than to increase. Overall, despite significant developments, it is too early to speak of a consolidated norm recognizing extraterritorial human rights duties in the framework of customary international law. At most, the current stage is still one of standard-setting.[370]

4.6 Conclusion: Extraterritorial Obligations in International Human Rights Law

In light of the object and purpose of international human rights treaties and considering current threats, it would seem reasonable to assume that states should not be allowed to do abroad what they are not allowed to do at home.[371] However, as the above outline has reflected, this is not as straightforward as it may appear. Arguably, it at least partly results from the foundational role IHRL assigns to the ambiguous concept of *jurisdiction*. Three aspects are of main concern here.

First, there is still much confusion as to how jurisdiction is to be construed. While it is today widely accepted that the concept in IHRL differs from the one used in general public international law, the latter is still regularly referred to. Moreover, the models of jurisdiction regional and global bodies have centered on—spatial and personal jurisdiction—do not convince. The problem with the former is that it is not capable of protecting human rights effectively: Various situations exist where territorial control is completely absent but where third states seriously affect human rights enjoyment of individuals abroad. In turn, the latter model is on the one hand criticized for its apparent indistinguishability from a 'cause-and-effect' notion of jurisdiction, which would equate mere *attributability* for a violation with *jurisdiction*. As a result, so the critique asserts, the concept goes too far, pertaining to every act a state commits, and is too vague to serve as a legally viable threshold.[372] On the other hand, the personal model could also be criticized for being too loaded by virtue of the 'authority' element, which might not be able to cover merely factual control (without genuine *authority* in a normative sense), *ultra vires* actions of state agents, or situations of clandestine intelligence activities.[373]

The two models seem not capable of comprehensively covering the contemporary and increasing possibilities of violating rights without crossing borders, such as in the case of surveillance operations.

An emerging tendency in IHRL case law is to allow for both these modes of jurisdiction, while differentiating the degree of obligations that accompany them: Whereas overall control over an area is held to come with the full range of human rights obligations, they are reduced in situations of state agent authority over a person to those stemming from rights that are *relevant to the situation at hand*.[374] However, while this general idea seems reasonable and is endorsed by scholars, the questions of when such dividing and tailoring is legitimate, what exact degree of obligations follows, and on what criteria this is based remain largely unanswered.

The second relevant aspect is that, given the struggle of human rights bodies with providing adequate, consistent, and coherent principles on the issue, extraterritorial applicability and the relation between jurisdiction and territory are often addressed on a case-by-case basis rather than as a general matter. Though they analyze various specific jurisdictional scenarios, this alone does not shed sufficient light on the general question behind.[375] The ECtHR has been intensely criticized for its failure to introduce principled extraterritoriality jurisprudence. The IACtHR, though praised for its courageous novel approach, has seen itself confronted with similar kinds of criticism. The role of the ICJ, which is authorized to issue binding judgments, has certainly been important in the evolution of extraterritoriality principles and likely continues to be so—but its role in IHRL interpretation is not beyond dispute.[376] Moreover, while UN bodies advocate an expansive scope of extraterritorial applicability, they do so mostly in non-binding recommendations, and the legitimacy of them attending to this task is not only questioned by states.[377] Even if some of these points of criticism can be repudiated, others are more serious and mirror the challenges these bodies continue to face.

Third, as part of public international law with its Westphalian pillars, IHRL is essentially informed by the dichotomy between territory and extraterritory. Thereby, it arguably comes with a territorial paradigm—reflected in the design, the implementation, and the interpretation of its norms. What the above has outlined is that the concept 'jurisdiction' is symptomatic of this territorial paradigm. Not only is it the case that jurisdiction serves as a door-opener for territorial views: A territorial interpretation of jurisdiction results in a territorial interpretation of the applicability of human rights treaties. But also, through its *de iure* counterpart in general public international law, jurisdiction has, from the outset, been a loaded term, implying a link to sovereignty, to the entitlement to exercise authority, which are in turn paradigmatically related to territory. At the very least, this territorial paradigm suggests that the base line is not the idea that IHRL binds states whenever and wherever they act and that any territorial *limitation* to this universal idea would have to be justified. Rather, the point of departure is still a territorial one, so that it is the *expansion* of duties beyond territory that needs justification and not *vice versa*.

The general recognition of the extraterritorial applicability of IHRL is thus far from being achieved. If it is to be increasingly accepted, this must result from detaching the jurisdictional threshold from the condition of territoriality.

In light of the conflations the notion of *jurisdiction* gives rise to, one might judge it an unfortunate terminological choice to set it as the decisive applicability threshold, considering that its meaning differs substantially from that of the term in general public international law, opening the door for misunderstandings. Accordingly, one might reasonably question its appropriateness as a condition of human rights protection. Be that as it may, given its standing in positive law, i.e., its central role in IHRL norms, the most pressing question is not whether jurisdiction is the *right* criterion but *what interpretation of jurisdiction* is adequate and justified. One of the main convictions that motivates the present analysis is that this latter question and the link between jurisdiction and territory must be addressed in a thorough manner and on a foundational level. Before doing so, Chapter 5 will briefly reiterate the overall conclusions drawn from the book's first part on the legal status of extraterritorial human rights obligations.

Notes

1 Buchanan, Allen, 'Why International Legal Human Rights?', in Cruft, Rowan; Liao, S. Matthew & Renzo, Massimo (eds.), *Philosophical Foundations of Human Rights* (New York: Oxford University Press, 2015), 244–262, 247 ff.
2 For example, Art. 1(3) *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI (UN Charter).
3 *Universal Declaration of Human Rights*, 10 December 1948, A/RES/217 A(III) (UDHR).
4 *American Declaration of the Rights and Duties of Man*, 2 May 1948, OEA/Ser.L./V.II.23, doc. 21, rev. 6; reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, Doc. 6, rev. 1 at 17 (1992) (ADRD). Strictly speaking, the ADRD is legally non-binding, but it is regarded as binding for the members of the OAS, IACtHR, *Interpretation of ADRD within the Framework of Article 64 of ACHR (Advisory Opinion)*, OC-10/89, 14 July 1989, Series A. no. 10, para. 43 ff. and Section 4.5.4.
5 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (ICCPR); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (ICESCR).
6 OHCHR, *Ratification of 18 International Human Rights Treaties*, Status of Ratification: Interactive Dashboard, http://indicators.ohchr.org/ [accessed 10 July 2023].
7 *Convention on the Prevention and Punishment of the Crime of Genocide*, 20 November 1989, 1577 UNTS 3 (CPPCG).
8 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (ICERD).
9 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (CAT).

10 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (CEDAW).
11 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (CRC).
12 *CRPD*.
13 *American Convention on Human Rights [Pact of San José]*, 22 November 1969, 1144 UNTS 123 (ACHR).
14 *African Charter on Human and Peoples' Rights [Banjul Charter]*, 27 June 1981, 1520 UNTS 217 (AfCHPR).
15 *Arab Charter on Human Rights [revised]*, 15 September 1994, 12 IHRR 893 (2005) (ArCHR).
16 *European Social Charter*, 18 October 1961, 529 UNTS 89, ETS 35; *European Social Charter [revised]*, 3 May 1996, 2151 UNTS 277, ETS 163 (ESC).
17 Art. 38(1) *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1055 (ICJ Statute). See also ICJ, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, ICJ Reports 1985 (3 June 1985), 3, para. 27.
18 This common Art. 3 is listed in the four *Geneva Conventions* as applying to conflicts of non-international character. According to customary international law, the Article is applicable to all sorts of conflict, be they internal or international, see ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986 (27 June 1986), 14, para. 220.
19 Kälin, Walter & Künzli, Jörg, *Universeller Menschenrechtsschutz: Der Schutz des Individuums auf globaler und regionaler Ebene*, 4th edn (Basel: Helbing Lichtenhahn / Nomos, 2019), 74 ff.
20 Cf. De Schutter, *International Human Rights Law*, 63 ff.
21 Art. 38(1)(c) *ICJ Statute*; ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980 (24 May 1980), 3, para. 91.
22 Kälin & Künzli, *Menschenrechtsschutz*, 80 ff.
23 Chinkin, Christine, 'Sources', in Moeckli, Daniel; Shah, Sangeeta & Sivakumaran, Sandesh (eds.), *International Human Rights Law*, 3rd edn (Oxford: Oxford University Press, 2018), 63–85, 75 ff.
24 Art. 53 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (VCLT).
25 Including the principle of *non-refoulement*, the rights to life and to property, and the prohibitions of discrimination, arbitrary and long detention, death penalty for minors, of forced labor.
26 Chinkin, *Sources*, 73 f.; De Schutter, *International Human Rights Law*, 87 ff.
27 ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970 (5 February 1970), 3, para. 33 f.; Art. 48(1)(b) and Art. 48(2) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Commission, Report of the ILC on Its Fifty-Third Session, A/56/10, Supplement No. 10, 2001 (Draft Articles on State Responsibility), 2001; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, ICJ Reports 2004 (9 July 2004), 136, para. 156 f.; CCPR, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, General Comment 31 (80) on ICCPR, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 2. See also De Schutter, *International Human Rights Law*, 91, 113 ff.

28 Sheeran, Scott & Rodley, Nigel Sir, 'The Broad Review of International Human Rights Law', in Sheeran, Scott & Rodley, Nigel Sir (eds.), *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), 3–6, 5.
29 Peters, Anne, 'Humanity as the A and Ω of Sovereignty', *European Journal of International Law*, 20/3 (2009), 513–544, 515 ff.
30 Bodin, Jean, *Six Books of the Commonwealth*, [1576], abridged and translated by M. J. Tooley (Oxford: Basil Blackwell Oxford, 1955), book I, chap. VIII, X.
31 Hobbes, Thomas, *Leviathan* (London, 1651), chap. XVIII, XX f., XXVI, XXIX f.
32 Bodin grants that sovereignty may be bound by natural or divine law and even Hobbes acknowledges the sovereign's subordination to God's will, Bodin, *Commonwealth*, book I, chap. VIII; Hobbes, *Leviathan*, chap. XXVI, XXIX.
33 Schmitt, Carl, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, [1934], 7th edn (Berlin: Duncker & Humblot, 1996), 13 ff., 19, 37 f. Schmitt's absolutist conception of *external* sovereignty also refers to his thesis that the distinction between friend and enemy lies at the core of the political sphere, Schmitt, Carl, *Der Begriff des Politischen*, [1932], 2nd edn (Berlin: Duncker & Humblot, 1963), 26, 30 f., 50 f. See further Chapters 6 and 7.
34 Cf. Buchanan, *Justice, Legitimacy, and Self-Determination*, 46.
35 For example, Kelsen, Hans, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 2nd edn (Tübingen: J.C.B. Mohr, 1928), 40; Peters, *Humanity*, 516, 519 f. However, normative justifications have also been provided, based on the idea of the foundational sovereign equality of the members of the international community, Kelsen, *Problem der Souveränität*.
36 Grotius, Hugo, *The Rights of War and Peace*, [1625] (Indianapolis: Liberty Fund, 2005), book I, prelim. discourse, para. VI ff.; book I, chap. I, para. XIV; book II, chapter I ff. However, Grotius does not categorically exclude an absolute conception of sovereignty, see ibid., book I, chapter III, para. VIII.
37 Locke, John, *Second Treatise of Government*, Macpherson, C.B. (ed.), [1689] (Indianapolis/Cambridge: Hackett Publishing, 1980).
38 Kant, Immanuel, 'Die Metaphysik der Sitten', in Königlich Preussische Akademie der Wissenschaften (ed.), *Gesammelte Schriften*, [1798], Akademie-Ausgabe, 2nd edn, vol. 6 (Berlin, 1914), 203–493, 311 ff.; Kant, Immanuel, 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis', in Königlich Preussische Akademie der Wissenschaften (ed.), *Gesammelte Schriften*, [1793], Akademie-Ausgabe, vol. 8 (Berlin, 1923), 275–317, 289 ff.; Kant, Immanuel, 'Zum Ewigen Frieden', in Königlich Preussische Akademie der Wissenschaften (ed.), *Gesammelte Schriften*, [1795], Akademie-Ausgabe, vol. 8 (Berlin, 1923), 341–386, 341 ff.
39 De Vattel, Emer, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereignts, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Kapossy, Béla & Whatmore, Richard (eds.), [1797] (Indianapolis: Liberty Fund, 2008), book II, chap. I.
40 Art. 2(1), 2(4), 2(7) *UN Charter*.
41 ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986 (27 June 1986), 14, para. 202; Kunig, Philip, 'Intervention, Prohibition of', in Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, 2008, para. 7.
42 For an overview, Besson, Samantha, 'Sovereignty', in Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, 2011, para. 89, 95 ff.

43 Philpott, Daniel, 'Sovereignty', in Zalta, Edward N. (ed.), *Stanford Encyclopedia of Philosophy*, Fall 2020 edn (Stanford: Stanford University, 2020), https://plato.stanford.edu/archives/fall2020/entries/sovereignty/, Chapter 3; ICTY, *Prosecutor v. Dusko Tadic [Appeals Chamber Dec.]*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case IT-94-1, 2 October 1995, para. 97.
44 Lafont, Cristina, 'Sovereignty and the International Protection of Human Rights', *Journal of Political Philosophy*, 24/4 (2016), 427–445, 429 ff.
45 Cf. Leisering, *Menschenrechte*, 43 ff.; Joseph & Dipnall, *Scope of Application*, 111; Gardbaum, *International Constitutional Rights*, 765, fn. 33, 765 f. For an overview, Weissbrodt, David, *The Human Rights of Non-citizens* (Oxford: Oxford University Press, 2008).
46 Art. 1(3), 55(c), 56 *UN Charter*.
47 Hopgood, *Real World*, 312 f.; Sabel, *Sovereignty*, 205.
48 For example, the "self-determination initiative" in Switzerland, rejected in a popular vote in 2018, BBl 2019, 5931 ff.
49 Benvenisti, *Sovereigns as Trustees of Humanity*, 296.
50 Art. 31, 32 *VCLT*.
51 ECtHR, *Tyrer v. the United Kingdom*, 5856/72, 25 April 1978, Series A. no. 26, para. 31; Mahlmann, *Konkrete Gerechtigkeit*, 150 f., 215 f.; Kälin & Künzli, *Menschenrechtsschutz*, 42; Fitzmaurice, Malgosia, 'Interpretation of Human Rights Treaties', in Shelton, Dinah (ed.), *The Oxford Handbook of International Human Rights Law*, 2013, https://academic.oup.com/edited-volume/42626/chapter-abstract/358048128
52 Art. 2(1) *ICCPR*, emphasis added.
53 See, e.g., Gibney, *International Human Rights Law*, 103 ff.; Milanović, *Extraterritorial Application*, 222 ff., but also earlier authors such as Buergenthal, Thomas, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in Henkin, Louis (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), 72–91, 74.
54 This has long been the position advocated by the US, see CCPR, *Concluding Observations USA*, A/50/40, 52, 3 October 1995, para. 19.
55 CommHR, *Summary Record of 194th Meeting*, E/CN.4/SR.194, 16 May 1950, para. 46; CommHR, *Summary Record of 329th Meeting*, E/CN.4/SR.329, 10 June 1952, 10, 13 f.
56 ICJ, *Wall (Advisory Opinion)*, para. 109; CCPR, *Saldías de López (on behalf of López Burgos) v. Uruguay*, 29 July 1981, CCPR/C/13/D/52/1979, para. 12.3; CCPR, *GC 31 ICCPR*, 2004, para. 10. In scholarship, one of the earliest authors supporting such a reading of Art. 2(1) was Buergenthal, *To Respect and to Ensure*. On the extraterritorial applicability of the ICCPR, Section 4.5.3. For critics of this position, e.g., Dennis, Michael J. & Surena, Andre M., 'Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap between Legal Theory and State Practice', *European Human Rights Law Review*, 6 (2008), 714–731; Dennis, Michael J., 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict', *Israel Law Review*, 40/2 (2007), 453–502; Noll, Gregor, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', *International Journal of Refugee Law*, 17/3 (2005), 542–573, 557 ff.

57 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the ECHR*, Vol. II, Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly (10 August—18 November 1949) (The Hague et al.: Martinus Nijhoff, 1975b), 260; Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the ECHR*, Vol. III, Committee of Experts (2 February—10 March 1950) (The Hague et al.: Martinus Nijhoff, 1976a), 200.
58 Art. 1 *ECHR*, emphasis added.
59 Da Costa, *Extraterritorial Application*, 95.
60 Art. 56 *ECHR*; and similarly, e.g., Art. 4 *Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11*, 20 March 1952 (as amended by Protocol No. 11), ETS 9 (ECHR Prot. No. 1).
61 For example, ECtHR, *Drozd and Janousek v. France and Spain*, 12747/97, 26 June 1992, Series A. no. 240, para. 90.
62 Art. 1(1) *ACHR*, emphasis added. On its *travaux préparatoires*, cf. Gondek, Michal, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp/Portland: Intersentia, 2009), 109 ff.
63 Art. 1(2) *ACHR*.
64 Art. 2(1) *CRC*. See also Art. 2 *ArCHR*.
65 Art. 7 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3 (ICPMW). So far, the Convention has only 57 States Parties at present, see OHCHR, *Ratification of 18 International Human Rights Treaties*.
66 Art. 3 *ICERD*.
67 Art. 6 *ICERD*.
68 For example, Art. 5(1)(a), Art. 11, Art. 16(1) *CAT*.
69 *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, 2173 UNTS 236 (OPAC-CRC).
70 This option was also discussed (but dismissed) in ICJ, *Wall (Advisory Opinion)*, para. 112.
71 Art. 11(1), Art. 15(4), Art. 22, Art. 23 *ICESCR*. For a discussion, Gibney, *International Human Rights Law*, 96 ff.
72 Joseph & Dipnall, *Scope of Application*, 126.
73 Art. 14 *ICESCR*.
74 Langford, Malcolm; Coomans, Fons & Gómez Isa, Felipe, 'Extraterritorial Duties in International Law', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 51–113, 57 ff.
75 Art. 4(2), Art. 32 *CRPD*.
76 Art. 55, 56 *UN Charter*; cf. Langford; Coomans & Gómez Isa, *Extraterritorial Duties*, 57; Skogly & Gibney, *Transnational Human Rights Obligations*, 790 f.; den Heijer, Maarten & Lawson, Rick, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 153–191, 183 ff. For an analysis of the extraterritorial aspects of these Articles in the UN Charter, see Skogly, Sigrun I., 'Extraterritoriality: Universal Human Rights Without Universal Obligations?', in Joseph, Sarah & McBeth, Adam (eds.), *Research Handbook on International Human Rights Law* (Cheltenham: Edward

Elgar, 2010), 71–96, 76 ff.; Langford; Coomans & Gómez Isa, *Extraterritorial Duties*, 53 ff.

77 IACHR, *Coard et al. v. United States*, Case no. 10.951, 29 September 1999, Report 109/99, OEA/Ser.L/V/II.106, Doc. 6 rev. (1999), para. 37; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 2005 (19 December 2005), 168, para. 216 f.; ICJ, *Wall (Advisory Opinion)*, para. 106, 112; CESCR, *Concluding Observations Israel*, E/C.12/1/Add.27, 4 December 1998, para. 8.

78 For example, Art. 1 *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302 (OP1-ICCPR); Art. 2 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, 2922 UNTS 29 (OP-ICESCR).

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80 Kamminga, *Extraterritoriality*, chapter A; Oxman, Bernard H., 'Jurisdiction of States', in Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, 2007, chapter A; Duttwiler, Michael, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights', *Netherlands Quarterly of Human Rights*, 30/2 (2012), 137–163, 156.

81 Milanović, *Extraterritorial Application*, 23.

82 Ryngaert, Cedric, 'Territory in the Law of Jurisdiction: Imagining Alternatives', in Kuijer, Martin & Werner, Wouter (eds.), *The Changing Nature of Territoriality in International Law*, Netherlands Yearbook of International Law 2016, vol. 47 (The Hague: T.M.C. Asser Press, 2017), 49–82; Cleveland, *Constitution Abroad*, 234 ff.; Besson, *Sovereignty*, para. 10 ff. Besson mentions that traces of these principles had existed in earlier times, ibid., para. 14.

83 Oxman, *Jurisdiction of States*, chapter A. The principles described here are based on PCIJ, *The Case of S.S. Lotus (France v. Turkey)*, 7 September 1927, Series A. no. 10, 18 ff.

84 Chapter 3.

85 Kamminga, *Extraterritoriality*, para. 11 ff.; Oxman, *Jurisdiction of States*.

86 Some also refer to this principle as the *objective territoriality principle*.

87 For the demarcation from the present analysis, Section 1.3.2.

88 Kamminga, *Extraterritoriality*, chapter C.

89 Müller, Angela, 'Security Measures Abroad and Extraterritorial Human Rights Obligations', in Fritsche, Ruwen et al. (eds.), *Unsicherheiten des Rechts. Von den sicherheitspolitischen Herausforderungen für die freiheitliche Gesellschaft bis zu den Fehlern und Irrtümern in Recht und Rechtswissenschaft*, Archiv für Rechts- und Sozialphilosophie—Beihefte, 162 (Stuttgart: Franz Steiner Verlag, 2020), 103–114, 106.

90 This view is widely shared, see, e.g., Kälin & Künzli, *Menschenrechtsschutz*, 153; Da Costa, *Extraterritorial Application*, 12; den Heijer & Lawson, *Extraterritorial Human Rights*, 163 ff.; Milanović, *Extraterritorial Application*, 26 ff., 198 f.;

Duttwiler, *Authority*, 140; CAT, *Implementation of Article 2 by States Parties*, General Comment 2 on CAT, CAT/C/GC/2, 24 January 2008, para. 7; Gondek, *Extraterritorial Application*, 364; Scheinin, Martin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in Coomans, Fons & Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004), 73–81, 79 f. It has been argued that the source of this reading lies in the jurisprudence of the ICJ, Wilde, Ralph, 'Human Rights beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties', *Chinese Journal of International Law*, 12/4 (2013), 639–677, 662 f., 672 f.; referring to ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, ICJ Reports 1971 (21 June 1971), 16, para. 118.

91 Cf. Da Costa, *Extraterritorial Application*, 9 ff.

92 Shapcott, Richard, 'Cosmopolitan Extraterritoriality', in Beardsworth, Richard; Brown, Garrett Wallace & Shapcott, Richard (eds.), *The State and Cosmopolitan Responsibilities* (Oxford: Oxford University Press, 2019), 98–118, 104 f.

93 Art. 4–Art. 11; Art 16–Art. 19 Draft Articles on State Responsibility.

94 See above and Altwicker, Tilmann, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts', *European Journal of International Law*, 29/2 (2018), 581–606, 599. See also Milanović, *Extraterritorial Application*, 41 ff.; Coomans, Fons, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', *Human Rights Law Review*, 11/1 (2011), 1–35, 5 f.

95 There is also a debate on the applicability of fundamental rights duties to nonformal, nonlegal acts of public authorities, based on the question of whether these acts can be categorized as sovereign acts of the state ('hoheitliches Handeln'). Cf. the (not widely shared) opinion that state acts on foreign territory typically do not amount to sovereign acts of the state ('hoheitliches Handeln'), Heintzen, Markus, *Auswärtige Beziehungen privater Verbände: Eine staatsrechtliche, insbesondere grundrechtskollisionsrechtliche Untersuchung* (Berlin: Duncker & Humblot, 1988), 119 f.

96 ECtHR, *Loizidou v. Turkey [GC]*, 15318/89, 18 December 1996, Reports 1996-VI, para. 52 ff., 61 ff. See also Milanović, Marko, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court', in Aaken, Anne van & Motoc, Iulia (eds.), *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018), 97–111, 103 ff.

97 For example, ECtHR, *Al-Skeini and Others v. the United Kingdom [GC]*, 55721/07, 7 July 2011, ECHR 2011, para. 102; ECtHR, *Jaloud v. the Netherlands [GC]*, 47708/08, 20 November 2014, ECHR 2014, para. 110. In this latter case, the ECtHR explicitly emphasized the distinction between jurisdiction and state responsibility (para. 154), even though it itself does not clearly differentiate between the two concepts, cf. Sari, Aurel, 'Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations', *EJIL: Talk!*, 24 November 2014, www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/; Section 4.5.1.

98 Art. 29 *VCLT*; Art. 50 *ICCPR*; Art. 28 *ICESCR*.
99 ECtHR, *Sargsyan v. Azerbaijan [GC]*, 41167/06, 16 June 2015, ECHR 2015, para. 127.
100 ECtHR, *Ilaşcu and Others v. Moldova and Russia [GC]*, 48787/99, 8 July 2004, ECHR 2004-VII, para. 312, 330 ff.
101 ECtHR, *Djokaba Lambi Longa v. the Netherlands (dec.)*, 33917/12, 9 October 2012, ECHR 2012, para. 69 ff., 73.
102 Sections 1.1.1; 4.1.
103 Art. 23 *ACHR*; Art. 24 *ArCHR*; Art. 13 *ACHPR*; Art. 25 *ICCPR*. Moreover, it can be justified with regard to the rights to enter and stay in a state's territory (e.g., Art. 12 *ICCPR*), to some economic rights in developing countries (e.g., Art. 2(3) *ICESCR*), and to political activities (Art. 16 *ECHR*, Art. 24 *ArCHR*).
104 Gardbaum, *International Constitutional Rights*, 767.
105 EComHR, *Cyprus v. Turkey (dec.)*, 6780/74, 6950/75, 26 May 1975, DR 2, 125, 136, para. 8.
106 ECtHR, *Loizidou v. Turkey (prelim. obj.) [GC]*, 15318/89, 23 March 1995, Series A. no. 310, para. 62.
107 Ibid., para. 62, emphasis added.
108 ECtHR, *Loizidou [GC]*, para. 56; ECtHR, *Cyprus v. Turkey [GC]*, 25781/94, 10 May 2001, ECHR 2001-IV, para. 77.
109 This distinction has been widely recognized in scholarship and many have adopted similar terminology to denote the two concepts, e.g., Milanović, *Extraterritorial Application*, 118 ff.
110 EComHR, *X. and Y. v. Switzerland (dec.)*, 7289/75, 7349/76, 14 July 1977, DR 9, 57, 57, 71 ff.
111 EComHR, *Stocké v. Germany (dec.)*, 11755/85, 9 July 1987, Commission Report of 12 October 1989, para. 166.
112 Ibid., para. 166. See also EComHR, *X v. The Federal Republic of Germany (dec.)*, 1611/62, 25 September 1965, Yearbook ECHR 8, 158, 168.
113 EComHR, *Ramirez Sánchez v. France (dec.)*, 28780/95, 24 June 1996, DR 86-B, 155, 161 f.
114 For example, ECtHR, *Drozd*, para. 91; EComHR, *M. v. Denmark (dec.)*, 17392/90, 14 October 1992, DR 73, 193, para. 1 of legal considerations; EComHR, *Chrysostomos, Papachrysostomou and Loizidou v. Turkey (dec.)*, 15299/89, 15300/89, 15318/89, 4 March 1991, DR 68, 216, para. 32 ff. of legal considerations; EComHR, *Reinette v. France (dec.)*, 14009/88, 2 October 1989, DR 63, 192, 193; EComHR, *Hess v. the United Kingdom (dec.)*, 6231/73, 28 May 1975, DR 2, 72, 73.
115 EComHR, *Hess,* 73, emphasis added.
116 ECtHR, *Soering v. the United Kingdom*, 14038/88, 7 July 1989, Series A. no. 161, para. 86.
117 See, however, Altwicker, *Transnationalizing Rights*, 585 f. Though the UK might also had assisted future violations potentially committed in the US, the concerned act (the extradition decision) firstly had effects on a person on UK territory.
118 ECtHR, *Soering*, para. 87.
119 ECtHR, *Banković and Others v. Belgium and Others (dec.) [GC]*, 52207/99, 12 December 2001, ECHR 2001-XII. For an analysis, Müller, *Security Measures*, 105 ff.
120 ECtHR, *Banković*, para. 55 f., 59 f.; Section 4.3.

121 Ibid., para. 61, emphases added.
122 Ibid., para. 66, 68; cf. ECtHR, *Soering*.
123 ECtHR, *Banković*, para. 62; also Dennis & Surena, *Application of the ICCPR*, 727 ff.; cf. Da Costa, *Extraterritorial Application*, 11.
124 ECtHR, *Banković*, para. 63 ff.; Section 4.3.1.
125 Ibid., para. 75.
126 Ibid., para. 71, emphases added.
127 Ibid., para. 74 ff.
128 Ibid., para. 75. See also Section 10.2.2.
129 Ibid., para. 75.
130 Ibid., para. 80; ECtHR, *Cyprus v. Turkey [GC]*, para. 78.
131 Wildhaber, Luzius, 'Speech Given by the President of the European Court of Human Rights on the Occasion of the Opening of the Judicial Year on 31 January 2002', in ECtHR (ed.), *Annual Report 2001* (Strasbourg: Registry of the European Court of Human Rights, 2002), 19–25, 23 f.
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133 McGoldrick, Dominic, 'The Extraterritorial Application of the International Covenant on Civil and Political Rights', in Coomans, Fons & Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004), 41–72, 72. Similarly O'Boyle, Michael, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Bankovic" ', in Coomans, Fons & Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004), 125–140, 130 ff.; Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, 3rd edn (Oxford: Oxford University Press, 2014), 97 f.
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139 ECtHR, *Banković*, para. 64.
140 Scheinin, *Extraterritorial Effect*, 77.
141 This was argued for in ECtHR, *Al-Skeini*, para. 142.
142 Milanović, *Extraterritoriality and Human Rights*, 57; Gibney, *International Human Rights Law*, 74 f.; Loucaides, *Extra-Territorial Effect*, 400 f.; Lawson, *Life after Banković*, 115 f.
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144 Loucaides, *Extra-Territorial Effect*, 400.
145 Cf. Müller, *Security Measures*, 106 f.
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147 Altwicker, *Transnationalizing Rights*, 589; Wilde, *Civil and Political Rights*, 644.
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152 ECtHR, *Öcalan v. Turkey [GC]*, 46221/99, 12 May 2005, ECHR 2005-IV, para. 91.
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156 Art. 9, 14, 17, 10 *ECHR*.
157 ECtHR, *El Mahi*, 8.
158 Cf. Chapters 9 and 10.
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160 For other perspectives on this comparison, den Heijer, Maarten, *Europe and Extraterritorial Asylum*, Studies in International Law, 39 (Oxford/Portland: Hart Publishing, 2012), 43; Ganesh, *Distant Strangers*, 528 ff. For an alternative model of jurisdiction, also discussing *El Mahi*, Section 10.2.
161 ECtHR, *Andreou v. Turkey (dec.)*, 45653/99, 3 June 2008, 11; Duttwiler, *Authority*, 148. Interestingly, the constellation is similar to the one the US Supreme Court was confronted with in *Hernández v. Mesa* (2017), though the two Court's respective outcomes differ considerably, cf. Section 2.3.1.
162 ECtHR, *Pad and Others v. Turkey (dec.)*, 60167/00, 28 June 2007, para. 54. The case was declared inadmissible on other grounds.
163 Similar situations were under scrutiny in ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway (dec.) [GC]*, 71412/01, 78166/01, 2 May 2007. The ECtHR declared the case inadmissible because it found the conduct in question to be directly attributable to the UN. Yet, while concerning (as it is often the case in situations of international armed conflicts) an extraterritorial situation, the contentious issue they address is that of *attributability* and therefore, they do not precisely concern the question analyzed here.
164 ECtHR, *Al-Skeini*, para. 138 f.
165 Ibid., para. 134 ff.
166 Ibid., para. 149. See Wilde, *Civil and Political Rights*, 647.
167 ECtHR, *Al-Skeini*, para. 142.
168 Ibid., para. 137 f.
169 Ibid., para. 137 f., 149.
170 Ibid., para. 177.
171 See above and, e.g., ECtHR, *Öcalan*, para. 91; ECtHR, *Issa*, para. 71.
172 Milanović, *Extraterritoriality and Human Rights*, 58.
173 Similarly Milanović, *Jurisdiction and Responsibility*, 98 f.
174 Cf. Joseph & Dipnall, *Scope of Application*, 123; ECtHR, *Al-Skeini*, Concurring Opinion Judge Bonello, para. 15.
175 Gibney, *Litigating*, 100.
176 Ryngaert, *Clarifying*, 59 f.
177 Shany, Yuval, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law', *The Law & Ethics of Human Rights*, 7/1 (2013), 47–71, 57; see also Milanović, *Jurisdiction and Responsibility*, 98 f.
178 ECtHR, *Al-Skeini*, Concurring Opinion Judge Bonello, para. 5, also para. 4, 7.
179 Ibid., Concurring Opinion Judge Bonello, para. 8.
180 Ibid., Concurring Opinion Judge Bonello, para. 8 f., 13.
181 ECtHR, *Jaloud*, para. 152. This approach was confirmed in ECtHR, *Pisari v. The Republic of Moldova and Russia*, 42139/12, 19 October 2015, para. 33. See also Bhuta, Nehal, 'The Frontiers of Extraterritoriality: Human Rights Law as Global Law', in Bhuta, Nehal (ed.), *The Frontiers of Human Rights: Extraterritoriality*

and Its Challenges (Oxford: Oxford University Press, 2016), 1–20, 11 f.; Yildiz, Ezgi, 'Extraterritoriality Reconsidered: Functional Boundaries as Repositories of Jurisdiction', in Margolies, Daniel S. et al. (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (Abingdon/New York: Routledge, 2019), 215–227, 224 f.

182 Cf. Raible, *Game Changers*; Ryngaert, Cedric & Haijer, Friederycke, 'Reflections on Jaloud v. the Netherlands', *Journal of International Peacekeeping*, 19/1–2 (2015), 174–189, 180 ff.; De Koker, Cedric, 'Extra-territorial Jurisdiction & Flexible Human Rights Obligations: The Case of Jaloud v. the Netherlands', *Strasbourg Observers*, 8 December 2014, https://strasbourgobservers.com/category/jaloud-v-the-netherlands/.

183 For example, in ECtHR, *Hassan v. the United Kingdom [GC]*, 29750/09, vol. ECHR 2014, 16 September 2014.

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185 For example, ECtHR, *Belozorov v. Russia and Ukraine*, 43611/02, 15 October 2015, para. 85.

186 ECtHR, *Ukraine v. Russia (re Crimea) (dec.) [GC]*, 20958/14, 38334/18, 16 December 2020, para. 244, 344 f., 348 f.

187 Milanović, Marko, 'ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea', *EJIL: Talk!*, 15 January 2021, www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/.

188 Art. 3 *ECHR*; Art. 4 *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms Securing Certain Rights and Freedoms Other than those Already Included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46 (ECHR Prot. No. 4).

189 ECtHR, *Hirsi Jamaa*, para. 73.

190 Ibid., para. 73.

191 For example, ECtHR, *Issa*, para. 71, 75 f.

192 ECtHR, *M.N. and Others v. Belgium (dec.) [GC]*, 43599/18, 5 May 2020, para. 118, 122 f.; cf. CJEU, *X and X*.

193 Altwicker argues that the model of authority and control over persons is practically inapplicable to domestic acts with extraterritorial effects, Altwicker, *Transnationalizing Rights*, 589.

194 ECtHR, *Al-Skeini*, para. 133 ff.

195 ECtHR, *Hirsi Jamaa*, para. 72, emphasis added.

196 Ibid., para. 73 ff.

197 ECtHR, *Practical Guide on Admissibility Criteria*, para. 198 f. Strictly speaking, the guide does not deal with the concept of state jurisdiction in Art. 1 *ECHR* but with the jurisdiction of the *Court*, and the cited paragraphs with Art. 32 and Art. 35(3)(a) *ECHR*.

198 ECtHR, *Big Brother Watch and Others v. the United Kingdom [GC]*, 58170/13, 62322/14, 24960/15, 25 May 2021, para. 272.

199 Section 2.2.

200 ECtHR, *Gray v. Germany*, 49278/09, 22 May 2014.
201 ECtHR, *Romeo Castaño v. Belgium*, 8351/17, 9 July 2019, para. 37 ff. See also ECtHR, *Carter v. Russia*, 20914/07, 21 September 2021, para. 131 ff.
202 ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey [GC]*, 36925/07, 29 January 2019, para. 190, original emphasis. Cf. also ECtHR, *Rantsev v. Cyprus and Russia*, 25965/04, 7 January 2010, ECHR 2010, para. 243 f.; ECtHR, *Hanan v. Germany [GC]*, 4871/16, 16 February 2021, para. 132 ff.
203 For an overview, ECtHR, *Güzelyurtlu*, para. 182 ff.
204 Milanović, Marko, 'Gray v. Germany and the Extraterritorial Positive Obligation to Investigate', *EJIL: Talk!*, 28 May 2014, www.ejiltalk.org/gray-v-germany-and-the-extraterritorial-positive-obligation-to-investigate/.
205 ECtHR, *Hirsi Jamaa*, para. 74.
206 For example, ECtHR, *Al-Skeini*, para. 102.
207 ECtHR, *Al-Skeini*, Concurring Opinion Judge Bonello, para. 8; also Shany, *Taking Universality Seriously*, 61.
208 ECtHR, *Georgia v. Russia [GC]*, 38263/08, 21 January 2021, para. 162 ff.
209 Ibid., para. 126, 137.
210 Ibid., para. 140 ff.
211 Milanović, Marko, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos', *EJIL: Talk!*, 25 January 2021, www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/.
212 ECtHR, *Georgia v. Russia*, para. 239, 269.
213 Ibid., para. 140 ff. The ECtHR failed to refer to the CCPR's analysis on the extraterritorial application of the right to life, see next section and CCPR, *The Right to Life (Art. 6)*, General Comment 36 on ICCPR, CCPR/C/GC/36, 30 October 2018, para. 63.
214 Blum, *European Convention*, 2; see also Skogly, *Obligation to Protect*, 243; Wilde, *World Court*, 670; Duttwiler, *Authority*, 151 f.; Ryngaert, *Clarifying*, 57 f.; Gibney, Mark, 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations', *Global Responsibility to Protect*, 3/2 (2011), 123–151, 150; Skogly, *Extraterritoriality*, 86 ff.; cf. also Cannizzaro, *EU's Human Rights Obligations*, 1094 f.; Raible, Lea, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship', *Leiden Journal of International Law*, 31/2 (2018), 315–334, 334; Yildiz, *Extraterritoriality Reconsidered*, 216.
215 Roxstrom & Gibney, *State Jurisdiction*, 144.
216 ECtHR, *Carter*, para. 134.
217 For example, ECtHR, *M.N.*, para. 98 ff.; ECtHR, *N.D. and N.T. v. Spain*, 8675/15, 8697/15, 13 February 2020, para. 130; ECtHR, *Belozorov*, para. 86; ECtHR, *Catan*, para. 104; ECtHR, *Chagos Islanders*, para. 70 f.; ECtHR, *Hirsi Jamaa*, para. 71 f.; ECtHR, *Al-Skeini*, para. 131 f.; also Müller, *Security Measures*, 107.
218 It is to be distinguished from the *ratione personae* and *ratione loci* jurisdiction of the CCPR to hear individual complaints, dealt with in the *OP1-ICCPR*.
219 For example, CCPR, *Samuel Lichtensztein v. Uruguay*, 31 March 1983, CCPR/C/18/D/77/1980, para. 6.1; CCPR, *Mabel Perreira Montero v. Uruguay*, 31 March 1983, CCPR/C/18/D/106/1981, para. 5; CCPR, *Sophie Vidal Martins v. Uruguay*, 23 March 1982, CCPR/C/15/D/57/1979, para. 7.
220 CCPR, *López Burgos*, para. 12.3.

221 This was later confirmed in CCPR, *GC 31 ICCPR*, 2004, para. 10; as well as by the ICJ in ICJ, *Wall (Advisory Opinion)*, para. 109. See Section 4.3.1.
222 CCPR, *López Burgos*, Appendix (Individual Opinion Tomuschat). In this text, Tomuschat does not explicate his position with regard to *non-citizens*.
223 CCPR, *Lilian Celiberti de Casariego v. Uruguay*, 29 July 1981, CCPR/C/13/D/56/1979, para. 10.1 ff.
224 CCPR, *López Burgos*, para. 12.3; CCPR, *Celiberti*, para. 10.3.
225 CCPR, *Gueye et al v. France*, 3 April 1989, CCPR/C/35/D/196/1985, para. 9.4.
226 ECtHR, *Al-Skeini*, para. 137.
227 CCPR, *Concluding Observations Iraq*, A/46/40, 1991, 150–158, para. 652.
228 CCPR, *Concluding Observations Israel*, CCPR/C/79/Add.93, 18 August 1998, para. 10. Likewise, CCPR, *Concluding Observations Israel*, CCPR/CO/78/ISR, 21 August 2003, para. 11; CCPR, *Concluding Observations Israel*, CCPR/C/ISR/CO/3, 3 September 2010, para. 5; CCPR, *Concluding Observations Israel*, CCPR/C/ISR/CO/4, 21 November 2014, para. 5.
229 CCPR, *Concluding Observations Cyprus*, CCPR/C/79/Add.88, 6 April 1998, para. 3; CCPR, *Concluding Observations Lebanon*, CCPR/C/79/Add.78, 5 May 1997, para. 4 f.
230 CCPR, *Concluding Observations Belgium*, CCPR/C/79/Add.99, 19 November 1998, para. 14; CCPR, *Concluding Observations The Netherlands*, CCPR/CO/72/NET, 27 August 2001, para. 8; CCPR, *Concluding Observations Poland*, CCPR/CO/82/POL, 2 December 2004, para. 3.
231 CCPR, *Concluding Observations Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 6.
232 Ibid., para. 6.
233 CCPR, *CO USA*, 1995, para. 284.
234 CCPR, *GC 31 ICCPR*, 2004, para. 10, emphasis added, also para. 2. See Section 4.3.1.
235 ICJ, *Wall (Advisory Opinion)*, para. 109.
236 Ibid., para. 109 ff. Arguably, the ICJ also implicitly rejected an *espace juridique* argument for denying applicability to the non-state party territory of Palestine, Wilde, *World Court*, 672.
237 ICJ, *Armed Activities Congo*, para. 206 ff., 216 f., 220.
238 Ibid., para. 219 f.
239 Wilde, *World Court*, 665 f., citation on p. 673.
240 ICJ, *Wall (Advisory Opinion)*, para. 109.
241 Wilde, *World Court*, 668 f.
242 UNGA, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living [Mission to Lebanon and Israel (7–14 September 2006)]*, Philip Alston, Paul Hant, Walter Kälin, Miloon Kothari, A/HRC/2/7, 2 October 2006, para. 18, 99.
243 HRC, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, Maina Kiai, A/HRC/29/25, 28 April 2015, para. 25, also para. 18.

244 UNGA, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, Agnes Callamard, A/HRC/35/32, 6 June 2017, para. 100; see also UNGA, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Christof Heyns, A/68/382, 13 September 2013, para. 42 ff.; ECOSOC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Philip Alston, E/CN.4/2005/7, 22 December 2004, para. 79.
245 UNGA, *Report of the SR on Extrajudicial, Summary or Arbitrary Executions*, 2013, para. 47 ff.
246 UNGA, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Christof Heyns, A/HRC/26/36, 1 April 2014, para. 137, see also para. 133 ff.
247 HRC, *Report of the Special Rapporteur on the Right to Privacy*, Joseph A. Cannataci, A/HRC/34/60, 24 February 2017, para. 29.
248 OHCHR, *The Right to Privacy in the Digital Age*, A/HRC/39/29, 3 August 2018, para. 9; see also OHCHR, *The Right to Privacy in the Digital Age*, A/HRC/27/37, 30 June 2014, para. 34 f.
249 OHCHR, *Right to Privacy in the Digital Age*, 2018, para. 9.
250 Ibid., para. 25.
251 UNGA, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Right to Life and the Use of Force by Private Security Providers in Law Enforcement Contexts*, Christof Heyns, A/HRC/32/39, 6 May 2016, para. 65, 124, 126.
252 CCPR, *Concluding Observations Republic of Korea*, CCPR/C/KOR/CO/4, 3 December 2015, para. 10 f.; CCPR, *Concluding Observations Germany*, CCPR/C/DEU/CO/6, 12 November 2012, para. 16.
253 CCPR, *Concluding Observations Canada*, CCPR/C/CAN/CO/6, 13 August 2015, para. 6; cf. Joseph & Dipnall, *Scope of Application*, 125 f. On the topic of TNCs, Section 4.5.3.
254 For example, HRC, *Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem*, Resolution, A/HRC/RES/34/30, 11 April 2017; HRC, *The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations*, Resolution, A/HRC/RES/S-2/1, 13 November 2006. However, these resolutions are typically not adopted unanimously.
255 Joseph & Dipnall, *Scope of Application*, 125.
256 Some argue that during the drafting process, France repeatedly aimed at deleting the criterion 'territory' but was unsuccessful in doing so, Dennis & Surena, *Application of the ICCPR*, 727; Dennis, *Non-Application*, 474 ff., 481; for a similar argument cf. Zilli, Aldo S., 'Approaching the Extraterritoriality Debate: The Human Rights Committee, the US and the ICCPR', *Santa Clara Journal of International Law*, 9/2 (2011), 399–421, 411 ff., 417.
257 Noll, *Seeking Asylum*, 557 ff., 563 f.
258 Zilli, *Extraterritoriality Debate*, 417 f.; Dennis & Surena, *Application of the ICCPR*, 727 ff.; Dennis, *Non-Application*, 481. Cf. the similar argument brought forward with regard to the ECHR, Section 4.5.1.
259 Dennis & Surena, *Application of the ICCPR*, 721 ff.; Dennis, *Non-Application*, 465; Zilli, *Extraterritoriality Debate*, 415 f.
260 Tomuschat, Christian, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003), 110; cf. Tomuschat, *Human Rights, 3rd edn*, 101.

261 Tomuschat, *Human Rights, 3rd edn*, 98. See also CCPR, *López Burgos*, Appendix (Individual Opinion Tomuschat).
262 For example, Chenwi, Lilian & Bulto, Takele Soboka, 'Extraterritoriality in the African Regional Human Rights System from a Comparative Perspective', in Chenwi, Lilian & Bulto, Takele Soboka (eds.), *Extraterritorial Human Rights Obligations from an African Perspective* (Cambridge: Intersentia, 2018), 13–62, 44 ff.; Gibney, *International Human Rights Law*, 103 ff.; Da Costa, *Extraterritorial Application*, 45 ff.; Milanović, *Extraterritorial Application*, 222 ff.; Wilde, *Civil and Political Rights*, 641; Gondek, *Reach of Human Rights*, 137, 374.
263 CCPR, *Concluding Observations Turkey*, CCPR/C/TUR/CO/1, 13 November 2012, para. 5.
264 CCPR, *Concluding Observations United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/6, 30 July 2008, para. 14.
265 CCPR, *Concluding Observations Malta*, CCPR/C/MLT/CO/2, 21 November 2014, para. 17.
266 CCPR, *Concluding Observations USA*, CCPR/C/USA/CO/4, 23 April 2014, para. 4; see also CCPR, *CO USA*, 1995, para. 284; CCPR, *Concluding Observations USA*, CCPR/C/USA/CO/3, 15 September 2006, para. 10.
267 CCPR, *CO USA*, 2014, para. 9, 21 f.
268 CCPR, *The Right to Life (Art. 6)*, Draft General Comment 36 on ICCPR [revised], 2017, www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf, para. 66, also para. 26.
269 Austria, *Comments of Austria*, General Discussion on Draft General Comment 36 on ICCPR, 2017, www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Austria.doc, 2.
270 Norway, *Submission by the Norwegian Government*, General Discussion on Draft General Comment 36 on ICCPR, 2017, www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Norway.docx, 4 f.
271 The Netherlands, *Comments of the Netherlands*, General Discussion on Draft General Comment 36 on ICCPR, 2017, www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/KingdomofNetherlands.docx, para. 29, emphases added.
272 France, *Commentaires du Gouvernement français*, General Discussion on Draft General Comment 36 on ICCPR, 2017, www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/France.docx, para. 37.
273 Canada, *Comments by the Government of Canada*, General Discussion on Draft General Comment 36 on ICCPR, 2017, www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Canada.docx, para. 7.
274 USA, *Observations of the United States of America*, General Discussion on Draft General Comment 36 on ICCPR, 2017, www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx, para. 15, footnote omitted, also para. 13.
275 CCPR, *GC 36 ICCPR*, 2018, para. 63, references omitted, emphases added. See also Section 10.2.3.
276 Ibid., para. 63.
277 On these criteria, Section 10.2.3.
278 France, *Observations de la France présentées en vertu de l'article 40, paragraphe 5, du Pacte*, Comments on GC 36 ICCPR, 14 June 2019, www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Observations_France_apres.pdf, para. 18.

279 CCPR, *A.S. and Others v. Malta*, CCPR/C/128/D/3043/2017, para. 6.7.
280 See also Milanović, Marko, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations', *EJIL: Talk!*, 16 March 2021, www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/.
281 CCPR, *A.S. and Others v. Italy*, CCPR/C/128/D/3042/2017, para. 7.7.
282 Ibid., para. 7.8.
283 CCPR, *A.S. v. Italy*, Annex I, Joint Opinion by Shany, Heyns, Pazartzis (dissenting). See also Section 10.2.4.
284 Cf., e.g., Wilde, *Socioeconomic Rights*; Gibney, *International Human Rights Law*, 96 ff.; various contributions in Langford et al. (eds.), *Global Justice*; Marks, Kylie Anne, 'How International Human Rights Law Evolves: The Rise of States' Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights', *Journal européen des droits de l'homme*, 2 (2014), 173–204; Coomans & Künnemann (eds.), *Cases and Concepts*; De Schutter et al., *Commentary to Maastricht Principles*; *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 28 September 2011, https://www.etoconsortium.org/en/the-maastricht-principles/; Gibney, Mark & Skogly, Sigrun I. (eds.), *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010); Craven, Matthew, 'The Violence of Dispossession: Extra-Territoriality and Economic, Social and Cultural Rights', in Baderin, Mashood & McCorquodale, Robert (eds.), *Economic Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007), 71–88; various contributions in Salomon, Margot E.; Tostensen, Arne & Vandenhole, Wouter (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Antwerp/Oxford: Intersentia, 2007); Salomon, Margot E., *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007); Vandenhole, Wouter, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy', *Nordic Journal of International Law*, 76/1 (2007), 73–100; Skogly, *Beyond National Borders*.
285 Joseph & Dipnall, *Scope of Application*, 127; Coomans, Fons, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Coomans, Fons & Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004), 183–199, 186 ff.
286 Section 4.3.1.
287 Langford; Coomans & Gómez Isa, *Extraterritorial Duties*, 101.
288 ICJ, *Wall (Advisory Opinion)*, para. 112; CESCR, *Concluding Observations Israel*, E/C.12/1/Add.90, 26 June 2003, para. 15, 31.
289 CESCR, *CO Israel*, 2003, para. 31, see also para. 15; also CESCR, *CO Israel*, 1998, para. 8.
290 ICJ, *Wall (Advisory Opinion)*, para. 112.
291 For example, CESCR, *Concluding Observations Israel*, E/C.12/ISR/CO/4, 12 November 2019, para. 8 f.; CESCR, *Concluding Observations Israel*, E/C.12/ISR/CO/3, 16 December 2011, para. 8. Israel had partly accepted responsibility for securing ICESCR rights in the Occupied Territories *for Israeli settlers*. Like the CCPR, the CESCR also rejected Israel's argument that IHRL is generally

inapplicable in situations of armed conflict, which shall exclusively be regulated by IHL as *lex specialis*, CESCR, *CO Israel*, 2003, para. 15, 31.

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293 CESCR, *International Technical Assistance Measures (Art. 22)*, General Comment 2 on ICESCR, E/1990/23, 2 February 1990.

294 CESCR, *The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, General Comment 8 on ICESCR, E/C.12/1997/8, 12 December 1997, para. 7 ff.

295 CESCR, *The Right to Adequate Food (Art. 11)*, General Comment 12 on ICESCR, E/C.12/1999/5, 12 May 1999, para. 36.

296 CESCR, *The Right to the Highest Attainable Standard of Health (Art. 12)*, General Comment 14 on ICESCR, E/C.12/2000/4, 11 August 2000, para. 39.

297 CESCR, *GC 15 ICESCR*, 2003, para. 33.

298 CESCR, *The Right to Social Security (Art. 9)*, General Comment 19 on ICESCR, E/C.12/GC/19, 4 February 2008, para. 54.

299 CESCR, *Right to Just and Favourable Conditions of Work (Art. 7)*, General Comment 23 on ICESCR, E/C.12/GC/23, 27 April 2016, para. 70.

300 CESCR, *The Nature of States Parties' Obligations (Art.2, Para. 1)*, General Comment 3 on ICESCR, E/1991/23, 14 December 1990 para. 14, emphasis added, see also para. 13; cf. also CESCR, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, Statement Adopted by the CESCR, E/C.12/2001/10, 10 May 2001, para. 16 f.

301 Joseph & Dipnall, *Scope of Application*, 127; Gibney, *International Human Rights Law*, 96 ff.; Vandenhole, Wouter, 'Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward', *European Journal of Human Rights*, 8/5 (2013), 804–835, 816 f.

302 CESCR, *Concluding Observations France*, E/C.12/FRA/CO/4, 13 July 2016, para. 8.

303 CESCR, *Concluding Observations Switzerland*, E/C.12/CHE/CO/2-3, 26 November 2010, para. 25.

304 CESCR, *CO France*, 2016, para. 7.

305 See also Langford; Coomans & Gómez Isa, *Extraterritorial Duties*, 110 f.

306 CESCR, *GC 15 ICESCR*, 2003, para. 38; CESCR, *GC 14 ICESCR*, 2000, para. 38 ff.; CESCR, *GC 12 ICESCR*, 1999, para. 35.

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308 HRC, *Report of the Special Rapporteur on the Right to Food [The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food: Moving from Charity to Obligation]*, Olivier De Schutter, A/HRC/10/5, 11 February 2009, para. 9; see also HRC, *Report of the Special Rapporteur on the Right to Food [Access to Justice and the Right to Food: The Way Forward]*, Hilal Elver, A/HRC/28/65, 12 January 2014, para. 38, 41 ff., 47.

309 HRC, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, John H. Knox, A/HRC/25/35, 30 December 2013, para. 62 ff.

310 For an overview, Deva & Bilchitz (eds.), *Building a Treaty*; Kaufmann, Christine et al., 'Extraterritorialität im Bereich Wirtschaft und Menschenrechte: Extraterritoriale Rechtsanwendung und Gerichtsbarkeit in der

Schweiz bei Menschenrechtsverletzungen durch transnationale Unternehmen', Schweizerisches Kompetenzzentrum für Menschenrechte (2016), www.skmr.ch/cms/upload/pdf/160815_SKMR_Studie_Extraterritorialitaet.pdf.

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312 CESCR, *State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, General Comment 24 on ICESCR, E/C.12/GC/24, 10 August 2017, para. 26 f.

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317 Norway, *Submission of the Norwegian Government*, General Discussion on Draft General Comment 24 on ICESCR, 2017, www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/Norway.pdf, 3.

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322 Ibid., principles 13 ff.

323 Ibid., principle 9(a)–(c), emphases added.

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328 Ibid., para. 21, 23.

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337 All citations in ibid., para. 99 ff., emphases added.
338 Ibid., para. 98, original emphasis.
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347 CAT, *Implementation of Article 14 by States Parties*, General Comment 3 on CAT, CAT/C/GC/3, 13 December 2012, para. 22; CAT, *GC 2 CAT*, 2008, para. 7, 16; CAT, *Sonko v. Spain*, 25 November 2011, CAT/C/47/D/368/2008, para. 10.3; CAT, *J.H.A. (on behalf of P.K. et al.) v. Spain*, 10 November 2008, CAT/C/41/D/323/2007, para. 8.2; CAT, *Concluding Observations USA*, CAT/C/USA/CO/2, 25 July 2006, para. 15 ff. For a discussion, Gibney, *International Human Rights Law*, 106 ff.; Cole, *Outsourcing Torture*, 285 ff.; Nowak, Manfred, 'Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective', in Gibney, Mark & Skogly, Sigrun I. (eds.), *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010), 11–29.
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349 ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007 (26 February 2007), 43, para. 183; ICJ, *Armed Activities Congo*, para. 216 f.; ICJ, *Wall (Advisory Opinion)*, para. 113; see also CRC, *State Obligations Regarding the Impact of the Business Sector on Children's Rights*, General Comment 16 on CRC, CRC/C/GC/16, 17 April 2013, para. 43; ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) [Provisional Measures]*, ICJ Reports 2008 (15 October 2008), 353, para. 109.

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357 Cf., e.g., Ben-Naftali & Shany, *Living in Denial*, 87.

358 Hampson, *Scope*, 158 ff.

359 Langford; Coomans & Gómez Isa, *Extraterritorial Duties*, 68 ff. Note that their focus is on economic, social, and cultural rights.

360 Skogly & Gibney, *Transnational Human Rights Obligations*, 789.

361 Cf., e.g., UK, *Submission on Draft GC 24 ICESCR*, 2017, 2.

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363 For example, Canada, *Comments on Draft GC 36 ICCPR*, 2017, para. 7; Colombia, *Contribuciones del Estado colombiano*, General Discussion on Draft General Comment 24 on State Obligations under ICESCR in the Context of

Business Activities, 2017, www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/Colombia.pdf, 13 ff.; Norway, *Submission on Draft GC 24 ICESCR*, 2017, 3; The Netherlands, *Comments on Draft GC 36 ICCPR*, 2017, para. 29.

364 For example, Norway, *Submission on Draft GC 24 ICESCR*, 2017, 3; The Netherlands, *Comments on Draft GC 36 ICCPR*, 2017, para. 29.

365 As an illustrative example, compare the position of Norway in its national Policy Document ("Human rights lie at the heart of Norway's international efforts" and "Norway's development policy is guided by international human rights principles") with its comments on ICESCR (in which it emphasizes the "primarily territorial" nature of the Covenant, which, like other human rights treaties, shall only apply extraterritorially "under certain exceptional circumstances"), Norway, *Norway's International Efforts to Promote the Rights of Persons with Disabilities*, www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/efforts_disabilities.pdf>, 2, 4; Norway, *Submission on Draft GC 24 ICESCR*, 2017, 3.

366 Heupel, Monika, 'How Do States Perceive Extraterritorial Human Rights Obligations? Insights from the Universal Periodic Review', *Human Rights Quarterly*, 40/3 (2018), 521–546, 534 ff.

367 Ibid., 546.

368 Heupel discusses the phenomenon of states aiming at embarrassing the state under review, but assesses that it does not influence her findings, Heupel, *How Do States Perceive Extraterritorial Human Rights Obligations?*, 534, 543. However, even if not with the aim of *embarrassing* other states, some states are still much more willing to accept extraterritorial obligations of *other* states than their own.

369 Ministry of Defence & Fallon, *Government to Protect Armed Forces*; cf. also Ekins & Marionneau, *Judicialisation of War*; Morgan; Ekins & Verdirame, *Derogation*. See also Section 4.5.1.

370 Vandenhole, *Taking Stock*, 834.

371 CCPR, *López Burgos*, para. 12.3; cf. also ECtHR, *Issa*, para. 71.

372 Milanović, *Extraterritorial Application*, 119, 173, 206 ff.

373 Kanalan, Ibrahim, 'Extraterritorial State Obligations beyond the Concept of Jurisdiction', *German Law Journal*, 19/1 (2018), 43–63, 52 f.

374 ECtHR, *Al-Skeini*, para. 137 f.; ECtHR, *Hirsi Jamaa*, para. 74; ECtHR, *Jaloud*, para. 123.

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376 Cf. Wilde, *World Court*; skeptically Dennis, *Non-Application*, 459 f.

377 For example, Dennis, *Non-Application*, 459.

5 Conclusion

The Legal Status of Extraterritorial Human Rights Obligations

This first part has outlined the legal status of extraterritorial human rights obligations in selected legal systems at domestic, supranational, and international levels. First, while constitutional systems like that of Switzerland (at least in wording) and Germany (also in practice) appear to partly recognize the extraterritorial applicability of fundamental rights, the US Constitution and the way it has been interpreted imply a different approach. Inspired by the idea of the Constitution as a social compact, citizenship and territoriality play a critical role in determining the circle of human beings who get to enjoy its protection—a role that has been noticeable up until today. It is accompanied by the doctrine that the political branches, the legislative and especially the executive one, must be essentially unconstrained in matters of foreign policy, where the Constitution—and with it the judiciary—shall not set limits to their room for maneuver. Though this foundational mindset has been qualified in a handful of cases, recent jurisprudence reflects a comeback of the territorial view, a 'new territorialism'.

Second, the structure, content, and functioning of fundamental rights protection within the EU reflect an approach sympathetic to extraterritorial duties: In principle, the applicability of the CFR does not depend on location—it applies whenever EU law applies, i.e., to EU institutions (whenever they act) and to Member States (whenever they implement EU law). Arguably, its acting as a promoter of global goods might reflect the fact that the EU regards itself as being subject to (moral and legal) fundamental rights obligations to outsiders. In this logic, territorial extension of its own norms could be seen as one means to comply with these obligations. However, it is not always clear whether the motives behind such territorial extension primarily lie in fundamental rights concerns. Besides, recent case law has suggested a fallback to restricting the CFR's reach at least with respect to sensitive policy areas like migration.

Third, in IHRL, though tendencies to widen the scope of extraterritorial protection are discernible, they do not yet stand on firm ground. First, the concept of jurisdiction, central as it is for the applicability of a considerable part of IHRL, remains ambiguous, having been interpreted in a variety of different ways. Second, when it comes to providing and consistently applying coherent

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principles, the records of human rights bodies are mixed. Not only do different bodies come to different conclusions, but the same body also often struggles with upholding consistency in its approach to extraterritorial applicability. Third, while some bodies, especially within the UN, are generally supportive of extraterritorial obligations, the jurisprudence of the ECtHR illustrates how the essentially territorial understanding of jurisdiction and the still exceptional status of extraterritorial application are still manifest. As a result, while the analysis of case law has detected some red threads, the question of when treaties apply in situations abroad is still "keenly debated and far from settled".[1]

The overall conclusions we can draw from the above comments are twofold.[2] First, the status of extraterritorial obligations has not yet been sufficiently clarified: Finding coherent legal approaches to the issue appears to be a challenge for a wide variety of different judicial and quasi-judicial bodies. The interpretation of extraterritorial applicability appears susceptible to conflations and jurisprudential approaches go back and forth between widening and restricting the reach of fundamental rights protection when it comes to individuals abroad, depending on specific contexts, the rights in question and, sometimes, on political opportuneness. Reliantly protecting those individuals by way of such legal regimes thus remains an unresolved task.

While this is epitomized by the controversies around the concept of jurisdiction in IHRL—on which the focus of the present analysis lies—it is also well discernible at domestic and supranational levels. At the domestic level, whereas one could argue that this at least partly results from the very idea behind constitutions, which *per se* intend to delimit insiders from outsiders, alternative constitutional approaches have proved otherwise.[3] In the supranational European regime, which, in its very core, aims to transcend borders and to transnationalize not only legal systems but also foundational values, territorially restrictive conceptions of fundamental rights protection would come as a surprise. Arguably, this is also true for IHRL, which is founded on the idea that the protection of human beings cannot end at state borders. While the regimes of protection at all these levels (more or less explicitly) rely on the idea of universal human rights, all of them struggle with developing and consistently applying principled approaches that would ensure that people can also be shielded against infringements by foreign states. Ultimately, this points to a significant lacuna: How to approach the extraterritorial applicability of fundamental rights remains an unresolved legal problem that deserves further attention—and that can only benefit from foundational work on the normative idea that stands behind the concept of universal human rights in the first place.

As a second conclusion, the above summary indicates that the territorial mindset continues to play a critical role—at all three levels, though to varying degrees. It is persistent in case law, even if in a somewhat qualified version. In scholarship, while many tend to accept some degree of extraterritorial human rights obligations, others adhere to the notions of sovereignty and territoriality as the basic pillars upon which domestic and international law rest—including human rights law.[4] In a similar vein, scholars have advised

governments to resist extraterritorial application by derogating from treaties when acting abroad, by objecting to jurisprudence, by refusing to comply with relevant judgments, by ultimately considering withdrawal from the treaty, and by reinforcing the general opposition to extraterritorial obligations in order to hinder them from becoming part of customary law.[5] Others promote a qualified version of the territorial view, allowing, seemingly as a concession to contemporary reality, for a highly limited degree of extraterritorial duties to be recognized in practice and merely in extraordinary circumstances, for example when states hold someone in custody abroad.[6] Such views are still foundationally based on the idea that there is *something particularly valuable* about the relationship between the state and its territorial residents that does not hold in relation to other individuals—and that this something should be the critical factor in assigning human rights obligation.

In addition, in recent years, there has been an increasingly influential current of academic critique on the general normative idea of universal human rights as well as of their implementation in IHRL. In *Eric Posner*'s words, "human rights were never as universal as people hoped, and the belief that they could be forced upon countries as a matter of international law was shot through with misguided assumptions from the very beginning".[7] These kinds of critique obviously have implications on the status of extraterritorial obligations: If there should be no *universal* human rights in the first place, then there is no point in discussing human rights obligations of states to individuals all over the globe. Moreover, many states and other stakeholders still hold that the human rights straitjacket must be looser beyond their own borders, that it cannot be as tight as it is at home. They are (still or anew) convinced that concern should primarily or exclusively be addressed to insiders and that obligations to those abroad remain rare exceptions that need substantial justification. The continuing prevalence and indeed rise of politicians across the world employing the rhetoric of ideologies like patriotism, nationalism, or supremacism—from Hungary and Italy to Brazil, the UK, and the US (to name just a few)—does not spark hope that states' acceptance of the idea of owing something to individuals abroad is on the rise. Coupled with the trend of states employing extraterritorial measures in order to benefit from 'legal black holes' (e.g., via extraordinary renditions or detention centers abroad), support for the idea might as well collapse.

In sum, the territorial paradigm, which after the Second World War meant to expand the protective scope and a modern alternative to assigning rights on the basis of citizenship, is not yet overcome. In today's world, where borders are becoming increasingly porous, this paradigm reveals its ambiguous character: While it entails more inclusiveness as to the protection of insiders, it comes with the exclusion of outsiders.

In the course of developing coherent principles to guide extraterritorial applicability—the unresolved task indicated by the first main conclusion of this first part of the book—this second conclusion, i.e., the persistence of the territorial paradigm, needs to be addressed. It does not merely spring from

prudential considerations of efficiency and effectiveness but has more foundational underpinnings, and its persistence suggests that one should not be too quick in putting these aside. Against this background, it is essential to address the normative foundation of arguments that reject the extraterritorial applicability of universal human rights. If the importance of a thorough analysis and critique of such counterarguments is overlooked, the status, acceptance, and implementation of extraterritorial duties might become even more challenging than it appeared at first sight. The ability to refute these arguments is essential if the idea of extraterritorial obligations shall be standing on firm ground both in courtrooms and beyond.

Again, the question is not whether jurisdiction is the right or wrong threshold for the applicability of human rights protection but whether territory serves as a plausible interpretation of this threshold—in other words, whether jurisdiction is in its core a territorial concept. To answer this question, the book's next part addresses the theoretical underpinnings behind the territorial mindset and dives into the normative idea behind human rights. On this basis, the third part will attend to the unresolved legal problem of how to conceptualize the standard of jurisdiction so as to accord with this normative idea.

Notes

1 Park, Ian, 'Extraterritorial Application of International Human Rights Law', in *The Right to Life in Armed Conflict* (Oxford: Oxford University Press, 2018), 65–100, 99; Langford et al., *Introduction*, 24 ff.; Vandenhole, *Taking Stock*, 817, 833.
2 Müller, *Justifying*, 54 f.
3 Cf. Sections 2.2 and 2.3.
4 Cf. Ryngaert, Cedric, *Unilateral Jurisdiction and Global Values* (The Hague: Eleven, 2015), 59 ff.
5 Morgan; Ekins & Verdirame, *Derogation*, para. 11 ff., 24 ff.; Ekins & Marionneau, *Judicialisation of War*.
6 Tomuschat, *Human Rights, 3rd edn*, 98.
7 Posner, Eric, 'The Case against Human Rights', *The Guardian*, 4 December 2014.

Part II

Ethical Framework and Normative Justifiability

6 Setting the Scene

6.1 Intention, Structure, and Scope of the Analysis

The overall objective of this book is to provide a justificatory theory of extraterritorial obligations in human rights law. While the preceding part outlined their status in positive law and at different legal levels, this part takes a philosophical perspective and addresses their *normative* justifiability. The goal is thus not merely to establish that extraterritorial obligations flow from the correct interpretation of international human rights treaties. Rather, the inquiry focuses on an earlier stage by asking: Are there *moral* reasons for acknowledging states' extraterritorial human rights obligations at both the moral and the legal level?

The fact that a major part of contemporary IHRL takes the form of interstate treaties may give the impression that human rights amount to mere voluntary standards, to which states may choose to commit or not. As will be argued in what follows, this is not the case: Human rights regimes rely on the idea of human rights as a normative concern that entails a claim to universal respect.[1] This normative concern must be considered in the interpretation of legal obligations enshrined in positive law—to the extent that positive law allows for it—and as a yardstick *de lege ferenda*. Thus, if moral reasons for extraterritorial human rights obligations can be identified, then there is a strong case for interpreting applicability thresholds like jurisdiction in ways that take seriously this claim for universal respect that human rights involve, and for identifying potential gaps that existing legal norms leave.[2] Ultimately, this also denies the idea that states can only be bound by international norms they have explicitly consented to.

The aim of the current second part of the book is thus to link the previously outlined legal debate to the relevant philosophical debates. As explained above, analyzing the question from a perspective of legal philosophy and elaborating a corresponding justificatory normative theory appear crucial in light of the fact that extraterritorial human rights obligations still face many obstacles that hinder them from becoming widely accepted in political reality and coherently framed in legal practice.[3] Clearly, the foundational questions that extraterritorial applicability sparks need to be addressed not only from a legal but also from a philosophical angle: Criticism must be evaluated, the arguments for

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and against be assessed, and elements of justification be developed. If they are to be recognized, extraterritorial obligations need to be firmly grounded in a convincing justificatory normative theory.

Accordingly, Chapter 7 reconstructs and critically discusses approaches that would *reject* the legitimacy of extraterritorial human rights duties and rather limit them to state territories. After the current chapter's introductory remarks, it systematically discusses potential arguments behind a 'territorial view', arising from six clusters of theoretical frameworks. Based on this critical analysis, Chapter 8 then explicates the reasons that speak *for* applying human rights abroad and pours them into a justificatory theory of extraterritorial human rights obligations. Hence, the analysis starts by criticizing potential objections and then continues by identifying, in a positive way, elements of a justificatory theory. The book's third part will then translate these findings to the level of legal interpretation and implementation.

Before diving into the normative analysis, some preliminary remarks on underlying general substantial presumptions are called for. First, while human rights form an important part of global justice, it is not assumed that a theory of human rights already constitutes a *comprehensive* account of global justice: Such an account is not developed here, as it would need to include a wide variety of additional elements besides human rights.[4] Neither is it assumed that in the framework of international law, all justice concerns are to be addressed through the lens and instruments of IHRL. Other areas of international law also contribute to global justice—IHRL is a key but still only one among many necessary roles to be filled for the cast to be full.

Second, the following discussion alludes to values, goods, rights, and obligations, and it should first spell out its premises on the relations among these concepts. It starts from the assumption that values form the basis of norms like rights and obligations: Values explain the identification of certain things as 'goods'. These values and goods generate reasons for norms—for present purposes, reasons for individual human rights and corresponding obligations of duty-bearers. While values and goods constitute the axiological part of the considerations, rights and obligations are the outcome of translating axiology into action-guiding deontic norms.[5]

As the discussion concerns human rights obligations of *states*, the third presumption holds that states are moral agents, and that the moral norms they are subject to can be determined by reference to the moral norms that apply to the individuals composing it: The former are *grounded in* the latter.[6] Yet, 'grounded in' does not equal 'congruent'. States base their legitimacy on being collective projects of justice that are precisely intended to realize individual and collective goods.[7] They are moral agents, but not intrinsic ones. Their moral agency derives from them being instruments in the service of the actual ultimate unit of concern: the moral agents inhabiting them, i.e., human individuals. Furthermore, they are institutions with unique kinds and degrees of power and resources. Due to these characteristics and due to their purpose, which lies in protecting and fostering the individual, the moral

principles applicable to states might turn out to be much more stringent than those regulating individual conduct.[8]

Fourth, it is assumed that there are good reasons why moral and legal human rights obligations should apply to states—but this focus on states does not imply that they are necessarily the only human rights duty-bearers. It also does not entail any evaluative position on the legitimacy and appropriateness of dividing the globe into territorially delimited states, which serves as a mere empirical background condition.[9]

Fifth, states often do not *de facto* turn a blind eye to the misery of people abroad: Many states refrain from violating rights abroad and often contribute to the fulfillment of basic needs of distant outsiders. The focus of the present analysis lies, however, on the denial of *obligations* to act accordingly. If one is not obliged to do X, one may still be permitted to do X. The point is, however, that if one is not obliged to do X, one is also permitted *not to do X*—and it is this implication that is relevant to the present discussion. In other words, if 'territorial views' assert that states have no human rights obligations toward outsiders, they concomitantly assert that the state is *permitted to disregard* their human rights situation. They would still be allowed *not* to disregard their human rights (i.e., to *de facto* consider human rights of outsiders by refraining from torturing them or by providing development aid), but this would then be a benevolent and morally supererogatory act of charity rather than a way of discharging stringent duties. To ensure consistency with deontic categories, if one denies states' obligation to respect, protect, or fulfill human rights of outsiders, one must hold that it is morally irrelevant or supererogatory if states *de facto* consider human rights of outsiders or not.

Sixth, as mentioned, it is not assumed that there is a categorical difference as to the moral idea behind fundamental constitutional rights and international human rights: Ultimately, both are grounded in the same idea of protecting human beings. While legally, they are implemented at different levels and identify different duty-bearers, they *morally* express the same basic idea.[10] While the focus of the analysis is on IHRL, the territorial mindset often figures more prominently and less covertly in domestic and supranational contexts. They thus often provide illustrative examples of the origins of territorial conceptions as discussed in what follows.

6.2 The Philosophical Debate Behind

6.2.1 Human Rights and Global Justice

The question of what we owe to those outside, i.e., to those who are not members of our community, has occupied legal and political philosophy for centuries.[11] The philosophical debates on *human rights* and on *global justice* had long remained, to a certain degree, separate debates[12]—though of course notable exceptions that merge the two into a holistic approach have always existed. Today, human rights form one of the main normative foci of global

perspectives in political and legal theory.[13] Still, conspicuously, the issue of global justice and the question of duties to outsiders have rarely been addressed through the lens of *extraterritorial obligations* of *states* in *human rights law*.[14]

On the one hand, while a number of *global justice* theories centrally refer to the role of human rights, many have remained focused on questions of *distributive justice*, which have not been regarded through a human rights lens or, if so, implied a limitation to only one category of human rights, leaving civil and political rights mostly out of the picture.[15] Within the global justice debate, the role of distance and proximity to outsiders has extensively been discussed but often with a focus on *positive duties* to provide aid and assistance (prominently so in the debate on global poverty) and not on violations by third states committed abroad. Most importantly, accounts focusing on moral considerations have often paid little attention to how they translate into institutional solutions within the legal domain in general and into *international law* in particular.[16] Many of these analyses restrict themselves to the discussion of *individuals*' duties and do not directly address the question of how to transpose these duties to state obligations in international law. Among the exceptions are the important debate that has evolved around the issue of *R2P* or newer debates such as the one on 'common interests', opening up interesting ways of merging philosophical and legal perspectives on the normative underpinnings of international law.[17] On the other hand, *human rights theories* have intensely addressed the justificatory philosophical underpinning of universal human rights but have (generally speaking and not without notable exceptions) tended to put less emphasis on the role of human rights *obligations* in *law*, on *foundational applicability conditions* of human rights *law*, and on duties vis-à-vis those who are *not* part of the state's population.

Moreover, theoretical approaches in a variety of disciplines have mirrored the "current revival of a spell-breaking, realist perspective on the international human rights discourse",[18] questioning the normative foundation, the historical evolution, or the practical implementation behind the concept of universal human rights.[19] Partially, this has been inspired by revisionist work on human rights history. Concurrently to this increase in critiques on the general idea of a universalist conception of human rights, recent years have also shown "a 'skeptical turn' in global justice theory".[20] Often, such skepticism on cosmopolitan and universalist approaches is manifested by the ascription of foundational significance to the distinctions between the domestic and the global sphere as well as between individuals that belong to a state's community and those that do not.

In sum, while philosophical debates on human rights and global justice theory provide pertinent analyses, they leave a partial gap with respect to the basic question addressed here: Are there moral reasons behind human rights *law* to recognize *extraterritorial* obligations of *states*? The aim is to contribute to filling this lacuna and to do so, as a first step, by outlining and evaluating potential reconstructions of arguments that would embrace a *territorial limitation* of obligations. The existence—and rising influence—of statist and

nationalist accounts, skeptical of the idea, reach, and weight of human rights, cannot be ignored. Confronting such counterarguments is critical, first, given the attacks directed at the ideas of cosmopolitanism and universalism—not only in academia but also in politics, as political leaders' continual resort to membership claims and states' emphasis on the inviolability of their sovereignty illustrate. Second, to a certain extent and by certain voices, a territorial conception of human rights is still portrayed as the more legitimate starting point. If one wants to challenge this territorial paradigm, one needs to explicate the arguments on which it could be based. To recall, the idea is that only if potential and actual counterarguments have been addressed in a systematic manner is one in a position to positively identify elements of a justificatory approach to the issue, i.e., to provide a justification for extraterritorial human rights obligations.

6.2.2 Statism

6.2.2.1 Statism versus Cosmopolitanism

Roughly speaking, two main opposite strains have emerged in the debate on global justice: *Statism* versus *Cosmopolitanism*.[21] While both serve as umbrella terms for a variety of accounts, one of the central tasks uniting them is to develop solutions to the perceived tension between duties to compatriots on the one hand and duties to all humanity on the other.[22]

In brief and abstracted from the variety existing between different accounts, the *cosmopolitan* starting point is generally characterized by a series of basic assumptions: the individual is the ultimate unit of moral concern; all human individuals universally are of equal moral worth, which implies a claim to their equal moral concern; there are general moral rights and duties that are not conditional upon an underlying relation or limited to communities but appertain to all members of humanity; and there is no morally foundational distinction between the domestic and the global sphere. In the eyes of the cosmopolitan, we owe equal concern not only to co-citizens but to all individuals globally—and this shall also be reflected at the level of institutions. What cosmopolitanism centrally involves is the idea of human rights, which have become one of its main normative currencies. From a cosmopolitan point of view, the burden of proof essentially lies with those who would want to *restrict* duties to territories.[23]

Statists hold the opposite view, namely that it is cosmopolitans, arguing for *expanding* duties beyond borders, who bear the burden of proof. Applied to the point at issue, their main difference thus lies in their radically contrary assumptions as to where the legitimate point of departure lies: While cosmopolitans hold that duties should be conceived of as of a universal nature, statists assert that they are *per se* limited to a state's community.

In what follows, six variants of statism-inspired theories will be discussed, which could all be employed as starting points for arguments against

extraterritorial human rights obligations. While statist theories vary considerably as to their premises and foci, what unites the approaches analyzed below is their emphasis on the significance of the *political community* of the state as well as of membership of it, citizenship, or nationality. Emphasizing the primacy of the political community and the domestic realm, statist accounts typically attach particular significance to a strong notion of external territorial *state sovereignty*, functioning as the main shield of the political community. This explains why such accounts have also been subsumed under the label of "*[s]overeigntiste territorialism*".[24]

By virtue of their central status, the discussion starts with a brief explanation of the role of these two concepts—the *political community* and *state sovereignty*—in statist theories.

6.2.2.2 The Significance of the Political Community

Even though they differ as to the reasons for this attribution, the statist arguments discussed below all generally agree on attributing significance to the political community. Thereby, the analysis will not focus on territory as a geographical notion but rather on *territory as the basis and boundary of the political community*. Accordingly, the territoriality of the state and its community will be presupposed. This, of course, constitutes a simplification in light of the existence of disputed territories, occupation situations, and the like. For present purposes, it still appears a legitimate assumption. Hence, in what follows, the term 'political community' will allude to the territorially delimited community of a territorial state, encapsulating all the individuals located on territory, be it citizens or noncitizens, lawful or unlawful residents, and it will be used interchangeably with 'territorial community'.

Prima facie, this is in tension with approaches that differentiate communities along the lines of shared *citizenship* or *nationality*, which can be both narrower (by not including everyone on territory) and more expansive (by including citizens or conationals living abroad) than territorial communities. However, first, the discussion targets arguments *for rejecting human rights obligations to individuals abroad*—regardless of whether these arguments hold that states owe such obligations to everyone on the territory or only to some of them (e.g., only to citizens or conationals). What is at stake here is *not* the legitimacy of creating different categories of people *within* territories. What is at stake is only the claim that those beyond the state's territorial borders are not among the addressees of its human rights duties: It states that if you are within its borders, the state *may* owe you *some* human rights obligations. If you are outside, it does *not owe you any* such obligations.[25]

Second, arguments tend to overlap. On the one hand, this arises from a mere terminological issue, as many authors use 'national' interchangeably with 'civic' or 'statist', i.e., to denote the political, territorial community of the state.[26] On the other hand, in attributing unique significance to political

communities, many authors lean on national and cultural aspects: Arguments for tying states' duties to insiders often evoke considerations of nationalist bonds, where the nation is portrayed as a culturally, often ethnically and linguistically united and homogeneous group with a common historical background, which serves as the main source of self-identification.[27]

Third, citizenship-based or nationalist approaches could accept some extraterritorial obligations, namely if these are directed at compatriots living abroad. Yet, it would then not be human rights law (which applies independently of citizenship) that forms the basis of such duties—and thus it misses the crux of the issue discussed here. Moreover, nationalist accounts regularly deny strong legal duties to conationals abroad, be it for substantial reasons (because those who left the community also ceded their membership) or for practical reasons (acknowledging the simple fact that the territorial division of the globe serves as the pillar of dividing legal responsibilities). Even domestic legal regimes with strong nationalist underpinnings regularly accept that protection should appertain to *every person on a state's territory*, not only to citizens on its territory and not necessarily to citizens abroad.[28]

It is informative to explicate this substantial but implicit qualification, as the analysis will discuss statist views that focus on *membership of the political community* and less on arguments that allude to a foundationally geographical conception of the community or to the value of the spatial and geographical concepts of territory. For the discussion at hand, it appears legitimate to abstract from the nuances between narrower and broader conceptions of statism.

6.2.2.3 The Significance of State Sovereignty

Statist views typically assign a central role to *state sovereignty*. Irrespective of the varying normative backgrounds of statist accounts, sovereignty typically serves as one of the main legal shields that statist accounts can invoke for rejecting the expansion of human rights obligations beyond the political community, based on the claim that beyond the domestic context, states are not subject to the same restrictions as within.[29]

It is important to point out that the statist arguments discussed below do not generally have to embrace an absolute conception of sovereignty and thoroughly oppose the idea of fundamental rights. Some of them readily accept curbs on states' conduct in the form of such rights—but only or primarily do so with respect to *internal* sovereignty. What is crucial is that they would need to reject that *external* sovereignty is also directly abridged by similar normative constraints, i.e., by rights of *individual nonmembers*. Thus, when opposing extraterritorial obligations, statists must draw a categorical distinction between the domestic sphere and internal sovereignty on the one hand and the international sphere and external sovereignty on the other. When they refer to sovereignty as the legal shield to oppose extraterritorial duties, they

thus hold a particular and "very austere"[30] conception of external state sovereignty: *Inter alia*, it entails the state's freedom from direct transnational duties to nonmembers of the community—*at least in the field of human rights.*

Translated to the legal question at issue here, the applicability of human rights law, statists could argue either (i) that it is *territory* that shall function as the decisive applicability threshold and replace *jurisdiction*, or (ii) that *jurisdiction* shall remain in place but that it must be interpreted as an *essentially territorial* notion, thus in a strongly restrictive special sense. Yet, it is not the difference between positions (i) and (ii) but rather their *common premise* that is of concern here: Both positions contend that whatever reason X it is that subjects states to fundamental rights obligations (if there is any), it springs from the relation between a state and the members of its political community, i.e., it lies within (and is limited to) the sphere of internal sovereignty. Statist accounts differ, however, as to the *reason X*, i.e., the feature that makes the relation between the state and its members categorically different to its relation to outsiders.

6.2.2.4 Six Statist Approaches

In what follows, six statist approaches to this reason and their potential application to the question of extraterritorial human rights obligations will be discussed.[31] *International Relations Realism* claims that moral considerations have no place in international relations, that states are—for good reasons—essentially governed by self-interest and that references to universal principles like human rights only serve as hypocritical instruments to conceal other motives. *Communitarian* approaches—at least the strict variants discussed here—regard morality as essentially being of a relational nature and as exclusively applying within the context of communities, such as the political one, by virtue of their being the main sources of human self-identification. Similarly, conceptions of *special obligations* emphasize the significance of legitimate partiality and assert that, next to general duties owed to everyone, there are special duties to prioritize comembers over outsiders. *Neo-republican* approaches highlight the prior role of self-determination of political communities and the significance of being free from subjugation to the will of external entities. The *institutionalist* asserts that justice obligations only pertain to the framework of coercive institutions in which people participate as coauthors—and, in the contemporary world, these justice-relevant institutional frameworks are limited to those of the domestic state. What typically stands behind is the idea of a *social compact*, through which individuals have consented to subjecting themselves to a state authority in exchange for its protection of individual goods, and which is restricted to members of the compact. Lastly, relevant *relativist* theories maintain that the values behind IHRL do not reflect universal but only relatively valid values embraced by Western liberalism, so that equipping these norms with a claim to universality amounts to a parochialist, imperialistic enterprise.

Many of these background theories are interrelated. As a result, separately discussing them will require the disentanglement of debates that are, in practice, often intertwined. For example, many other statist approaches share the empirical assumptions of International Relations Realism discussed in Chapter 7. Likewise, institutionalist arguments are closely related to neorepublican concerns for collective self-determination. Relativist approaches can equally have sympathies for or actively support communitarian theses. Thus, the lines between the approaches are naturally blurry and in academic reality, scholars often endorse mixed versions. Still, classifying these various normative background theories will help identify and analyze the specific arguments behind them, allowing for carefully differentiating nuances that may seem negligible at first sight but make a difference in relation to the question of extraterritorial obligations. On the level of terminology, this interrelatedness is illustrated by the fact that other labels have been used to describe these approaches and it is obvious that terminological choices can itself be a matter of debate—but one that is not relevant for the substance of the discussion at issue.

Methodologically, the discussion starts from an exegetical analysis of arguments structured along these six schools of thought, but it does not purport to give a comprehensive presentation of the overall theories themselves. It will then reconstruct their potential arguments against extraterritorial obligations, which eventually contain a combination of lines of reasonings by different authors. This methodological approach allows for a broad consideration of claims without constraining itself to one particular theoretical strand or author. It entails, however, that the aim is not to comprehensively discuss the theories themselves but to focus on reconstructing the way in which they could potentially argue against extraterritorial human rights obligations. It is important to stress that many of the accounts discussed have not specifically been linked to the topic of extraterritorial obligations. The aim is to analyze which arguments could motivate a rejection of extraterritorial obligations and from which theoretical framework their premises spring. Evidently, not all authors associated with the respective traditions would endorse the conclusion of the final arguments, simply because they would not want to accept some of the other premises. For example, moderate exponents of statist theories could agree that a state also has some limited, instrumentally motivated, and subsidiary duties to outsiders. But, first, these moderate versions are often motivated by the same kinds of skepticism of expanding duties beyond borders on which more extreme versions rely—and it is the grounds of this foundational skepticism that is of interest here. Second, considering current attempts to delimit the reach and weight of human rights, it does not appear superfluous but rather essential to reply to those who go beyond such a moderate view and who would generally restrict human rights duties to states' territories. In this sense, the following discussion aims at analyzing which premises such latter conceptions would need to be based upon—and whether their arguments withstand philosophical scrutiny.

Notes

1 Buchanan, Allen, *The Heart of Human Rights* (New York: Oxford University Press, 2013), 96; Lafont, *International Protection of Human Rights*, 440 f.
2 On the relation between morality and law in the domain of human rights, Section 1.3.1; Chapter 9.
3 Cf. Skogly, *Extraterritoriality*, 86 ff.
4 On human rights and global justice theory, also Section 6.2.
5 Mahlmann, *Elemente*, 89.
6 Cf. Habermas, *Legitimationsprobleme einer verfassten Weltgesellschaft*, 416 f.
7 Cassee, Andreas, *Globale Bewegungsfreiheit: Ein philosophisches Plädoyer für offene Grenzen* (Berlin: Suhrkamp, 2016), 60 f.; Peters, Anne, 'Foreign Relations Law and Global Constitutionalism', *AJIL Unbound*, 111 (2017), 331–335, 332.
8 Section 8.2.
9 Section 1.3.1.
10 On this basic idea, Section 8.1.
11 Early authors writing on the topic include—among many others—e.g., Grotius, *The Rights of War and Peace*, book II, chap. XXV; Hutcheson, Francis, *An Inquiry into the Original of Our Ideas of Beauty and Virtue*, Leidhold, Wolfgang (ed.), [1725], revised edn (Indianapolis: Liberty Fund, 2008), treatise II, sec. V, para. 1; Kant, *Zum Ewigen Frieden*; De Vattel, *Law of Nations*, prelim. For an overview, Glanville, *Responsibility to Protect*.
12 Kreide, Regina, 'Menschenrechte und globale Gerechtigkeit', in Pollmann, Arnd & Lohmann, Georg (eds.), *Menschenrechte. Ein interdisziplinäres Handbuch* (Stuttgart/Weimar: J.B. Metzler, 2012), 383–389, 383, 388.
13 Held, David, 'Cosmopolitanism in the Face of Gridlock in Global Governance', in Beardsworth, Richard; Brown, Garrett Wallace & Shapcott, Richard (eds.), *The State and Cosmopolitan Responsibilities* (Oxford: Oxford University Press, 2019), 243–258, 244.
14 Cf. Langford et al., *Introduction*, 30 f.; Ratner, *World Public Order*, 207; Besson, *Bearers*, 246 f. Important exceptions include legal scholars that provide foundational theoretical analyses and approaches, cf. Ratner, *World Public Order*; Besson, *Extraterritoriality of the ECHR*; Kumm, *Integrated Conception*; Langford & Darrow, *Moral Theory*; Milanović, *Extraterritorial Application*; Besson, *Bearers*; Ryngaert, *Unilateral Jurisdiction and Global Values*; Gibney, *International Human Rights Law*; Altwicker, *Transnationalizing Rights*; Montero, Julio, 'International Human Rights Obligations within the States System: The Avoidance Account', *The Journal of Political Philosophy*, 25/4 (2017), 19–39; Raible, Lea, *Human Rights Unbound: A Theory of Extraterritoriality* (Oxford: Oxford University Press, 2020); and the various contributions in Beardsworth, Richard; Brown, Garrett Wallace & Shapcott, Richard (eds.), *The State and Cosmopolitan Responsibilities* (Oxford: Oxford University Press, 2019). For a slightly different assessment, De Schutter, *International Human Rights Law*, 187 ff.
15 Also Kreide, *Menschenrechte*, 385; Besson, *Bearers*, 246 f.
16 Ratner, *World Public Order*, 207; Vandenhole, *Taking Stock*, 806; Langford & Darrow, *Moral Theory*, 440 ff.; Besson, *Bearers*, 246 f.; Benhabib, Seyla, *Kosmopolitismus ohne Illusionen: Menschenrechte in unruhigen Zeiten* (Berlin: Suhrkamp, 2016), 130 f.

17 The debate on 'common interests' is not limited to the area of human rights. For an overview, Benvenisti, Eyal & Nolte, Georg (eds.), *Community Interests across International Law* (Oxford: Oxford University Press, 2018); Benedek, Wolfgang et al. (eds.), *The Common Interest in International Law*, Law and Cosmopolitan Values, 5 (Cambridge: Intersentia, 2014).

18 Diggelmann, Oliver & Altwicker, Tilmann, 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 68/3 (2008), 623–650, 628, footnote omitted.

19 For example, Brown, Chris, 'Universal Human Rights: A Critique', *The International Journal of Human Rights*, 1/2 (1997), 41–65; Luhmann, Niklas, *Die Gesellschaft der Gesellschaft* (Frankfurt a.M.: Suhrkamp, 1998), 1075 f.; Taylor, Charles, 'Conditions of an Unforced Consensus on Human Rights', in Bauer, Joanne R. & Bell, Daniel A. (eds.), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999), 124–146; Ignatieff, Michael, *Human Rights as Politics and Idolatry*, Gutmann, Amy (ed.) (Princeton/Oxford: Princeton University Press, 2001); Pinker, Steven, *The Blank Slate: The Modern Denial of Human Nature* (London: Penguin Books, 2002); Osyatinski, Wiktor, *Human Rights and Their Limits* (Cambridge: Cambridge University Press, 2009); Moyn, *Last Utopia*; Greene, Joshua, *Moral Tribes: Emotion, Reason, and the Gap between Us and Them* (New York: Penguin Books, 2013); Held, Virginia, 'Care and Human Rights', in Cruft, Rowan; Liao, S. Matthew & Renzo, Massimo (eds.), *Philosophical Foundations of Human Rights* (New York: Oxford University Press, 2015), 624–641.

20 De Schutter, Helder & Tinnevelt, Ronald, 'David Miller's Theory of Global Justice: A Brief Overview', *Critical Review of International Social and Political Philosophy*, 11/4 (2008), 369–381, 373. On this topic, also Beardsworth; Brown & Shapcott, *Introduction*, 2 ff.

21 The terminology varies. Statism has also been termed "*[s]overeigntiste territorialism*", Benhabib, Seyla, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty', *The American Political Science Review*, 103/4 (2009), 691–704, 692 f.; or subsumed under the umbrella term 'communitarianism', Caney, Simon, *Justice beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2006), 15 f.

22 Beardsworth; Brown & Shapcott, *Introduction*, 2, 4.

23 Pogge, Thomas W., 'Cosmopolitanism and Sovereignty', *Ethics*, 103/1 (1992), 48–75, 48 f.; Tan, *Justice*, 6 ff., 46; Caney, *Justice*, 3f., 265; Ratner, *World Public Order*, 201 ff.; Benhabib, *Kosmopolitismus ohne Illusionen*, 33. The list is not exhaustive. Cosmopolitanism is a wide label under which a variety of approaches—and thus further basic assumptions—could be subsumed, including on global democracy or global constitutionalism.

24 Benhabib, *Claiming Rights*, 692 f., who further divides this position into "nationalist" and "democratic" subvariants.

25 Cf. the different conceptions of membership in *Verdugo*, which all seem to share the idea of limiting constitutional obligations to the political community: *US v. Verdugo-Urquidez*, 260, 271 ff.; 279 (Stevens J., concurring); 283 f. (Brennan J., dissenting); cf. Section 2.3.

26 For example, Huntington, Samuel P., 'Dead Souls: The Denationalization of the American Elite', *The National Interest*, 1 March 2004, https://nationalinterest.org/article/dead-souls-the-denationalization-of-the-american-elite-620; Sandel, Michael J., *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2009), 208 ff.
27 Nationalist approaches are predominantly referred to in the context of communitarian arguments, Section 7.2.
28 For example, for the US, Section 2.3 and Neuman, *Whose Constitution?*, 911.
29 Shapcott, *Cosmopolitan Extraterritoriality*, 105. On the concept of state sovereignty, Section 4.2. Here, the discussion focuses on the role state sovereignty plays in statist accounts. For a summarized version of the current section, Müller, *Security Measures*, 107 ff.
30 Beardsworth; Brown & Shapcott, *Introduction*, 5.
31 See also Müller, *Justifying*, 55 ff.

7 Statist Objections to Extraterritorial Human Rights Obligations

7.1 International Relations Realism: The Nature of the International Sphere

7.1.1 The Realist Objection

7.1.1.1 International Relations Realism and Its Main Claims

A theoretical framework in which the concept of state sovereignty has played a particularly important role is that of *International Relations Realism (IR Realism)*.[1] According to this view, relations among states are, first and foremost, regulated by *power*, and states themselves are motivated exclusively by *national self-interest*. The entire range of their conduct, including potential decisions to participate in cooperative enterprises like international law, is explicable by reference to their seeking to further their own goals. The value of international law, if there is any, is of merely instrumental and contingent nature, depending on its contribution to the realization of states' interests. Interests of others, whether of other states or outside individuals, are not taken into account in deliberation if they are not relevant to a state's own goals.

Realism has historical roots in authors such as *Niccolò Machiavelli*, *Thomas Hobbes*, *Georg Wilhelm Friedrich Hegel*, or *Carl Schmitt*—though the theories these authors put forward already vary to a considerable degree. *Machiavelli* followed an imperialist approach and rejected the idea of morality *per se*, which would actually have adverse effects in light of the immoral nature of the world. States are inherently self-interested, and their only aims are to survive and gain power. The prince is not constrained by any natural or divine law: He is only obliged to follow the *raison d'état*.[2]

The *Hobbesian* assumption is that the international sphere is in a state of nature, war-prone, anarchical, and insecure, where states' exclusive pursuit of self-interest means a constant threat to each other's security. In such a state of war (analogous to that of individuals prior to their submission to the sovereign state), justice and morality simply do not apply: "The notions of Right and Wrong, Justice and Injustice have there no place".[3] As a result, sovereign states can legitimately harm innocent outsiders in the pursuit of

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their interests. Hobbes does not foresee the possibility of overcoming this international state of war via the conclusion of a contract (contrary to what he proposed for the individual sphere).[4]

In *Hegel*'s view, the state, in which the objective spirit manifests itself, is prior to any individual interests and the individual's status thoroughly depends on her membership of the state. Criticizing Kant's idea of establishing perpetual peace through a federation of states, Hegel regards states as independent, self-satisfying, autonomous, and international law as fully based on their sovereign will: Morality and politics are to be separated; the idea of rights based on humanity is irrelevant to the political realm of the state.[5]

Schmitt presents a decisionist theory of absolute sovereignty, in which the foundation of the legal order itself springs from the decision of the sovereign as the superior authority, which is itself unbound by any higher-ranking norms. He defends the primacy of the political decision over law, objecting to what he perceives as the liberal tendency to minimize the weight of the former within an impersonal legal system.[6] Conspicuous for present purposes are the Schmittean claim that at the core of the political realm lies "the distinction between *friend* and *enemy*",[7] which again flows from the decision of the sovereign, and his related critique of universalism and cosmopolitanism. In Schmitt's view, the appeal to universalist principles of humanity, such as human rights, is fraudulent and hypocritical: It serves as a mere facade for states' imperialist undertakings and their striving for power, for promoting their own ideologies under the guise of universal morality. The imposition of such principles would put an end to the Westphalian order of sovereign equality and lead to total war.[8]

The above claims have inspired authors such as *Hans Morgenthau*, *E.H. Carr*, or *Kenneth Waltz*, who refined them into what has become known as *IR Realism*. Broadly, its core theses can be summarized as follows. First, IR Realism is based on a strict demarcation between the domestic and the international realm, to which different principles apply. Second, it is a state-centric view that regards the state as the primary actor in the international sphere. Third, it holds the empirical assumption that this international sphere is in a 'state of war': Absent a global sovereign, this sphere is anarchic and conflict-prone, conditioned by constant fear and threat. Fourth, in this system of self-help, power functions as the main currency. Fifth, the concept of national interest is of outstanding significance for IR Realism: The pursuit and defense of a state's self-interest amount to its prior good, taking priority over all other concerns. National interest is defined in terms of power and security: Given the nature of the international realm, states' main aim is to survive and defend themselves against threats to their security—and it is power that serves as the main instrument to achieve this end. Sixth, moral considerations do not pertain to the political sphere and to relations among states. While some realists are skeptical of the concept of morality in general and hold a highly pessimistic view about human nature and motivation, others acknowledge the applicability of morality to individual relations or within the domestic context, while

still others are agnostic on the issue. Still, what they all agree on is that whether or not moral considerations apply in other respects, they do not apply to the anarchic sphere of international politics. Seventh, and related to the previous point, realist views typically allude to rationality, prudence, and effectiveness as the central evaluative standards in the transnational political world, rejecting idealism in political and legal theorizing and emphasizing criteria like factuality and feasibility.[9]

Based on these core premises, realists can make a variety of additional claims. Some of them endorse a descriptive account, resting with realism's *empirical* premises that it is a mere fact that the domain of international relations is one of decentralized and power-governed anarchy, where the self-interested nature of states and the primary role of power function as the *de facto* "single, decisive cause", "the final or ultimate arbiter".[10] This "realism proper"[11] rejects the analytical relevance of normative considerations such as human rights. It tends to be associated with contemporary versions of *neorealism*.[12] In recent years, the realist background idea has been revived by a variety of scholars, mostly motivated by the intention to provide an alternative to mainstream liberalism and idealism in political and legal theory.[13]

What is interesting for the question at issue are accounts (whether classical or contemporary) that combine the empirical theses with *normative* premises.[14] In a *prudential* version, their argument typically asserts that, in light of the empirical situation, it is *rational* for states to act upon self-interest instead of principles of morality and justice, to strive for power and domination, to uphold a latent threat of force, or even to resort to the actual use of force: Only then will they be able to ensure their security and survival. Moral concerns can be included in the national interest insofar as this contributes to realizing the latter, but they do not have independent motivational force—at least not when it comes to states' external relations.[15] Moreover, so it is claimed, only if states possess solid territorial sovereignty are they in a position to contribute to a stable, well-ordered international environment and thus to secure peace and evade war. In that sense, expanding obligations beyond borders would lead to complete chaos, to a "breakdown of international society", as *Hedley Bull* argues.[16]

In some versions of the theory, normative realist claims also exhibit a *moral* dimension. Such "fiduciary realism"[17] typically argues for a moral requirement to override ordinary morality in international relations, especially in extraordinary circumstances. Acting upon self-interest then itself becomes the overriding moral obligation, which requires the state to disregard any concerns about other states and the individuals inhabiting them. In this moral variant, states employ rational means to reach a moral goal, based on a supreme moral duty of the state to further its own interests. While realism is generally not known for such moral reasoning and some realists plainly reject its validity, many theories still (often implicitly) draw on both prudential and moral claims and blur the line between these modes of reasoning. This tendency to "moralize(…) prudence"[18] is exemplified in Morgenthau's approach, which

describes prudence as the "supreme *virtue* in politics" and orients itself at "the *moral principle* of national survival".[19]

7.1.1.2 A Realist Argument Against Extraterritorial Human Rights Obligations

Realist theories can involve a mixture of empirical, prudential, and moral claims. In all these dimensions, they have implications for the idea and the reach of universal human rights.

First, some realists counter the idealistic illusion that the impact of power-seeking hegemonic states could be mitigated by cooperative international systems, treaties, or institutions. They neutrally assert that normative approaches to international relations in general and the morality-based idea of human rights in particular amount to "wishful and potentially unscientific 'idealistic' thinking inconsonant with the historically unchanging laws of international anarchy": Accordingly, one should also not be naïve about the effects that IHRL will have—at most, these effects will be of a highly limited scope.[20]

As a first transposition to the issue of extraterritorial obligations, realists could thus object that trying to equip IHRL with applicability beyond borders is an idealistic and *de facto* highly unrealistic undertaking. The respect for human rights does not have intrinsic weight in states' deliberation: Rather, it depends on its compliance with national self-interest. Only if respect for human rights extraterritorially happened to coincide with any interest the state has, would it be motivated to act accordingly. This, however, is highly contingent. Interpreting international legal norms as giving rise to extraterritorial obligations will simply not result in an adaptation of states' foreign policies—expectations to the contrary are simply naïve.[21]

Second, the realist opposition to the idea behind IHRL forms part of its rejection of political moralism, liberalism, and idealism. From this angle, morality simply has no place in international politics and law, and political and legal theory should be concerned with reality rather than morality.[22] To extraterritorial obligations, a realist might thus object that whether or not legal fundamental rights, based on moral concerns, are to be applied within the domestic context, they cannot be expanded beyond states' borders. There is no ground for pouring moral ideas—like fundamental rights—into international law. The realist might even grant that states can *voluntarily* consent to conclude international agreements, possibly even such that compel them to respect human rights domestically if this happens to help them advance their interests—but she would assert that by its very nature, international law is a thoroughly contingent and rationality-based enterprise, which cannot contain genuinely morality-based restrictions, be it to other states or to outside individuals. In this view, the idea of duties to outsiders arising from their status as carriers of moral human rights would contradict the amoral system of limited cooperation among power-seeking states. From a state perspective, outside

individuals simply cannot have independent moral status and, accordingly, international law cannot generate any obligations to them.[23]

Third, based on this foundational thesis of separating law and politics from morality, realists object to what they perceive as the ubiquitous hypocrisy of states concealing self-interest while pretending to act in the name of the common good: Theories of universal morality are mere propaganda means of dominant nations that attempt to impose their own standards onto others, likely resulting in "a war to conquer the world".[24] Alluding to universal human rights then necessarily becomes a facade too, boiling down to a way of covering a state's power-driven pursuit of own interests and, thereby, amounting to an imperialistic undertaking: "The actual politics of human rights on the international scene is the politics of giving powerful countries the moral justification to do what they'd like to do anyway under the specious cover of enforcing human rights".[25] Often, such versions of the realist theory are linked to either a skeptic position on morality *per se* or a relativist view on the nature of moral principles, perceiving them as necessarily contextually and historically conditioned.[26]

Recently, this strand of critique has come with a revival of interest in the theory of Schmitt. Various political theorists claim to detect important aspects of his diagnosis in today's global order, too. They are drawn to the Schmittean way of "unmasking the real power politics that so frequently hide behind the rhetoric of law, legalism, and individual or human rights",[27] of emphasizing that the label of human rights is prone to be abused by powerful states in order to cover power politics and the imperialist pursuit of self-interests. Rejecting the efforts of the human rights movement as moralist and imperialistic, they regard liberal and cosmopolitan perspectives as contributing to the maintenance of hypocrite structures of imperialism, hiding ideologies behind the delusive facade of universal human rights:

> [T]he abstract subject celebrated as the carrier of universal human rights is but a fabrication of the disciplinary techniques of Western 'governmentality' whose only reality lies in the imposition on social relations of a particular structure of domination.[28]

Following this logic, subjecting states to human rights obligations not only at home but also abroad would multiply the imperialistic potentials of human rights law: Its extraterritorial application would open up countless additional ways for states to impose their own standards all over the world. This argument is less concerned with denying concrete duties of the state abroad (which could, arguably, also have less means to act in such imperialistic manners if it was constrained by extraterritorial duties). Rather, it opposes the general idea of a system that would subject state A, when acting on the territory of another sovereign state B, to a set of norms that do not stem from B's own sovereign decisions but from external sources—sources that emanate from powerful states' ideologies. Even if in principle, the extraterritorial applicability of human

rights law would put constraints on every state's conduct, it would still mean that hegemonic states' standards govern the ways in which individuals in other states are treated. Potentially, extraterritorial applicability would also lead to an increase in aggressive interventions into other states' internal affairs under the guise of enforcing human rights, threatening the stability of the current Westphalian order of sovereign equality and non-intervention.[29]

Fourth, drawing on the 'fiduciary realist' argument, it is not only the case that states *do* act on their self-interest, but also that this *ought* to be the case: In order to be *truly moral*, states *should* pursue national self-interest when it comes to foreign policy and global affairs and *should* not be guided by ostensible principles of universal or 'ordinary' morality. Everything else would be a reckless "policy of national suicide".[30] In light of the insecure and power-dominated international sphere where the threat of war is constantly present, only the self-interest maxim is capable of ultimately guaranteeing the achievement of the overall aim of states, namely their survival and the protection of their members. Thus, the normative status of other potential principles of action are thoroughly contingent on their coincidence with the overriding moral principle of pursuing national interest. In other words, it becomes a *moral* requirement to accept that there are no other independent moral principles that guide relations among states. States are free to enter and obey contracts with other states (if this contributes to their national interests) but have no free-standing duties to the external world that hold independent of their explicit consent. Accordingly, direct human rights obligations to outside individuals would illegitimately constrain a state's prerogative to pursue national interest. Eventually, "a liberal democracy is more like IBM than Médecins sans Frontières".[31]

7.1.1.3 Realism Applied: The Doctrines of Exceptionalism and Exemptionalism

Most prominently in the US context, realist presumptions have been combined with a conviction in the unique value of their own nation, a "belief in the exceptional freedom and goodness of the American people".[32] This evolved into the doctrine of *exceptionalism*, mostly used as a political doctrine and still dominating US political landscape, which arguably constitutes an applied version of realism that is particularly pertinent to the question at issue. It draws upon realist premises on the power-dominated international sphere, where it is rational for states to pursue national interest. Exceptionalism emphasizes national security as the prior good, exemplified in political strategies like the 'Bush Doctrine' pursued by the administration of former US President *George W. Bush* in the framework of its 'War on Terror', where "*freedom from fear*" is the ultimate priority, taking precedence over other goods.[33] Deviating from the neorealist descriptive analysis, the exceptionalist doctrine combines this realist background picture with a neoconservative morally loaded conception of national values and interests, which are regarded as morally ideal

and superior to those of others, resulting in what has been called "higher realism".[34]

When it comes to human rights, exceptionalism is ambiguous. On the one hand, it portrays the effort to bring justice and human rights enjoyment to the rest of the world as an essential part of US foreign policy, emanating from its role as the global superpower. Due to its outstanding qualities and its unique power position, so the argument goes, the US is not only permitted but may even be obliged to impose its own model onto others. Yet, though it may avail itself of human rights language in explaining its foreign policy, this should be undertaken at as little cost as possible and without entailing any actual constraints on its pursuit of self-interest and power. It does not arise from an intrinsic commitment: The promotion of human rights abroad serves as a mere tool to pursue the state's own agenda and thus as conditional on being conducive to it, in line with the realist view.[35]

On the other hand, exceptionalism is often combined with *exemptionalism*, i.e., the position that the US, by virtue of its power position as well as its exceptionality and moral superiority, is exempt from rules that other states may have to comply with, most importantly from rules of international law.[36] Thus, the exceptionalism doctrine claims that the US is the leading force in bringing human rights fulfillment to the world while, at the same time, it itself shall not be subject to international norms like IHRL—especially not in its conduct abroad.

It is important to note that, though the US–American context provides a paradigmatic example, the exceptionalist viewpoint is not constrained to it. Historically, it was also mirrored in British colonialism and its appeal to "the White Man's Burden", in French colonialism and its portrayal as a "civilizing mission", or in the Chilean dictator *Augusto Pinochet* regarding himself as the "savior of Christian civilization".[37] Today, one can detect similar lines of reasoning used by various regimes with an expansive approach to foreign policy. Some authors suggest that the past few years have even witnessed the rise of a 'European Exceptionalism', given the increasingly influential role of the EU over foreign relations of its Member States, international relations, and multilateral institutions in general, combined with its alleged tendency to extend the reach of its own norms by portraying them as based on universal values.[38] However, given the motives, the kind and the extent of European efforts, this diagnosis does not fully convince.

In more extreme versions, the doctrine of exceptionalism has evolved into ideas of hierarchical nationalism or supremacism. Though today, there is hardly any serious philosophical argument for such positions, it is important to be aware that the exceptionalism doctrine can share substantial premises with these often blatantly racist and discriminatory positions.

The realist paradigm and its exceptionalist–exemptionalist derivative become apparent in the actions of US political branches, for example, when the US supports the introduction of a new human rights treaty but eventually does not itself ratify it or ratifies it with substantial reservations, or

when it expresses its conviction of not feeling bound by IHRL norms and by corresponding authoritative interpretations, such as those that assert the extraterritorial applicability of norms.[39] It is also mirrored in its strict demarcation between territory and non-territory for the application of fundamental rights, most paradigmatically in the measures it adopted in the course of the 'War on Terror'. Measures such as extraterritorial detention facilities and extraordinary renditions precisely aim at introducing "extralegal 'rights-free' zones and individuals (…), by separating those places and people to whom America must accord rights from those it may treat effectively as human beings without human rights"[40] and are typically combined with denying that other states have similar prerogatives to act accordingly.

Exceptionalist and exemptionalist conceptions have also implicitly manifested themselves in US case law. The Supreme Court has repeatedly rejected the idea of domestic constitutional rights placing any legitimate limits on executive power in foreign affairs, as exemplified in the case of *Verdugo-Urquidez*: US agents can conduct searches and seizures abroad without any constitutional restrictions applying. Here, the extraterritorial reach of constitutional protection was rejected, *inter alia*, by virtue of the illegitimate constraints it would mean to the pursuit of national self-interest, "significantly disrupt[ing] the ability of the political branches to respond to foreign situations involving our national interest".[41] This would be irresponsible given that "[s]ituations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force".[42] In a concurring opinion, applying constitutional constraints abroad was described as being not only irresponsible but also "impracticable" and "anomalous"[43]—formulations that developed into an influential dictum, exemplifying the exemptionalist perspective. And, if domestically protected constitutional rights cannot place any legitimate limits on foreign policy, this would even less be the case for IHRL norms.

Typically, this emphasis on the necessity of far-reaching executive powers in foreign affairs is accompanied by a skeptical view on judicial review, as exemplified by *Eric Posner*. Posner criticizes the *Boumediene* judgment, in which application of the US Constitution to Guantánamo Bay was affirmed, as "one more step in the march of judicial cosmopolitanism—the emerging view that the interests of nonresident aliens deserve constitutional protection secured by judicial review".[44] In his eyes, while it would be legitimate if the *executive* came to the conclusion that it was in its citizens' self-interest to grant constitutional protection to outsiders and while the executive would be entitled to conclude agreements to that end, it is not in the competences of the judiciary to grant such protection. Accordingly, he advises the Court to return to a moral compass grounded in what the citizenry holds dear—which is certainly not guided by cosmopolitan principles—and to abandon the *Boumediene*-track of protecting those who do not belong to this citizenry.[45]

In various later cases, the Supreme Court appeared to follow this advice, returning to an implicit doctrine of exceptionalism. As to statutory law, it held that "[t]he presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches".[46] Arguably, this recent dictum reflects the Court's perception of a changing global political order, of the competitive nature of the international realm with its constant, ubiquitous threat of conflict (thus of what realists claim to be an empirical fact), in which the political branches must be able to act freely in order to defend the exceptional nature of US power, values, and interests.[47]

For many, the belief of certain states in their own exceptional superiority confirms the pertinence of the Schmittean analysis to contemporary global politics. Arguably, the realist analysis of how things *de facto* work is rendered plausible by virtue of its ability to capture today's world and its methods of treating people: the 'War on Terror' and the means deployed in the treatment of terrorist suspects, reflecting the sheer idea behind bringing people to other territories in order to escape the reach of law, or the increasingly scrupulous and expanding use of new technologies to haunt, surveil, or control people wherever they are. In the words of some commentators, the 'internationalist' political era ensuing the Cold War, in which human rights and humanitarianism were celebrated as common principles of humanity, has come to an end. Theories that promote extraterritorial obligations hence lack practical plausibility: Contrary to realist approaches, they cannot explain why the world is still such a cruel place, why the evolution of IHRL has not made a difference on the ground. As some conclude, realism might be the only option left on the table: "Aspirations to bring harmony to the relationship between ethics and foreign policy have had their day, for now at least".[48]

This development directly concerns the question of extraterritorial applicability of human rights norms. As the above outline suggests, realist presumptions provide starting points for serious objections to it. If realism (or neorealism) reemerges as a dominant doctrine in academia and jurisprudence, and if its practical derivatives of exceptionalism and exemptionalism increasingly inform the political sphere, then the extension of human rights duties beyond borders will face fierce opposition. As mentioned, one necessary (though not by itself sufficient) step to overcoming these hurdles is to challenge the theoretical background underlying them.

7.1.2 Countering the Realist Objection

7.1.2.1 The Empirical Claim

First, realists claim that the introduction (or judicial bodies' recognition) of the extraterritorial applicability of human rights law, good-hearted as these efforts may be, would not have any practical effects: States would simply not

adapt their conduct and policies. *Prima facie*, this objection bears plausibility: Even after the establishment of legal human rights regimes, the world has not stopped to reveal its dark sides, filled with cruelties, ravaged warzones, and human suffering. Contrary to what these norms stipulate, human beings continue to be treated in horrible ways. Still, the realist approach is unconvincing from both an empirical and a normative perspective.

Empirically, it is just not true that states only act on self-interest and are merely driven by power and security concerns. To the contrary, states are ready to cooperate with each other beyond the pursuit of self-interest: The very phenomenon of international law and its comprehensive nature, regulating a wide array of aspects of global life, indicate that states can be genuinely willing to join forces and that they do take considerations beyond a narrow conception of their national interests into account.[49] Many states take human rights norms—including international ones—seriously, and they regularly comply with them even if this means a constraint on their margin of maneuver.

It is certainly true they do not *always* do so and that many states repeatedly show blatant disregard for human rights norms. Still, that does not justify the conclusion that human rights law is generally without effects: Not only is effectiveness a vague notion, especially in the context of human rights, in which "compliance (…) can take many different forms and degrees".[50] But also, it is more than likely that things would be even worse if there was no such body of law in the first place. The establishment of a legal human rights system, together with the corresponding human rights movement, has not been able to bring universal peace and justice to the world, but it has doubtlessly had some achievements: It has led to a unique universal awareness of what human beings have a basic right to; states now have to justify their behavior to the rest of the world; the international community can blame and shame perpetrators; and international bodies can adjudicate over claims of such violations. Thus, from an empirical point of view, the assumption that the recognition of extraterritorial obligations by judicial bodies, human rights practitioners, or academic scholarship will make *no difference at all* to state conduct is more than questionable.

That said, the realist analysis is not thoroughly impertinent: It points to important facets of the global landscape and the challenges they imply for the realization of morality-based principles. In that sense, elements of the realist analysis can be of relevance when it comes to practical considerations on the *level of implementation* of human rights law.[51]

Nonetheless, there is another and much more significant objection to the empirical realist rejection of extraterritorial duties. The implications drawn from the realist analysis contradict a foundational philosophical principle: The fact that a norm *is* not complied with or that a standard *de facto* has not been achieved does not imply that this *should* not be the case: There is a gap to bridge in moving from *Is* to *Ought*, from the empirical to the normative realm.[52] Even if it were completely true, the mere fact that states do not tend to take human rights seriously when acting abroad or in their design of policies

and measures with effects abroad would not by itself have any consequences on the normative status, i.e., the legitimacy of the extraterritorial application of human rights.

7.1.2.2 The Pertinence of Morality

The second realist objection targets the idea of pouring morality-based restrictions into international law: In the anarchic and confrontative international domain, there is no place for moral concerns, so the realist claim goes.

As a preliminary reply, it is simply not the case that the applicability of morality generally depends on there being a cooperative, centralized, harmonic, or non-confrontative setting.[53] Moral norms can also apply to spheres and situations that are rather disharmonic—indeed, it is often these settings in which the awareness of how important it is to comply with moral norms appears to make most of a difference. Furthermore, morality is not a voluntary undertaking from which one can opt out as one desires. If morality is the normative phenomenon it is generally supposed to be, then it applies whenever human-controlled actions have effects on other human beings, regardless of whether the agents involved welcome its regulating the matter. Thus, if realists want to deny the applicability of moral principles to the international arena, the easier way out for them would be to deny the validity of morality in general, i.e., to resort to moral skepticism—which they do not, since some themselves implicitly rely on moral principles. But if they do not resort to moral skepticism, they face the perplexing task of differentiating spheres of human-controlled actions, i.e., of explaining why morality should apply to some kinds of actions with effects on individuals (namely in the domestic or the private context) but not to others (namely in the transnational context).[54]

7.1.2.3 The Hypocrisy Critique

Third, realists warn that legal human rights norms serve as hypocritical means of covering up states' self-interests and whitewashing the imposition of their ideologies onto others—and an international system that generally recognizes extraterritorial obligations would multiply this imperialistic potential. To recall, the objection is not made from the perspective of the particular state that is subjected to extraterritorial duties (as a result of which it could have less means to act imperialistically) but rather targets the mere idea of having an international system that obliges agent A on the territory of state B to norms that do not have their source in the sovereign decisions of state B (but in interests of hegemonic states).

To begin with, this realist objection could be made to international law in general as a legal system that is negotiated by states and largely depends on their consent. In the specific context of human rights, the objection depends on the falseness of the universalist assumption: Only if it is indeed *false* that they reflect universal moral norms is it true that their universal legal implementation

provides means to illegitimately impose norms on others who do not share them. However, it is not least the almost universal acceptance of IHRL treaties that makes the universalist nature of these norms difficult to refute, as shall later be argued in more detail—most probably because there is something to it. Moreover, on closer inspection, the objection itself reflects a deeply *moral* appeal: It implicitly presumes that imposing own standards on others purely for self-interest is *wrong*. Yet, if it is generally wrong, then this is presumed to be a *universal moral principle*. Even Schmittean-inspired theories often implicitly or unconsciously avail themselves of precisely such moral reasoning: Their repudiation of what they perceive as the imperialist motive behind human rights itself relies on moral evaluation, namely on the principle that it is *wrong to impose standards on others* and to conceal states' pursuit of self-interest under the guise of human rights. These implications run counter not only to other realist premises but also to what was criticized in the first place, namely that there are no such universal principles. Thus, the realist objection involves serious internal contradictions.

Most importantly, the realist objection implicitly entails a call for respect of others. However, it is implausible that a general policy permitting states to *ignore* human rights abroad would amount to a more genuine form of respect than a general obligation to *comply* with them at home and abroad.[55] If one is genuinely concerned with respect of others and at the same time aims to oppose extraterritorial obligations, one would need to show how others are *adversely* affected by a global system that requires all state actions, regardless of location, to comply with human rights.

7.1.2.4 The Moral Realist Claim

The fourth objection by the 'moral realist' (prone to be combined with the exceptionalism doctrine) asserts that there *should* not be any morality-based constraints on states seeking to realize national interests, the pursuit of which is itself categorized as a *moral* requirement.

First, again, if morality exists as a normative phenomenon (as this realist objection must assume insofar as it posits a *moral* requirement to follow national interests), one cannot choose whether and in which contexts one is subject to it. Similarly, states are not genuinely free to choose whether and when human rights norms oblige them. Of course, IHRL is to a large part a treaty-based legal system. However, not only is it the case that most states have today consented to IHRL treaties but also, as preambles routinely assert, does the validity not have its origin in the adoption of the treaties: On the contrary, treaties are understood as legal recognitions of independently existing prelegal norms. Moreover, a considerable part of IHRL has evolved into customary international law, to which states are bound even if they have not *explicitly* consented.

Second, the concept of 'national interests' is at least vague: How is it defined, who is authorized to determine its content, and does it provide a

comprehensive basis to be considered the core good to which all motives behind state conduct can be reduced?[56] Not only this, states' interests are not necessarily, always, and essentially egoistic *self*-interests exclusively directed at and concerned with the welfare of its own state and its community. In principle, it is highly doubtful whether, why, and how the respect for human rights of outsiders (or the respect for moral norms in general) would necessarily run counter to national interests and threaten a state's survival. To the contrary, compliance with human rights (both territorially and extraterritorially) and national interests can overlap: First, human rights could amount to 'common interests' in international law, the substance of which is commonly shared, and their inclusion into states' interests could promote global justice, as the 'Second Image Argument' claims.[57] It might indeed benefit states if they act as promoters of cosmopolitan values, for example, by leading to a more stable and secure global landscape. When framed as a descriptive claim, realists can even sympathize with this idea.[58] Alternatively, it can be made as a normative statement, deeming it rational for states to include concerns for outsiders into their scheme of interests. Plausibly, this line of reasoning typically underlies constitutional norms that acknowledge obligations to extraterritorially located individuals, reflecting states' "enlightened self-interest".[59]

The 'Second Image Argument' is a strong instrumental argument against the moral realist, given the high empirical plausibility that states' extraterritorial compliance with human rights will contribute to the stability and strength of their own position in the global framework. Still, a weakness of the argument is its contingency: Only when the promotion of human rights indeed contributes to a state's domestic interests is the state motivated to act accordingly.

A third response to the moral realist draws on the intrinsic value of human rights and the tension that flows from combining, in an exceptionalist fashion, the realist appeal to the nonmoral nature of international relations with a morally loaded conception of domestic concerns. Because the moral realist denies the applicability of moral evaluation to the international sphere, it is unclear by what kind of evaluative standard she would justify assigning moral superiority to one specific state's interests over those of others, or how the US exceptionalist could prove the supremacy of the US Constitution and the foundational values behind it.

Similarly, if one recognizes the necessity of constraining *domestic* state action by constitutional means, by fundamental rights, and by checks and balances, how could this be reconciled with a realist view on the international scenery and with states' *unconstrained* latitude in *external* affairs?[60] Why should state action no longer be limited and why would different branches no longer need to mutually control each other when it comes to actions that have effects abroad? The foundational ideas of constitutionalism are based on the value of human beings and the need to protect their security, autonomy, liberty, and dignity. If in both cases of effects at home and abroad it is *individuals* who are affected, then it is inconsistent to adhere to constitutionalist principles in the

former but to not even minimally apply them in the latter context. A justificatory basis for such a categorical differentiation of domestic and extraterritorial contexts is not discernible.

Whether implicitly or explicitly, equipping the empirical realist analysis with a moral realist dimension, i.e., asserting a moral requirement for states to exclusively pursue national interests while rejecting morality-based norms of international law (including human rights obligations to those beyond territory), entails various internal contradictions.

However, the initial empirical realist premise can be combined with further normative premises, alluding to other categories of reasons for the position that states only owe human rights duties to insiders. The argumentative frameworks discussed in the subsequent sections sometimes avail themselves of such empirical realist claims. In their normative premises, however, they differ from the realist approach. Thus, they provide yet other attempts to reach the same conclusion, namely that human rights obligations shall be limited to territory.

7.2 Communitarianism: The Prior Status of Communities

7.2.1 The Communitarian Objection

The "sceptical turn"[61] in global justice theory has not only been detectable in the field of international relations theory but also, and importantly so, in political and legal philosophy in the narrower sense of the term. After a period within which cosmopolitan conceptions of morality and justice have been at the forefront of these academic fields, more and more authors today express skepticism about the idea of expanding obligations beyond the domestic arena and to the global sphere. Many of them have done so by pointing to the key significance of communities for the lives of individuals. This and the next section will analyze two variants of such community-based conceptions and the ways in which they can be employed as argumentative frameworks against extraterritorial human rights obligations.

7.2.1.1 The Idea of Moral Communitarianism

A conception that rejects the idea of expanding moral duties beyond borders on a very foundational level is that of *moral communitarianism*. According to strict or 'hard' communitarians, communities are prior to the individual: The status of the individual, including rights and duties, derive from her membership of the community and is thus subsidiary to that of the latter. Since communities are regarded as the decisive and ultimate units of concern, they provide the framework within which morality finds its application. Moral principles are developed by and within the community; there are no external sources of moral standards. While communitarianism has been refined into a variety of more qualified versions, in some of which central claims have been

mitigated, it is the theory of *hard communitarianism* that will be relevant as a potential starting point for a critique of extraterritorial obligations.[62]

Many communitarian theories have evolved as a reaction to liberalism, criticizing the latter for its individualistic perspective and emphasizing the constitutive importance of the community for the self. This goes beyond the claim that relationships are highly valued and contribute to individual well-being or security—a claim hardly anyone would want to deny. Rather, communitarians insist, these bonds, in which people involuntarily find themselves, form part of what the self is made of, they are essential sources of self-identification and of locating and understanding oneself in life: People are inescapably "situated selves", linked to the contexts, relations, and communities they happen to be born into.[63] Hence, these bonds are not only "logically prior to the individual"[64] but also indispensable elements of human flourishing. In the eyes of communitarians, cosmopolitan liberalism, its abstract and atomized conception of the individual, its emphasis on individual choice, autonomy, and freedom and its impartial and universal presumptions do not adequately grasp this necessarily particular, situated, and context-sensitive experience of human life, which is determined by one's unchosen ties to the near and dear.[65]

Moreover, so the hard communitarian assumes, social bonds amount to constitutive elements of our being moral agents in the first place: It is only within them that people become moral beings, are morally educated, and develop their capacity for moral deliberation, judgment, and agency. It is only here where they learn what solidarity, reciprocity, cooperation, altruism, and trust means; it is only here where they feel moral emotions such as pride or shame. The shared history and patterns of mutual interactions, the experiences of altruistic conduct based on feelings of solidarity, the genuine willingness to contribute both to the common good of the community and to other members' well-being all manifest the primacy of the community. Hence, genuine communities are part not only of people's very existence, self-image, and self-fulfillment but also of their being moral creatures.[66]

This comes with a skeptical view on the possibility of expanding moral emotions and motivation beyond borders. According to *Richard Rorty*, we can only act out of genuine solidarity to those we consider being " 'one of us', where 'us' means something smaller and more local than the human race".[67] People *do* draw a difference between compatriots and strangers, and, as *Michael Ignatieff* emphasizes, are essentially disposed to care for the near and dear and "naturally indifferent"[68] to strangers. The universalist idea behind human rights thus runs counter to the disposition of human nature and, consequently, has little impact on what people actually feel and are motivated by—it is not capable of genuinely extending moral concern and achieving universal solidarity. In *David Miller*'s words, "[t]he onus is on the universalist to show that, in widening the scope of ethical ties to encompass equally the whole of the human species, he does not also drain them of their binding force".[69]

The hard communitarian conception makes a foundational claim about the necessarily *relational* nature of morality: There is no universal morality that is

prior to the community—the human moral status is not grounded in the individual itself but in her membership of the community. Hence, as a normative system, morality must incorporate the fact that human beings cannot help but feel loyalty, that they cannot help but be partial to those they are in a community with. For the communitarian, particularity (e.g., that it is *my* child, *my* community, or *my* state) must foundationally matter—there is indeed magic in the pronoun 'my':[70] It provides the agent with direct, irreducible, and distinct kinds of reasons if the object of her action is *her own* community, *sui generis* reasons to act that are not grounded in morality and not reducible to the individuals composing the community. Rather, it is the other way round: Moral principles are reducible to relational reasons.[71]

For communitarians, the choice between universalism and particularism as the touchstone of moral theory is thus a real and foundational one: If we were morally guided by universal and impartial principles of justice, we could no longer attach genuine and appropriate significance to communities, the membership of which is so central to us. While for most communitarians, the upshot of their theory is to construct an essentially particularized, relational version of morality, others concede that morality would essentially need to be of an impartial nature—and, as a result, they cast doubts on (or straightforwardly reject) the overall pertinence of morality to the regulation of relationships and communities.[72] In *Bernard Williams*' words, it is just "one thought too many"[73] to try to find *moral* reasons for legitimizing one's giving preference to the interests of the near and dear over those of strangers: Reasons arising from social bonds stem from emotions and concerns that are prior to the moral sphere and shall be exempt from moral evaluation. In other words, people's disposition to be partial is insurmountable and so central to them that provides a *pre*moral prerogative to act upon. From this perspective, the idea of universal moral impartiality guiding individual human conduct abstracts from human identity, integrity, and separateness, from their actual motivation, situation, and interests, and leads to people feeling alienated of what is really meaningful to them.[74]

7.2.1.2 The National and the Political Community

Relevant to the issue at hand, the communitarian assumptions have been transposed to larger communities. While intimate relationships are typically constituted by affection, love, and intimacy, what bestows the identity-providing element and their unique value on larger communities like national, religious, ethnic, civic, or territorial ones is the mutual sharing of values, ideas, and causes, of history, culture, and traditions. For the political community, the basic assumption is that the possibility of altruism and solidarity is confined to conationals and cannot be extended to outsiders:

> In a patriotic society, where all individuals share a *common past* and *purpose*, each can *identify* with the others and find in them an *equal partner* in a *common cause*. The *rooting of the self* in a *culture of loyalty* enables

> individuals to grasp the humanity of their fellow citizens and to treat them as bearers of *equal rights*.[75]

Accordingly, communitarians have sympathized with a strong, Westphalian conception of sovereignty and are deeply skeptical about moral duties to distant strangers. Such a communitarian conception can be combined with a realist picture on the nature of the international sphere. The difference is primarily one of perspective: While communitarians emphasize the natural bond of solidarity *within* communities, realists focus on the absence of such solidarity and the self-interested, power-driven motivations *among* political communities and states. In other words, while realists focus on the normative 'thinness' of the international sphere, communitarians emphasize the normative 'thickness' of the domestic realm, and thus also draw a categorical difference between the two spheres.[76]

A prominent communitarian conception of the political community is *Alisdair MacIntyre*'s theory of patriotism as a virtue. According to it, human beings are, in their core, storytelling beings linked to the narratives of their lives, which in turn stem from the relations, associations, and roles they find themselves in and that constitute their "moral starting point".[77] In MacIntyre's eyes, it is the *nation* that plays a key role in this moral development: People never come to acquire any impersonal, universal moral code but always a specific, particularized moral code of the institutionalized political community they belong to. Membership of it comes with patriotist loyalty, which partly derives from the features and achievements of the community and partly from the agent-relative fact that it is *my* community. The partial, particular perspective—involving the "virtue" of patriotism—is thereby prior to morality: Moral norms need to be figured out in the context of the national community. MacIntyre also opposes the individualistic picture of liberalism, regarding the idea of universal principles, such as those underlying the concept of human rights, as delusional at best.[78]

MacIntyre's focus is on *nations* and he is skeptical about whether political communities of modern states could still fulfill this traditional role. In his view, such communities are simply too pluralistic and the moral outlooks within it too rivalrous for genuine moral consensus to be achievable: The virtue of loyalty to one's nation is categorically different to the emotions one has toward the anonymous, impersonal association of a modern state, which is marked by deep moral disagreement.[79] Thus, though he himself chose to label himself a patriotist, he might legitimately be considered an actual nationalist. In general, one way of distinguishing nationalist from patriotist theories is via the entity at which loyalty is directed: in the former, it is *one's nation*, marked by shared ethno-cultural origin, whereas in the latter, it is *one's state* as a politically organized territorial unit and its community. Whereas nationalism constitutes a form of *ethnic* loyalty, patriotism could be labeled *civic, jurisdictional,* or *territorial* loyalty.[80] Nonetheless, not only are the lines blurry but also are both relevant as communitarian arguments against extraterritorial human rights obligations, as has been outlined above.

Nationalism adopts the communitarian background intuitions and typically defines the (prestate) nation as a community of shared identity, culture, history and traditions, shared causes, goals and values, shared territory, natural conditions and economy, all of which are sources for individual identification and self-respect.[81] Following *David Miller*, a prominent contemporary proponent of a nationalist approach, this community provides people with the opportunity to situate themselves "in the context of a collective project that has been handed down from generation to generation", that involves shared identities, and the self-determination of which has not only instrumental but intrinsic value: There is intrinsic value in people collectively regarding themselves as common authors of the social world they live in.[82]

Many authors are less skeptical than MacIntyre that national communities can still play such a decisive role when they have developed into a territorial, political, civic community, i.e., into a modern state. It is then the nation that is so significant for the self but that, in order to survive and preserve its integrity and identity, must be poured into a framework of political institutions on a particular piece of territory—namely on the "geographical homeland that they regard as the nation's own".[83] And it is this territorial element that eventually turns the national community into a political one, and the loyalty among members into a civic one, though it still has its origins in a shared national background.[84]

Michael Walzer is a prominent proponent of the significance of the political community, defined by territorial presence, by drawing on the idea of a nationalist background. Walzer states that members of a political community have a solid right to exclude others and to (almost) unilaterally control immigration, but as soon as they allow a person to immigrate, she should be offered citizenship. Thus, the political community ideally consists of all inhabitants of the respective territory. In this political community, people mutually owe others what they do not owe anyone else, primarily the "communal provision of security and welfare".[85] But people do not only value the community for instrumental reasons, the community itself amounts to one of people's basic needs, derived from the experience of having a common ethnocultural background, sharing values, and developing moral obligations and justice principles within this context of shared meanings. To inhabit this role as "*communities of character*", political communities must necessarily be limited, exclusive, and have boundaries—the distinction between members inside and strangers outside the state is central to us. As the irreducibly decisive unit of personal and moral identity, the community and its members construct and apply moral principles among themselves and not with the help or with reference to external standards.[86] In another author's words, borders amount to an "anthropological necessity".[87]

In sum, accounts such as that of Miller and Walzer reflect what some have called the "curious process by which nationalist premises are deployed as a basis for the derivation of statist conclusions".[88] Consequently, nationalist arguments often centrally inform arguments against extraterritorial human rights obligations.

Other authors directly apply the communitarian picture to the political community of the state without relying on nationalist considerations. *John Horton* draws an analogy between families and political communities and argues that, while differences exist, what these two associations have in common is that (i) both are non-voluntarily entered and (ii) both constitutively involve obligations that are exempt from the need of moral justification via foundational moral principles. He agrees with Williams' rejection of the idea of turning to moral philosophy for seeking to justify people's conduct—rather, moral and political philosophy must be based in our actual ethical life and experiences, on how we really feel, value, and act. Horton is confident that this sense of shared identity, of feeling responsible for one's community can also exist in modern, diverse political communities as long as the level of internal moral fragmentation has not become too high.[89]

7.2.1.3 A Communitarian Argument Against Extraterritorial Human Rights Obligations

The above already indicates in which way a communitarian outlook provides the basis for an argument against extraterritorial human rights obligations. If morality only finds application in the context of the identity-conferring political community, then states' moral obligations can only hold within this context. If so, states cannot be morally obliged to consider claims of those who are not members of its community.

This goes along with a particular view on the nature of the state as a moral agent, which serve as the institutionalized manifestation of the community as a whole. In light of the fact that states are made up of beings with an essentially partial nature, not only would the good of the community be undermined by requiring states to answer both insiders' and outsiders' needs, but also, more fundamentally, states are inherently and essentially partial agents: Being partial forms part of the essence of the concept of the state and the community it represents.

Another communitarian premise is crucial for the argument against EHRO: If moral norms are necessarily locally established, they cannot depend on any external standards like universal moral principles. From the communitarian viewpoint, conceptions of rights cannot stem from external sources and be prior to the community. As a result, there cannot be a moral obligation of the community's institution, here the (essentially partial) state, to be guided by principles of universal morality. Accordingly, there are no moral reasons to cement such obligations into international law.

7.2.2 Countering the Communitarian Objection

7.2.2.1 The Challenge of Particularity in Moral Motivation

The following critique of the communitarian argument will focus on five of its main aspects. First, it is a too simplified conception of human beings if they

are portrayed as being motivated exclusively by loyalty to the near and dear—people can be and are motivated by concerns of strangers, too. But if moral concern and solidarity for strangers is not *virtually impossible* but rather at times *psychologically challenging*, this changes the picture: In rejecting a moral norm to X, one cannot merely point to the fact that it is psychologically difficult to do X or that a disposition to refrain from X is empirically widespread. Attempting to extend the scope of the 'Ought Implies Can' principle in such a way brings about the danger of sneaking in and rationalizing inclinations and biases. A moral 'ought to X' requires 'be able to X' but not 'be inclined to X'. In other words, people's motivation to X is not a precondition for a moral norm X to apply—the validity and relevance of the norm is essentially independent of inclination and motivation.[90] Thus, duties to outsiders cannot merely be rejected by saying it would be psychologically difficult to act upon them.

That said, the discussion about moral motivation somehow misses the point. We can readily accept that some kids of partiality (e.g., toward close family and friends) is nearly insurmountable for *individuals*. But the issue here is about obligations of the *state* as a collective, institutionalized agent, whose moral motivation plays much less of a role. Even those who assert that humans are genetically and historically preconditioned to give special weight to the near and dear and to be "naturally indifferent to all others outside this circle" might have to grant that this does not make the same true for a *state* toward its *residents* in *basic domains such as human rights*.[91]

7.2.2.2 The Moral Status of the (Political) Community

The second point of critique targets the communitarian picture drawn by Williams, who regards participation in relationships and the prioritization it involves as essentially premoral undertakings exempt from moral evaluation or, at least, exempt from the need of moral justification.

Morality is a normative system that enables living together by regulating conduct that influences sentient beings. Participating in communities and being partial to members manifests itself through actions with effects on human persons, i.e., sentient beings—and, thereby, in a domain to which morality paradigmatically applies. Moreover, it is precisely because valuing and pursuing relationships essentially involve partiality that they also have morally relevant effects on nonmembers. For this reason, denying the applicability of morality when one acts on reasons generated by one's membership of the community is contradictory: Acting on these reasons has obvious effects on other beings, both on insiders and outsiders. Valuing and pursuing relationships cannot be a premoral prerogative exempt from moral evaluation, precisely because it has morally relevant effects on others.

Furthermore, holding that communities like the political one are crucially involved in what it means for a person to become a moral being is incompatible not only with perceiving reasons generated by this very community as of a premoral nature but also with constraining the applicability of morality to

the community: To acquire my moral agency in group X does not entail that my moral duties are exclusively directed at group X and its members. Moral education prepares individuals for moral life that takes place within or beyond the community in which they were mainly morally educated. If one becomes morally educated through and within a communal structure, an essential part of one's internalizing moral principles derives from how this structure treats individuals not belonging to it. A crucial part of children's education is to make them realize that even if they feel specially attached to *some*, this does not legitimize disregard for *others*: Others have a claim, too. If another child hurts herself on the playground, my son needs to realize that this child (even if we have never met her before) needs my attention and that I, at this moment, prioritize her claims over his interest of having me play with him. If we were formed by political communities in our moral development, then it would precisely be critical how these communities treat outsiders: Adhering to principles of justice and respect vis-à-vis nonmembers constitutes an important part of being moral. Morality does not end at the garden fence of the family house—and neither at the border fence of the nation-state.[92]

Third, *de facto*, sharing values or worldviews can trigger the establishment of a community, but it is a further step to assume that such a community then automatically serves as the foundation on which moral principles arise. If this sharing indeed formed the constitutive core of the association, then for such moral duties to arise, the content of the shared values or worldviews matters: It would be a necessary condition that these are themselves (at least) not objectionable from a moral point of view. Put differently, if the community constituted by them provided the basic applicatory framework for morality, then these values themselves could not be in contradiction with what morality demands regarding the treatment of other people—the circularity is evident. This, obviously, is where a communitarian would object: In her view, there are no external moral standards to evaluate communities and the values on which they are based. The implausibility of this view, however, surfaces when one thinks of blatantly objectionable associations such as the Ku Klux Klan or the Mafia.

What the communitarian does by transposing her arguments to political communities is extending the units of concern beyond the core of familial relations and friendships and encompass groups defined by shared citizenship.[93] But 'my' alone cannot bear any magic: Particular relationality cannot be of irreducible moral significance if we want to avoid the conclusion that my ethnicity, my gang, or my racist association are. If the specific group is itself based on mistreatment and disrespect of human beings, it seems an implausible basis for the generation of moral principles. Thus, and this is crucial, we cannot avoid external standards in order to evaluate which relationships and communities do indeed generate moral reasons.

Of course, one could counter this critique by responding that the communitarian conception focuses on relationships such as familial bonds and on sharing values in genuine political communities—but not on sharing of racist

ideologies, of ethnic origin, or on former political communities that ceased to exist as a result of being muddled by civil war. Following this line of reasoning, the latter do not amount to *genuine communities*, because there is a qualitative categorical difference between the former kind of bonds, which are intrinsically valuable, and the sharing of ethnic features or racist ideas, which is not. However, this takes us back to step one. There likely is such a qualitative difference—but then, one still has to identify the point at which such mere sharing no longer generates genuine communities. Yet, and that is the crucial point here, one cannot determine this point without reference to standards that are themselves external to the communities. Only by reference to such standards can we assess which groups and what shared features are morally relevant, and which are not. This also exposes why the idea that mere particularity by itself matters is contradictory: If there were indeed moral magic in the pronoun 'my', then this would also cover *my* membership of objectionable associations like the criminal family gang or the abusive marriage. If the communitarian wishes to avoid the conclusion that objectionable associations like the Ku Klux Klan are assigned the same significance she generally assigns to communities, then she must somehow differentiate objectionable from genuinely valuable communities. But by doing so, she must necessarily draw on external moral principles that do not arise from within the community. Thereby, she transcends the communitarian worldview in which particularity by itself matters.[94]

The same is true for all kinds of bonds. While, for example, familial bonds tend to be valuable and enable flourishing and self-identification, real-life examples of abusive relationships involving mistreatment sadly prove that this is not necessarily the case. No *type* of associations can be judged as categorically taking the essential role that communitarians ascribe to them. Analogously, for *political communities*, one also cannot assert that they *generally* play this role. Rather, this must be assessed on a case-by-case basis: The actual specific community matters.[95] It cannot be held that communities *as such*, without further qualification, or *as a category* are intrinsically valuable.

Fourth, one of the most prominent communitarians, MacIntyre, is himself deeply skeptical about the possibility of pluralistic modern states playing the role communitarians generally attribute to associations. Thus, MacIntyre himself unveils a weakness in the communitarian conception when applied to communities like the political one. People belong to many different communities, such as families, school classes, friendships, or groups based on common interests, projects, opinions, faith, and so on—and these groups can vary on a spectrum from being very local in character to transcending states' borders. They are indeed often highly valued and important for the identity, well-being, and other central aspects of the self. But this does not yet prove, first, that every relationship essentially plays this role; second, that they thereby generate moral principles independent of external standards; and, *third*, that the (peaceful or oppressive, united or torn-apart) large and heterogeneous community of coresidents play this role, too (and, as a side

remark to MacIntyre, it is also questionable in the case of the nation, which still amounts to a large and anonymous association). Doubtlessly, small face-to-face groups in which members are in direct contact to each other—such as families—and the level of emotions, intimacy, and mutual dependence they typically involve appear much more central to the self than abstract communities such as those of compatriots. While both kinds of communities involve interpersonal interactions, this does not make them two types of the same phenomenon. Political communities are not essentially and necessarily sources of self-identification and flourishing, or networks of cooperation, solidarity, and trust but huge anonymous, public, and institutionalized associations with a broad range of tasks and aims. The fact of involving interpersonal interactions alone, given the very different nature of these interactions, does not justify the analogy between political communities and intimate relationships and the normative conclusions drawn from it.

Communitarians could respond that it is the *sharing* of values, histories, and traditions in political communities that is essential to personal and moral identity. However, this sharing transcends states' borders. It is simply not true that for Nicaraguan people, autonomy is of shared importance, while this is not the case for people living on Costa Rican territory. Different associations unite in their sharing of values and, at the same time, the plurality of outlooks *within* one state's community casts doubts on the assumed unity of shared values.[96] On the one hand, today's societies are heterogeneous; territorial borders do no longer correspond to social borders, and interests, values, and political ideas transcend jurisdictions. On the other hand, what members within a political community share is not only vague but cannot by itself give rise to normative claims: Phenomena such as cultures, histories, and traditions are not only in constant flux but also not *per se* normative entities. If these phenomena generate normative reasons, this needs a further justificatory basis.

Lastly, the sharing of values necessarily involves a subjective component: Whether one identifies with and shares the values of the community is, ultimately, up to the individual. Some individuals may hold very opposed values, others may not identify with them out of agnosticism, still others might lack the resources and capabilities to participate in the community and its development of shared conceptions. Thinking the communitarian conception through, if one does not genuinely share the values and thereby does not enable the community to play its foundational role for identity, integrity, and agency, one cannot be counted as a genuine member—which does not only make the political community a highly unstable community but also would open the door for totalitarian conceptions insofar as the community then only includes those who think, feel, and value alike.[97] And, it is at the latest then when universal standards would actually be especially important to protect those who do not count as genuine members.

In the case of the political community, it seems much more plausible that its value for individuals is of an *instrumental* and *contingent* nature.[98] Given the *status quo* and the division of the globe into territorial states, the particular

state one resides in can indeed play a crucial role in enabling mutually beneficial cooperation by reducing the risk of free-riding, in bringing about physical and social security, in providing means of subsistence, in equipping people with the institutionalized opportunity of political participation and judicial review. These are, however, instrumental contributions to goods, which do not derive from the community itself. Moreover, they are contingent, on the one hand, on the performance of the particular state in question. On the other hand, they depend on the global *status quo*: In principle, this role can be taken over by other agents should the latter prove to protect and promote these goods more efficiently and effectively. That the value of the state goes beyond these instrumental contributions cannot be established by way of analogy to intimate relationships.

Fifth, the above relates to a foundational problematic aspect of the communitarian theory: Its failure to adequately grasp the *status of the individual*. If the individual was determined by all its non-voluntarily entered social ties, where would this leave individual autonomy? Individual autonomy requires that one be in a position to make at least some choices about one's life path—and individual identity and integrity depend on this very possibility. It cannot (and will not) be denied that relationships and associations are of outstanding importance to the individual. But this does not entail that human beings are *reducible* to their membership of such groups. While they are doubtlessly social animals, they are still individuals—their personal and moral identity is not exhausted by their social ties, their dignity is not conditioned upon and arising from membership of them—but rather depends on their ability to make autonomous choices. And it is this very idea that expresses itself in the idea of human rights as rights that *individuals* have precisely *independently of their membership* of any community and independently of the protection of any particular state.

To conclude, the communitarian argument against extraterritorial human rights obligations, based on assigning foundational value and moral primacy to the political community, involves not only implausible premises but also various inconsistencies. Many of those who are generally sympathetic to the communitarian idea have recognized the weaknesses that come with denying the entirety of moral links to the outside world. Consequently, they have adapted the communitarian insight into a less radical approach that stipulates the existence of *special obligations* to compatriots, weakening the requirement of *exclusive attention* to comembers to that of *prioritizing* comembers.

7.3 Partiality, Patriotism, and Special Obligations

7.3.1 The Objection from Special Obligations

7.3.1.1 The Legitimacy of Partiality and the Idea of Special Obligations

Often arguing from a liberal position, many reject the hard communitarian's relational conception of morality and the prior status it assigns to the community, emphasizing that the *individual human being* constitutes the touchstone

of morality. At the same time, they share the core communitarian insight that people attach foundational importance to and intrinsically value relationships and communities and that morality, which regulates human conduct, should take this into account. Ambivalent toward the communitarian approach, they have sought to preserve this latter premise while at the same time overcoming the weaknesses of the hard communitarian's view. *Inter alia*, this has been done by providing moral justifications of partiality without relying on a relational concept of morality.

This *partialist*[99] positions try to find a middle path between communitarian intuitions on the one and concerns for moral universality and impartiality on the other hand, recognizing the value people assign to their relationships and the basic moral significance of social ties but maintaining that they do not form the exclusive basis of morality: Both non-relational and relational factors fundamentally matter. In moral deliberation, individuals can and should inhabit not only the personal, particular, agent-relative but also the impartial, universal, agent-neutral standpoint—both are foundational to morality.[100] As to the former, this means that the facts that we *intrinsically value* our memberships of communities and that we cannot help but *be partial* to them must be recognized from a moral point of view, referring to the 'Ought Implies Can' principle: If we cannot help but be partial to those we are associated with (i.e., to prioritize their interests, needs, and claims over those of others), then it cannot be morally demanded to universally and impartially assign equal concern to everyone's claims.

One important component of the partialist idea is the concept of *special obligations*, "obligations owed to some subset of persons, in contrast to natural duties that are owed to all persons simply *qua* persons".[101] While this subset may also involve those to whom we have made a special commitment, such as a promise, partialists focus on special duties to those we share a relationship with, sometimes also labeled 'associative obligations'. What is conspicuous about these special duties is that they are not merely *added* to general duties that exist vis-à-vis all human beings but essentially include an obligation to *prioritize*: It is the core idea behind special obligations that they involve partiality and granting priority. Thus, they have the potential to trump general moral obligations.[102]

A prominent proponent is *Samuel Scheffler*. In his eyes, morality must take the nature of the beings it regulates into account: Operating on human nature as essentially social and valuing beings, it must factor in the basic categories of human valuation and the reasons such valuing generates. Hence, morality generates both impartial principles and irreducible 'membership-dependent' reasons to be partial, i.e., reasons that are not reducible to impartial and universal considerations: If morality failed to do so, this would detach it from its commonsensical conception and its motivational force, leading to moral alienation. Scheffler attests the benefit of the doubt to commonsense morality: As long as it is not proven that people err in valuing memberships that generate reasons to be partial, these reasons can be assumed to be morally justified.

In other words, the burden of proof rests with those who would want to exclude non-reducible reasons of partiality: "Ultimately, then, the basic reason for thinking that morality incorporates reasons of partiality is that no credible system for the regulation of human behavior can possibly exclude them".[103]

Now, in Scheffler's view, it is the essence of communities that members necessarily perceive themselves as being not only allowed but *obliged* to prioritize the concerns of comembers over those of others. To non-instrumentally value one's membership of a community thus *is* to regard it as a source of special obligations.[104] Applied to the question at issue, such special obligations have also been said to exist among members of the political community as well as on the part of the political community as a whole—the agency of which is manifested through the state as its institutionalized collective agent—vis-à-vis its members. As a subclass of partialist theories, such approaches thus propagate what might be labeled *patriotist* special obligations. Yet, since (contrary to hard communitarians), partialists do not hold an exclusively relational view of morality, their argument against extraterritorial human rights obligations is not based on the premise that morality is thoroughly irrelevant when dealing with persons to whom a state is not related. Rather, it contends that a state has *special obligations to insiders* that take priority and that potentially outweigh *general obligations to outsiders*. It is this line of thought that the following sections focus on.[105]

7.3.1.2 Special Obligations to the Political Community

To start with, a patriotist objection to extraterritorial human rights obligations would still need to show why the *political community* amounts to a valuable community. It can either (i) start from the general partialist thesis about the valuableness and obligation-conferring nature of communities in general and then proceed by claiming that the political community constitutes an instance of such a valuable association that generates special obligations, or (ii) limit itself to directly arguing for the valuableness and duty-conferring status of this specific kind of community, i.e., the political community, without thereby making any claims about other types of associations.[106] The difference between the two arguments is that the general partialist variant (i) broadly starts from the value of *being related* in general, whereas the patriotist approach (ii) is limited to the issue of *relatedness within political communities*.

What is important for both variants is that the value of the respective communities is not only an instrumental one but also of an intrinsic, non-instrumental nature. Only then are special obligations truly irreducible to general obligations.[107]

In establishing a claim of type (i), partialist accounts can avail themselves of the communitarian view on the nature of communities as constitutive parts of self-identification, moral education, and flourishing. In addition, they also typically lean heavily on commonsense morality, in which, some say, moral concern and motivation is channeled through a system of concentric circles: Social

and geographical proximity and distance matter to people—and commonsense morality reflects this. In this view, people are naturally disposed to prioritize those closest to them, while one does not, cannot, and should not feel the same type of concern to people outside the community circles to which one belongs.[108] This suggests an analogy between families, clubs, and states: What people value is their membership of closed and exclusive associations, in which they are authorized to decide over the admission of entrance.[109] Now, so the argument goes, the stringency of moral duties should be adapted to suit this circle model, too.

Patriotist route (ii) is directly concerned with the specific kind of the political community. Many would agree that we value it for various instrumental reasons, be it its provision of physical and social security or its promotion of well-being, but patriotists add that its value is also of an intrinsic kind. In making this claim, one can again have recourse to communitarian assumptions, or, alternatively, to more modern versions of *constitutional*[110] or *covenanted*[111] *patriotism*, which typically adopt the general patriotist idea to today's multicultural and diverse political communities. In doing so, they ground the special concern for one's state and its community in their role as enablers of constitutional values or of core principles behind the community's political idea. Such approaches are typically sketched on the background assumption of universalism, which is why they would not serve as a plausible basis of an argument for limiting human rights obligations to territory (even though they might still support some degree of prioritization of insiders over outsiders). Nonetheless, they suggest another way of establishing the premise that the value of political communities is not merely of an instrumental nature.

The ascription of intrinsic value to communities by way of approach (i) or (ii) is then combined with the normative premise presented above, namely that morality must acknowledge and incorporate the fundamental significance human beings attach to their communities—i.e., it must itself generate moral reasons to enable, establish, pursue, and uphold them. Enabling, establishing, pursuing, and upholding communities, in turn, all necessarily involve the concept of *being obliged* to prioritize comembers. Consequently, it is claimed that the political community is, at its core, an ethical community that constitutively involves a network of special *obligations*. It is essential that members feel that they owe something to each other that they do not owe to outsiders and that they perceive both themselves and their state as under a moral obligation to prioritize comembers.[112]

7.3.1.3 A Patriotist Argument Against Extraterritorial Human Rights Obligations

For an argument against extraterritorial obligations, one implicit addition to the above premises is that if there are such special duties to be partial among members of the political community, then this entails analogous obligations of the institutionalized representation of the community—i.e., the *state*—to prioritize its members. Special obligations thus also bind the *institution toward*

individuals—not only among comembers. These special obligations are to be distinguished from those that hold in the other direction, namely of *individuals toward the institution state* (an example of the latter would be individual moral obligations to obey the law of the state one resides in, prominently discussed under the heading of 'political obligations').[113]

It has been argued that such a picture of the state with special obligations to its members is again congruent with how states are set up and *de facto* work:[114] The state, as the institutionalized agent of the community, is by its very essence obliged to prioritize its members. It must assign highest priority or even exclusive concern to their interests and needs. It is thus *per se* a partial entity, reflecting the value of the essentially partial community.

Arguments for such special obligations can again build upon analogies to intimate relationships: Parents cannot have a non-instrumentally valued relationship to their children if they assign equal concern to a far-away stranger. It is the very essence of their relationship that they perceive himself as having special obligations to prioritize their children's needs. Analogously, so the argument goes, we cannot have a genuine and intrinsically valued political community if we do not perceive its institution, i.e., the state, as obliged to give greater weight to the needs and interests of its members. If we held that it should give equal weight to outsiders' claims, then the very aspect through which we non-intrinsically value would collapse.

However, so far, the patriotist argument portrayed here has only held that a state is obliged to *prioritize insiders*, which would be compatible with assuming that it also has (at least subsidiary) duties to outsiders. As a last step, one would thus need to contend that *in the domain of human rights*, the state has a special duty not only to prioritize but to assign *exclusive concern* to its members. In this view, when it comes to human rights, states shall not only downgrade but can legitimately disregard claims of nonmembers. In this field, states' legitimate partiality is then no longer an issue of assigning *more* weight but of *exclusively* focusing on members' claims. Thereby, nonmembers are excluded from the scope of duty addressees: *As a category*, special obligations to insiders trump general human rights obligations to outsiders.

It is important to highlight two aspects. First, this is *per se* compatible with agreeing that *other* types of moral obligations, outside the domain of human rights, might expand beyond borders, such as those among comembers of religious, ethnic, linguistic, or other communities, or those that have a contractual source, such as the obligation to keep promises.

Second, it is also, again in principle, compatible with agreeing with the idea of universal human rights insofar as every human being is regarded as a *holder of rights*—thus with acknowledging that the foundational needs and interests behind them are universally shared—while asserting that the corresponding human rights *obligations* are exclusively allocated in the form of *necessarily particularized and special obligations* within the framework of the *political community*.[115] It is then only the state of which I am a member and on the territory of which I am located that bears human rights duties to me. In this view,

international law might legitimately contain human rights norms and oblige states to respect and protect these rights—but it may only oblige them to do so toward those who are located on their respective territories. This strategy of *domesticating* obligations tries to resolve the tension between, on the one hand, recognizing a universalist conception of human rights and, on the other, denying corresponding obligations to outsiders: While state A might have to assign and secure far-reaching rights to members of its own community, this does not turn foreign state B into a bearer of corresponding duties to members of A—and, as a result, international law should not put B under such duties.

Not everyone who advocates for a non-reductionist conception of partiality and special obligations in the political community would accept this last premise, which defines special obligations to be exclusive obligations in the domain of human rights. In more moderate conceptions, general duties (which may include human rights obligations) continue to exist alongside special duties, though the former are often assigned a subsidiary status.[116] As an example, while Miller seemed to widely agree with this last premise in earlier work, recognizing the idea of universal human rights but assigning not only primary but, arguably, exclusive responsibilities to the domestic state for securing these rights,[117] in later work, he put forward a dual system with both general, universal and special, domestic duties (though the former are constrained to the most basic set of human rights and mostly limited to negative duties, whereas a wider set of "rights of citizenship" is still only assigned to members of the political community and thus covered by special obligations).[118] Thus, while authors such as Miller are certainly skeptical about the stringency of human rights duties beyond borders, not all of them would (at least in their more recent work) *fully* subscribe to the last premise according to which human rights exclusively generate obligations to insiders—and this might already hint at the weaknesses of the argument. However, and this is what is crucially claimed here, *if one wants to argue for a territorial conception of human rights obligations via an approach of special obligations, then one must subscribe to this (rather extreme) last premise*—and it is worth bearing this in mind.

The above, in its essence, is the reconstruction of an argument for tying states' human rights duties to their residents that one could make within the framework of a theory of special obligations. It captures the essence of the non-reductionist idea, namely that legitimate partiality and special obligations derive from the underlying membership of this valuable community, from the sheer status of being related to one another, and the non-instrumental value that is assigned to this relation.

7.3.2 Countering the Special Obligations Objection

7.3.2.1 Is Versus Ought and the Pertinence of the Critique of Communitarianism

To start with, while intended as an alternative to it, the argument from special obligations is not capable of avoiding some of the main points of critique

raised against the communitarian thesis, especially regarding the general way in which it assigns intrinsic value to relationships and communities.

First, its factual observations do not suffice for the normative conclusions drawn: Compatriots *perceiving* their institution as being under special duties to its members does not yet mean that, from a normative point of view, it does generate such duties. In other words, by itself, our factual valuing something does not mean that we are justified in doing so and that this valuation outweighs other moral considerations, such as the interests and needs of outsiders—especially not in the field of human rights and the basic needs they are connected to.[119] Again, there is a justificatory gap to be bridged when stepping from the empirical into the normative realm.

Second, and as argued above, partiality is a typical but not an insurmountable human disposition that human beings are virtually logically or physically unable to overcome. People tend to favor their loved ones, yet they are also able to overcome such tendencies by endeavoring to stick to impartial principles—which partialists acknowledge—that they judge to be called for in a given situation. People are capable of distributing a birthday cake equally, even if they are tempted to give the biggest piece to their own child. In addition, the issue here is again one of obligations of the institution *state*. Not only seems partiality surmountable for the state but also would patriotists have to demonstrate that *this kind* of partial behavior of a state vis-à-vis its members, namely making them the exclusive addressees of its human rights obligations, would indeed be necessary for preserving the valuableness and integrity of the political community. It is unlikely that a community risks falling apart if the state, as an institution, is under obligations to consider human rights of outsiders, too—especially when considering affluent developed countries.

Likewise is the partialist appeal to commonsense morality only partially convincing: Neither does commonsense morality just blindly mirror the moral code of the majority (but it amounts to a reflected, a *commonsensical* conception of morality), nor is it exempt from the need of normative and principled review and justification. Revisionism cannot be rejected on the sole grounds that it *is* revisionism.[120]

Third, we must neither deny that intimate relationships are non-instrumentally valued nor that this valuing can have moral implications in the form of special duties. Yet, this does not yet entail anything about the status of and the duties generated by the *political community*.[121] Again, intimate relations and political associations are not two types of the same phenomenon but two distinct phenomena. Furthermore, it is highly unclear what the legitimate content of special obligations within a political community would be. This seems to heavily depend on circumstances and contingencies, differing widely across different states. Related to this, at first sight, the partialist account can avoid an objection raised against communitarians insofar as it can explain why sharing racist ideologies or ethnic features does not provide a legitimate basis of special obligations: Morality incorporates both principles of partiality and impartiality, and it is the latter that allows for singling out morally repellent relationships

like those between members of the Ku Klux Klan. In this view, a necessary criterion for a community generating special obligations is that the substance of this community is not morally objectionable from, *inter alia*, an impartial perspective. Analogously, impartial principles could serve as a basis for excluding specific instances of morally repellent familial bonds or political communities from the realm of duty-generating groups.

Yet, as soon as one agrees with this need for singling out bad, objectionable, or repellent communities, one actually starts assigning a *more foundational role* to these impartial principles. And this is also problematic for the partialist: If generating special obligations turns out to be conditional upon a yet more basic and impartial principle, the community no longer *by itself* generates obligations—rather, its doing so becomes dependent on compliance with this more basic moral principle. As a result, the partialist cannot uphold that reasons of partiality are non-reducible to impartial considerations and stem from the community itself. Non-valuable, irrelevant, or objectionable ones need to be singled out on the basis of impartial moral principles, which take a more basic role than those of partiality and special duties.[122]

As a side remark, neither could one allude to a concentric circles model of special obligations for the defense of a territorial regime of human rights obligations by asserting that geographical *proximity and distance* are morally relevant. These are gradual notions, and one would then have to recognize some duties toward people in neighboring countries but none to those in faraway countries (alternatively, if territorial borders provide the sole criterion for determining who is distant and who is not, it is then this either–or criterion, territory, that would again turn out to be decisive and which one would again need to argue for, and no longer the gradual notion of proximity). Proximity may be relevant for facilitating a state in discharging its duties, but it cannot form part of the fundamental justification of the existence of duties. Moreover, the significance of proximity and distance for the effects of certain courses of actions and for the practicability of complying with duties is contingent—and has been reduced: In today's world, actions taken far away can have serious infringements on individual rights. Today's globalized processes and the available means of technology and mobility have lowered even the instrumental significance that both social and geographical proximity or distance used to have. People's social, political, and economic world is today interconnected across borders. Proximity is no longer a prerequisite for transgressing human rights.[123]

Fourth, if the status of being a special-obligations-generating community cannot unconditionally be assigned to communities but must be assessed on a case-by-case basis, then this reveals a general weakness of the attempt to argue, from a patriotist perspective, for territorially limited human rights obligations. If human rights law in general and IHRL as an international *system* in particular should generally restrict obligations to territory and this is argued for on the basis of the intrinsic value of the political community and the special obligations it thereby shoulders, then one must assume that

such communities *essentially, generally, and factually* have such value and generate such obligations, thus that *every de facto* existing state in the international order does so—and thus merely by virtue of factual statehood. In view of global reality, this would include territorial communities of states in which oppression, injustices, and discrimination pervade, states in total disarray or that suffer from prolonged civil wars, like Yemen or the Central African Republic, authoritarian states that are notorious for serious human rights violations, like North Korea, or states in which violence and organized crime force people out of the country, like in El Salvador. If it turns out that intrinsic value cannot be ascribed to all political communities, then the patriotist argument for generally domesticating human rights obligations is likely to collapse.

This challenge is likely to also target other arguments discussed above and below: If the aim is to argue for a territorial conceptualization of human rights duties, especially in *international* law, then every state should territorially limit them. Hence, the grounds on which the moral justification for this territorial limitation rests, here the value of the community and its network of special obligations, would equally have to be assignable to *every* political community—which is, not only in the above but also in many other cases, questionable.[124]

In sum, it appears that a considerable part of the weaknesses of the communitarian perspective cannot be avoided by developing a special obligations account for rejecting the pertinence of human rights duties to those abroad.

7.3.2.2 Constitutional Patriotism

The approach chosen by *constitutional patriotism* provides a way of asserting the basic importance of political communities to individuals without employing the analogy to intimate relations: The former involve the sharing of constitutional values and of foundational political ideas of a society, which could provide the grounds for solidarity and special obligations. However, as mentioned above, approaches of constitutional patriotism typically do not oppose universal ideals and cannot directly ground an argument against extraterritorial human rights obligations. Nonetheless, it will be helpful to explicate the exact reasons why this is the case.

A preliminary problem is that, if core constitutional values provided the grounds for special duties, it would first need to be shown that the aims promoted by a specific state are *de facto* congruous with its declared constitutional values (for a state in which the public sphere involves suppression and discrimination, this at least does not seem to be the easiest of all tasks). But, above all, basing special obligations on the protection of such core values is not convincing in light of the substance of these values: A considerable part of many states' constitutional values is largely congruent with the values behind IHRL. The common denominator of core principles of modern pluralistic states' communities lies, essentially, in their (typically constitutionally

enshrined) fundamental rights and values, which precisely aim at protecting individuals. They allude to human dignity, autonomy, social justice, equality which are, often, translated into human rights. To the extent that these written constitutions indeed reflect the core values of a society, it would induce a substantial degree of tension to take these values as starting points for justifying *any* denial of dignity claims and basic rights. If prioritizing insiders comes at the price of treating outsiders unjustly, then such prioritizing might actually run counter to the substance of the values originally intended to be fostered. If human dignity amounts to the core constitutional value, it cannot at the same time serve as a starting point for rejecting human rights norms that are based, essentially, on the very same value.[125]

In addition, alluding to the content of specific values involves another problem that is generally informative for the point at issue: If the case for territorially limited obligations was based on the *specific* values a community promotes and the thereby generated call for special obligations, then states would have to support the communities that did best at promoting the corresponding specific goods—not necessarily *their own* community. If one is partial to a community because it has certain properties or behaves in a certain way (e.g., because it promotes justice and welfare), then one is not partial because it is one's *own* state's community.[126] The particularity requirement *that special obligations essentially include* is no longer given: French authorities and residents could suddenly have obligations to the Swedish community, if it turned out to be the case that the latter did better in promoting autonomy and justice. Alluding to the *substance* of constitutional values is thus in tension with the patriotist argument for special obligations, as this is necessarily based on the assumption that the mere *relation* of particularity is foundationally significant. For all these reasons, it is implausible that such modern versions of patriotism provide starting points for promoting a territorial human rights regime.

7.3.2.3 The Moral Relevance of Special Obligations

If members are *prioritized*, nonmembers are *relegated* insofar as they are addressees of general obligations that are being reduced. This raises the justification conditions of special obligations in this field considerably: It needs to be shown that the reasons for giving special concern to comembers would legitimize giving less—or no—concern to the morally relevant claims of nonmembers. Acting on reasons of partiality, prioritizing insiders over outsiders, is not a premoral undertaking but is essentially of moral relevance: It has an impact on outsiders. These effects on outsiders are particularly significant when their thereby downgraded claims are fundamental and weighty ones—such as those arising from human rights, touching upon their most basic needs and interests.

At this point, one could object that the above reconstruction of the argument is much too strong. First, partialists could hold that special obligations

do not reduce the general moral obligations we owe to all persons but are *added* to them, as, for example, Miller suggests in more recent work.[127] It is *on top* of general obligations to everyone that we have farther-reaching special obligations within the identity-conferring community. Comembers then get "double coverage" as addressees of both types of obligations.[128]

However, such an account is not only unconvincing in light of restricted resources and capacities, as a result of which various obligations can and often do come in conflict, but also does not capture the core partialist idea: They do not claim that after having discharged all our general obligations, we are free to occupy ourselves with special obligations to associates—a claim even impartialists would hardly deny. Rather, the patriotist idea of special obligations is that they essentially have *special* weight and that this weight functions as a touchstone in conflict cases: They require one to *prioritize*, i.e., to give at least greater or even exclusive weight to one's comembers. Especially in the case of the state, special obligations often tend to at least partially cancel or trump general obligations.[129] And on closer inspection, one can see that accounts such as Miller's do not just add special obligations to general ones: At least when it comes to obligations to protect and fulfill, special duties *always* outweigh general human rights duties and his model of duty allocation then stops being a genuine "split-level" model.[130]

Similarly, patriotists could object that they would not dismiss human rights claims (of outsiders) in favor of mere partiality (to insiders). Rather, they balance *human rights of outsiders* versus *human rights of insiders*.[131] Regarding insiders, so the objection goes, it is about human rights, too: They also have weighty claims to make. And even if outsiders' and insiders' claims were equal in substance, insiders have something more to put in the balance: relatedness.

It is certainly true that insiders also have weighty claims to make. It is also true that tensions between human rights obligations to insiders and human rights obligations to outsiders are likely to be triggered and that *here*, genuine conflicts can arise. But it fails to capture the essence of the territorial view to portray it as balancing the two kinds of claims. Rather, if one argues for a territorially limited system of human rights obligations, one implies that states *do not need to be concerned* with considering and weighing outsiders' human rights. Hence, outsiders' claims are not considered in deliberation—weighing between insiders' and outsiders' claims does not need to take place: If A has a relatively minor human rights claim and is an insider, the state is obliged by it. If B has a very serious human rights claim but is an outsider, the state is not obliged. It is thus not the relative weights of the respective human rights claims but rather the distinction between *insider vs. outsider* that eventually makes all the difference. Thus, advocating a territorial limitation entails that one category of claims is, regardless of their moral urgency, denied from the outset—namely all human rights claims of those beyond the territory. If one advocates a *global system* of limiting obligations to territory, one accepts a *systematic* exclusion of outsiders' claims, even in cases in which respecting, protecting, or fulfilling them would neither require any resources nor curb

the ability of the (collective and powerful institution) state ability to meet insiders' needs.

A systematic exclusion of outsiders' claims results in a no longer moderate but in an extreme position, according to which not even human rights concerns may legitimately interfere with the primacy of the community.[132] What is more, the issue of extraterritorial applicability concerns both duties that arise in situations where a state is *already present and acting in an extraterritorial setting* as well as duties to *take up extraterritorial action in the first place.*[133] The former is the paradigmatic case in which the question of extraterritorial applicability of human rights norms arises—especially in the legal debate. It asks, for example, whether a state agent located abroad is obliged to respect (or protect or fulfill) human rights of persons who reside in this area. The denial of duties becomes especially unconvincing in these cases. Can state agents located abroad excuse inflicting torture on the local population by reference to the fact that when it comes to human rights, they are exclusively obliged to coresidents at home? Not even acknowledging a minimal obligation in such situations comes close to denying the pertinence of human rights in general: If one does not accept that state agents in these situations are obliged not to torture, kill, or arbitrarily detain individuals abroad, one objects to *human* rights as such, i.e., to rights people have by virtue of being human.

7.3.2.4 Instrumental Reasons for Special Obligations

Nonetheless, for instrumental and pragmatic reasons and as long as the world is divided into communities of states, it makes sense to allocate some primary responsibilities for people's well-being to the domestic state, e.g., for the provision of safe drinking water or the establishment of a social security system. This is simply an *efficient and effective* way of organizing and enabling security and welfare—and this is not disputed here. What is disputed is that these obligations are of a fundamental moral nature, i.e., that they arise from the non-reducible significance of relationality and the intrinsic value of the community.

This, indeed, is a reductionist conception of states' special obligations: They are nothing more but an efficient means to realize the instrumental value that states' protection provides people with and, ultimately, a means to realize global justice, given the division of the globe into states. There is no magic in special obligations, just as there is nothing of irreducible intrinsic value in the relation between a state and its residents. Jurisdictional divisions can serve as an efficient way of organizing the distribution of responsibilities, but such instrumentally motivated partiality, if it has effects on nonmembers, must still be justified—and it is justified only if and as long as it contributes to the overall goal of global justice. Special obligations are not premoral constraints on general obligations—rather, general obligations must limit special ones.[134]

That said, holding such a view on political communities does not force one to accept a reductionist conception of the value of personal relationships,

too. As argued earlier, personal relationships and political communities are two different phenomena. Thus, a cosmopolitan picture that regards special obligations within political communities as merely an efficient tool to realize global justice is not *thereby* forced to hold that the value of personal relationships similarly flows from impartial considerations of global justice (though the cosmopolitan could maintain that for relationships *generating moral reasons* is still *conditional* on them conforming to more basic, impartial, and universal principles, so that the possibility to single out morally repellent relationships still exists).

Furthermore, while some degrees and domains of states' special obligations to members might be instrumentally reasonable, it is unlikely that in the field of human rights, exclusive obligations to members are instrumentally necessary, for example, to efficiently realize goals of global justice. Of course, if resources are scarce and helping outsiders would leave the state with insufficient means or time to meet insiders' human rights claims or to uphold its just institutions, there might be instrumental reasons for prioritizing concern to insiders, if this most efficiently contributes to universal human rights fulfillment. But this is not what the unpalatable premise of the patriotist argument suggests: Rather, it involves the sheer idea of prioritization that *per se* justifies disregard for others. The value of *political* associations is not of such a nature that it always and generally generates special obligations that at the same time extinguish general obligations to outsiders—especially not when it comes to human rights.

In this regard, it is critical to be aware of the special kind of moral agent that bears (extraterritorial) human rights obligations: States are *not* projects of partiality but essentially set up as *collective projects of justice* that strive to realize individual goods *by institutional means*.[135] This is the idea behind states and, insofar as a particular state is considered legitimate, it aims to realize this idea. As such a project of justice, the institution state—and with it its legal system—precisely plays a crucial role in counterbalancing individual partial dispositions and in protecting such demanding and basic goods that human rights arise from. For example, most legal systems would not accept one's choosing to help the slightly injured compatriot over helping the heavily injured foreigner on the basis of the former's co-citizenship—there is no room for prioritization in this situation and on this basis. In other areas, legal systems make room for acting on reasons of partiality, e.g., paradigmatically so in the case of parental or filial duties. In the world as it is today, institutions are one of the means to realize the requirements of essentially universal and impartial morality. Impartiality may be hard or even impossible to implement as a maxim for individuals in their everyday life, but this is not what moral impartiality requires. Rather, it is the adequate standard when it comes to justifying fundamental moral principles of justice. Applied to the political and legal realm, it is the adequate normative guide at the level of institutions, epitomized in the very concept of law.

Such second-order impartiality still leaves room for first-order partiality, i.e., for legitimate partiality of individuals toward close ones and in everyday

life. Consequently, if universal and impartial standards guide states, this does not imply that the very same standards should also guide individuals in their everyday decision-making—the latter might have more leeway. Recognizing extraterritorial human rights obligations of states thus does not entail that individuals should do all they can to fulfill human rights of the distant needy and thereby disregard all claims of friends, families, or personal projects. Individuals' and states' duties might just be vastly different in that respect. Partiality may thus be legitimate insofar as it is exercised on the basis of or in a world regulated by impartial principles of justice.[136]

Hence, principles applicable to states leave them significantly less leeway to act on partial and patriotic motives, not least because such behavior has effects on outsiders. These effects are especially problematic in the case of human rights claims, which aim at protecting the core fundamental interests of human beings. In view of the nature of the state, universal standards should guide *the institutional level* when it comes to a basic domain, namely *human rights*—at least *at this level* and *within this field*, particularistic preferences should be subdued. Here, there are no non-instrumental reasons to act on partial motives.

To conclude, whatever the value of *other types of relationships* and whatever the legitimacy of special obligations to compatriots *in other domains*, what this critique has aimed to show is that an argument against extraterritorial human rights obligations based on special obligations must lean on an implausible premise: It must presume that in the area of human rights, special obligations of a state to its members are of such kind that they become its exclusive obligations. It is this premise that is extreme and ought to be rejected—and it is actually this premise that would also be opposed by some who are sympathetic to (more moderate versions of) the partialist account. This, however, is precisely what the above critique has sought to reveal: If one argues for a territorial view on human rights obligations based on a theory of special duties, one is forced to accept this extreme premise. Human rights provide a fundamental threshold, a domain in which the concept of special associative obligations does not hold. Relevant as it may or may not be to other domains, it is essentially at odds with taking the fundamental idea of human rights seriously.

7.4 Neo-Republicanism: Sovereignty, Non-Domination, and Self-Determination

7.4.1 The Neo-Republican Objection

7.4.1.1 Individual Freedom Through Collective Self-Determination

Another idea with which communitarian arguments can and have been combined is the claim to collective autonomy of communities, which can provide yet another starting point for an argument against extraterritorial

human rights obligations. In a simplified version, such an argument would assert: Because of their significance for both the individual and the collective, members of political communities must be able to decide *for themselves* on the principles they adopt and subject themselves to—and not by reference to any external standards. Hence, they must be granted thorough collective autonomy and self-determination.[137] For a political community, this requires full external sovereignty, understood as freedom from any moral or legal obligations to the external world that do not directly result from internal decision-making. This includes, conspicuously, obligations of IHRL.

The linkage between collective freedom and self-determination on the one and sovereignty on the other hand is a prominent one: Territorial state sovereignty is typically regarded as the institutional manifestation of exercising the right to self-determination. Drawing on *Isaiah Berlin*'s terminology, this view assumes that sovereignty as "*freedom from*" external interference ensures individual and collective "*freedom to*" for a state's members, namely freedom to follow their own path, to make their own choices, to be able to function as the authors of their individual and collective lives.[138]

In international law, states' right to self-determination is among the main purposes of the UN; has evolved into an obligation *erga omnes* of customary international law; and arguably even amounts to a norm of *ius cogens,* thereby trumping any other international norm that does not also have such status, including IHRL.[139] The right to self-determination is also conspicuously included in human rights treaties, prominently in the common Article 1 of the ICCPR and the ICESCR, and the ICJ has declared it itself "a fundamental human right".[140]

Behind the significance ascribed to self-determination stands another assumption, which is widely shared across theoretical camps, namely the link between individual autonomy and collective autonomy: The exercise of collective autonomy not only contributes to but forms a constitutive part of individual autonomy. People not only care about their needs in isolation but the opportunity to participate in collective self-determination forms and integral part of their personal ability to make essential choices in determining their life paths. Political communities provide us with this opportunity to exercise collective self-determination—and, at least at this moment in time, they are the only entity that does so in an institutionalized, reliant, continuous, and effective manner.

This assumption is not new.[141] Many scholars have acknowledged the *instrumental* roles of collective self-determination and popular sovereignty for the protection of individual autonomy. However, some have a yet thicker understanding, emphasizing the independent value of collective autonomy expressed through self-determination:

> [W]e must also understand political communities, not only as securing individual goods, but also as central to the creation of a *common life*, in which people are co-participants and co-creators (…) there is also value in the particular community being collectively self-determining.[142]

A cluster of theories that puts such emphasis on notions of freedom and self-determination is that of *neo-republicanism*. Rejecting the liberalist picture, its 'civic humanist' branch regards collective self-determination as guaranteeing freedom in the sense of *self-rule*. Embodying a communitarian spirit, it asserts that participating in the self-government of their political community, with which people foundationally identify, amounts to the essence of freedom.[143] Another branch, typically called the 'neo-roman' approach, construes the overarching value of freedom as *non-domination*, i.e., the guarantee to not be subjected to the arbitrary will or power of another agent. Central to both branches is the value of *freedom*: The individual and the political community must both control themselves and be free from control by others.[144]

These theories, the difference between the two branches, and their respective implications on the internal requirements on political communities have been the matter of an intense debate in political philosophy, which goes beyond the scope of the present analysis. What is interesting for present purposes is their application to the field of external relations. When it comes to this field, neo-republicans typically advocate a strong conception of external sovereignty.

As *Philip Pettit* argues, at the international level, non-domination requires (i) that "[h]uman beings should be organized into free peoples—peoples whose members count as suitably undominated—with everyone belonging to at least one such group" and (ii) that "free peoples should constitute corporate bodies that enjoy freedom as non-domination in their relations with one another and with other global bodies".[145] Departing from more communitarian-inspired civic humanist neo-republican approaches, Pettit employs a statist conception of the political community, which is simply united by being subject to the same state and for whom the state acts as a representative.[146]

Regarding thesis (i), he maintains that a people is free if its state acts in its name and according to the common terms and standards that all its members have agreed upon. Only then are the state's acts really the acts of its community, and only then is the community not subjected to "a power of *arbitrary* interference".[147] The significance of aspect (ii) results from the fact that external freedom of a political community is ultimately grounded in the value of individual freedom. To start with, my individual freedom necessitates internal freedom (as non-domination) of my political community. Now, this latter freedom in turn requires external freedom of my state (the agent of the political community) in the form of non-domination from other actors—be it other states or global actors such as international organizations: "In order to be free, not only must a people be un-dominated by the state; that state in turn must be un-dominated from without".[148] Thus, the republican ideal of individual freedom ultimately requires external sovereignty in the form of external non-domination. If the state, and thus its community, cannot freely decide on the norms and policies it adopts, then it is subjected to the arbitrary will of external agents and thus to constraints on its free rein that do not stem from its own consent. In all its acts, measures, statements, laws, and ratified treaties, the state must reflect the will of its members: Only then can it avoid the

community's subjugation to arbitrary power. If this is not the case, members no longer exclusively control their state, and the power of external actors arbitrarily influences their lives. Thereby, individual freedom is undermined. To realize external freedom for the plurality of sovereign states and peoples on a global level, an international order is needed that nonhierarchically defines and contributes to protecting the enjoyment of "sovereign liberties" of peoples.[149]

Following the neo-republican view, the community's right to self-determination then grounds its right to territorial sovereignty. Only if its state is equipped with solid and far-reaching sovereign rights is a political community capable of effectively exercising collective self-government, controlling its own destiny, and thus avoiding domination by others: "[E]xternal sovereignty is (…) the precondition for the principles of autonomous collective self-government and collective self-determination (public autonomy)".[150]

Sovereignty is crucial for upholding not only the neo-roman conception of freedom as non-domination but also the civic humanist links between civic virtues, identity, and self-government of the community. If sovereignty is compromised, from above through processes of globalization or from below through claims of minorities, it becomes increasingly difficult to uphold these links. Sympathetic to the descriptive realist assumption about the anarchic nature of the world, sovereignty and the privileges that come with it are described as essential to the collective domestic project of realizing a forum for self-government, given the global status quo.[151]

7.4.1.2 A Neo-Republican Argument Against Extraterritorial Human Rights Obligations

The above is a brief and certainly simplified portrayal of central theses based on a neo-republican conception. For the purposes of it providing a first premise for an argument against extraterritorial human rights obligations, it shall suffice. Again, it is not claimed that all neo-republicans cited above would directly subscribe to the following parts of the argument. For example, Pettit accepts some constraints on states' sovereign liberties and could thereby factor in at least some minimal basic obligations to individuals abroad.[152] However, such obligations could also merely be an indirect consequence of states' obligations to other states—thus not genuinely grounded in individual rights. Be that as it may, the further premises alluded to below shall not be understood as reflecting specifically Pettit's approach. Still, they underline how close some neo-republican theories come to denying the pertinence of human rights as constraints to external sovereignty.

Starting from the neo-republican emphasis on the significance of collective self-rule and external non-domination, the argument could then proceed in the following way: Among the requirements of external freedom and sovereignty is the one to be free from direct duties to individual nonmembers—including human rights duties. Being constrained to comply with obligations that address, protect, and benefit individuals who are not part of the political

community would amount to illegitimate domination. Being constrained by external, universal norms would contradict the maxim that political communities must control themselves, i.e., that their members must themselves negotiate, implement, interpret, claim, and apply the norms that bind them—that they need to perceive themselves as the authors of the rights and duties that hold for their community and its institutions. For example, when it comes to adjudicating individual rights claims, domestic judges, especially those in robust democratic systems, are in a much better position to represent the opinions and beliefs of the community—judges of international courts, who are typically third country nationals, seem poorly suited to reflect them. On that ground, it is at least *prima facie* only the domestic rights regimes to which legitimacy can be attributed.[153] Hence, there are no reasons for legally subjecting states to direct human rights obligations to outsiders. While it might be granted that duties to respect other states' sovereignty could indirectly bring with them certain indirect duties to these states' individual inhabitants too, the latter would merely be derived norms, contingent on and ultimately again grounded in sovereignty, which remains the relevant and nonderivative concept.

In such a view, the pertinence of international legal norms in general, and that of IHRL in particular, is fully conditional on states' voluntary consent, as legal obligations may only be introduced on condition that they represent the collective will of a political community. Even if one grants the possibility of states choosing to *consent* to international obligations, their bindingness would remain completely conditioned upon this explicit consent, which states were *morally* allowed to withdraw at any moment, and upon their conformity with other states' sovereignty. Hence, states are neither under direct prelegal nor under consent-independent legal duties to consider outsiders' human rights claims.[154] This voluntarist view on the authoritativeness of international law that the neo-republicanism-inspired argument entails is largely shared by realists. From this perspective, international law may intend to protect sovereignty, but it neither defines nor constrains it. Rather, sovereignty, manifested in state consent, forms the basis on which international law has come into existence and from which it has gained its normativity in the first place.[155]

From the other side of the same coin, it could also be argued that sovereignty includes a state's right (which could be framed its 'territorial right') to be free from illegitimate domination by others, which is why an outside entity may neither ascribe rights to insiders nor consider itself to be compelled by corresponding obligations. In this view, if state A considered itself subject to direct obligations to people on the territory of state B and, in an effort to comply with these obligations, refrains from surveilling people, delivers development aid, or installs a system of higher education within state B, this would interfere with B's domestic affairs: Political communities have an exclusive prerogative to decide over the standards that regulate them, their *domain réservé*, which—in this view—includes the way in which own members are treated.

Prima facie, the argument involves an absurdity: It seems paradoxical to assume that state A would exercise domination and undermine B's sovereignty by refraining from violating human rights of residents of B, for example by refraining from surveilling them. However, if A considered itself bound to take active measures (such as the establishment of education systems) in order to protect or fulfill human rights of individuals in state B, it becomes clear in which way the compliance with such diagonal obligations could be highly problematic. Yet, the point of the argument is that it would not only be such clearly problematic active measures but already the *assignment of direct obligations* of foreign states to individuals that are construed as running counter to what the principles of non-domination, sovereignty, and comity demand. According to this line of thought, sovereignty not only entails a state's privilege to be free from duties to individuals abroad but also a privilege (here the privilege of the domestic state B) to be free from interference in being *the unique holder of duties to its own members.* If there are any duties of state A to individuals in B, these could only indirectly be entailed by what A owes to B as a sovereign state, which would fully depend on the latter's consent. In this case, the duties' addressees are not individuals but other sovereign states.

What could stand behind such a view are the ascription of foundational value to territories and the emphasis on the importance of territorial rights for self-determination.[156] In general, such references to territory are common in arguments for self-determination as a claim for secession and for the establishment of independent territorial states. There, it is held that particular territories are essential to self-determination and to individuals' and communities' ability to found political institutions, and serve as a reference point for identity due to its role in the community's history, culture, and values.[157] On this basis, so one might argue, it is crucial that this territory be free from domination, including domination in the form of, first, duties to cater to outsiders' demands and, second, duties of outside agents to satisfy insiders' needs.

Overall, the neo-republicanism-inspired argument adopts the strategy of domesticating rights and obligations by saying that states' room to maneuver shall be constrained vis-à-vis insiders and by norms that represent the collective will of their communities, but that it shall not be constrained vis-à-vis outsiders and not by universal, external principles that are imposed from the outside: Individual rights are not prior to but rather *result from* civic political activity of the particular community.

What looms in the background is the assumption of a fundamental conflict between universal human rights and popular sovereignty. Such a line of reasoning can also be detected in the works of *Hannah Arendt.* In her eyes, the idea of universal human rights generated by mere human nature could be misleading and potentially dangerous: It is membership of a community that provides the opportunity for political action, and the latter is the essential precondition of the 'right to have rights'—it is only the community of the state from which individual rights can spring and in the framework of which rights can be guaranteed.[158] However, the neo-republican arguments

against extraterritorial human rights obligations as reconstructed here go well beyond Arendt's view by asserting that constraints to state sovereignty are only legitimate if they are introduced and accepted by those who make up the sovereign, thus as a result of the exercise of popular sovereignty, and that the intention of such constraints cannot be to afford protection to people who are *not* part of the sovereign.

The insistence on the need to protect popular sovereignty can also be found in neoconservative justifications of exceptionalism as portrayed earlier. Constraints on external sovereignty through international norms—and through IHRL in particular—are viewed as going hand in hand with constraints on popular sovereignty and as undermining collective autonomy: "[W]hy should a republic, based in the rule of law, be constrained by international agreements that do not have the same element of democratic legitimacy?".[159] Paralleling the communitarian approach, moral, political, and legal principles should be decided on locally, within the boundaries of communities, and not by reference to any external standards. Hence, what motivates the neo-republican objection to the extraterritorial applicability of human rights is the alleged conflict between guaranteeing the freedom of a political community and concurrently subjecting it to universal standards, which are perceived to be of an external origin.

7.4.2 Countering the Neo-Republican Objection

7.4.2.1 The Significance of Collective Self-Determination for Individual Freedom

To begin with, the status and significance the argument assigns to collective self-determination ought to be regarded with caution. On the one hand, in today's world, it is no longer plausible that a state's external *freedom from* will guarantee maximal *freedom to* for its population. On the contrary, in many respects, guaranteeing individual freedom and non-domination precisely depends on participating in global cooperative schemes, as global challenges such as climate change, transnational organized crime, or migration, the management of which has a direct impact on individuals' well-being, freedom, autonomy, and subsistence, illustrate. To address such border-transcending challenges, attempting to secure individual freedom and autonomy exclusively through the domestic framework is not a promising route to take: In these respects, the individual today depends on states' participation in international cooperative schemes.[160]

Moreover, in international law, reliance on norms is crucial. If states could switch on and off their international commitments on a whim, this would not only impede critique and condemnation of noncomplying states but also open the door to unpredictable, unilateralist moves, and thus ultimately to arbitrariness and insecurity—the precise things the neo-republican would want to avoid.[161] Reliant and stable international schemes of cooperation are an important means to reduce these and similar risks, to increase predictability,

and to enable the formation of expectations with respect to other agents' conduct, by installing common norms and, sometimes, sanction mechanisms for norm violations.

On the other hand, it is certainly true that individual self-determination also has a collective dimension because it is important to the individual to be able to participate in decision-making at the political level too, to have a say about the policies of the institutions she is subject to, and to be entitled to justification about their decisions. In a world divided into states, democratic systems are very plausibly the systems that come closest to effectively and reliantly realizing this collective dimension of individual freedom and self-determination. However, the neo-republican argument is not only one about the—quite plausible—*instrumental* significance of some sort of political self-determination for the protection of individual goods. Its claim is of a more substantive nature, and it is here where the problem appears to lie: Individual non-domination and collective non-domination are not directly translatable into each other. The collective as a group can also take decisions that go against my will as an individual. If the political community has control over its destiny, this does not yet mean that all its members are in control, too. A political community can, for example by majority decisions, also undermine the freedom and autonomy of—and thereby exert domination over—individuals who are its members. Importantly, the less individuals are protected by, on the one hand, fundamental constitutional rights, and, on the other hand, the backstop of IHRL, the greater is the majority's potential of dominating individuals and minorities. Thus, both these levels of rights protection also play a key role in protecting individual autonomy in cases in which it conflicts with the expressed will of the community. The possibility to exert some form of political, collective autonomy forms a key element of individual autonomy, but the former in no way guarantees the latter.

7.4.2.2 The Substance of Self-Determination and Sovereignty

Assigning value to individual freedom and agreeing with the relevance of the collective, political dimension for individual freedom do not force one to accept the neo-republican's comprehensive conception of the collective prerogative to self-determination. In which way are the notions of individual freedom and collective self-determination related?

First, certainly, the neo-republican could not base her argument for collective self-determination on a *free choice* of the individual. Individual membership of the specific political community is rarely based on a free and autonomous individual decision but typically a matter of coincidence: In many cases, it is a matter of being born in a specific place.[162]

Second, and more importantly so, individual freedom and autonomy cannot ground a right to collective self-determination if the latter is understood as including the permission to disregard *other individuals'* freedom, autonomy, and dignity by violating their basic rights. What would be so problematic for

a neo-republican argument against extraterritorial human rights obligations is that it must assume that collective self-determination *equals* full external sovereignty, which in turn *equals* being free from direct obligations to outsiders. If individual freedom as non-domination or self-mastery provides the ultimate basis for the claim to external sovereignty, then this basis is undermined if such external sovereignty includes the prerogative to exert domination over *other individuals*, to undermine *other individuals'* self-mastery. In other words, having the means to exercise some form of collective self-determination is certainly a constitutive factor for the individual goods of freedom and autonomy—but that must not include the freedom to dominate over others by disregarding their basic claims. If individual freedom, non-domination, and self-rule are such primary goods, then their significance cannot be conditional upon the territorial location of the person they are assigned to. For outside individuals, they must be of primary significance, too. External freedom of the political community and its claim to non-domination and self-determination then cannot legitimately include the right to dominate over outside individuals and disregard any claims they raise. This claim must have its limits: Only then is it compatible with the same freedom for others.[163]

What about the other side of the coin, the idea that extraterritorial obligations established direct relations of third states to members of the domestic state, thereby implying an act of domination and undermining the latter's sovereignty? Again, when it comes to *obligations that arise when a state is already present on foreign territory or acting with extraterritorial effects*, it is absurd to assume an illegitimate act of domination by state A if A were obliged to hinder its state agents from violating rights on B's soil—not least in today's world, where third state agents' operations on foreign territory are ubiquitous and commonplace. If anything, the act of domination and the illegitimate interference happen at an earlier stage, namely already through the state's presence on foreign territory or its exercise of enforcement jurisdiction.[164] It seems more likely that B is being subjected to a power of arbitrary interference if A *failed* to put its state agents under such obligations when their acts have extraterritorial effects—and if, as a consequence, people get tortured abroad or shot from the other side of the border fence.[165] If it puts its agents under such obligations, residents of B have much more robust assurances that arbitrary interferences will not take place. Indeed, the setting of international obligations can contribute to reducing the risk of *arbitrariness* of interferences insofar as they provide a common set of expectations about the conduct of other states. If states are reciprocally subject to the same international norms, they are much less exposed to arbitrariness, because they are in a position to form expectations about norm-conforming behavior of other states.

However, this is compatible with asserting that things look different when it comes to *obligations to take up actions with extraterritorial effects*. For instrumental reasons, it will not be effective if state A starts constructing schools on B's territory in order to realize individual rights to education there. In reality, such attempts are often prone to misuse, i.e., to be enacted only under the

pretext of human rights. When it comes to these types of obligations, a reasonable system of carefully allocating them to different duty-bearers is central. Here, it will often make sense to assign primary obligations to domestic states, given the fact that this will most efficiently and effectively realize rights, reduce the risk of misuse, and avoid accountability gaps.[166]

Nonetheless, on a foundational level, the mere *assignment* of extraterritorial duties cannot mean an illegitimate act of domination over foreign populations. Human rights are part of universal morality and of international law. From the latter perspective, if both state A and state B have legally accepted the very same rights, then state B must accept (or even support and advocate) obligations of state A if A's conduct has effects on B's members—and *vice versa*. Sovereignty cannot give rise to an exclusive prerogative to ascribe rights to individuals on the territory and to be the unique bearer of corresponding obligations (moreover, the objection implicitly assumes that A's not being under obligations to people in B would be fully compatible with not violating B's sovereignty. However, when UK state agents on Iraqi territory fail to respect human rights of residents, e.g., by contributing to torture or arbitrarily detaining people, this does not seem to amount to a paramount example of respecting Iraq's sovereignty). The neo-republican could avoid this by granting that extraterritorial obligations to individuals can exist but only insofar as they result from obligations to respect the sovereignty of other states. But these would then again not be obligations genuinely generated by human rights, which are more than just derivatives of sovereignty.[167]

Another neo-republican route suggested earlier could be to base the importance of territorial sovereignty as external freedom on the very value of territory, which is constitutive for a political community's identity, and on the corresponding need for territorial rights to enable collective self-determination. While increased globalization, new methods of communication, and emergences of transnational network steadily erode the significance of territory, it *de facto* doubtlessly still has a "continuing allure".[168] Yet, this does not in itself have normative consequences: It does not entail that we *should* keep looking at the world through the territorial lens. And applied to the question at issue, it is far from clear in which way the relation between a state and its territory as a geographical unit brings human rights obligations into play. It is not at all obvious in which sense the value of territory for a political community entails territorial rights that would include, first, *exemption* from responsibility for respecting, protecting, and ensuring human rights of those not on it and, second, *exclusive* responsibility for respecting, protecting, and fulfilling human rights for those on it. Accepting obligations to individuals outside does not undermine the significance of territory as a reference point for collective identity, culture, or public discourse. The reason we do not want X's human rights to be violated by her own state does not lie in the value of its territory or its political community. The reason is that we do not want *individuals* like X to have their most basic rights violated.

7.4.2.3 Popular Sovereignty and Universal Human Rights

What about the assumption of an inherent tension between popular sovereignty and universal human rights? In democratic theory, some argue that the scope of people who shall have a say in decision-making and be granted the right to vote encompasses all those *normatively subjected* to a state and its legal system but cannot be extended to include everyone *factually affected* by it here and there. Can this be transposed to the question at issue here, i.e., is such thick subjugation also necessary for triggering human rights obligations?[169]

First, recognizing extraterritorial human rights obligations is not tantamount to saying that everyone affected by the conduct of a state must be included in its decision-making process. The argument here is not about global democracy. There is a difference between human rights protection and democratic participation: It lies in the fact that when it comes to *human rights*, everyone is a stakeholder, not only those subjected to a specific democratic system. What this implies is that everyone *affected* shall be safeguarded by a minimally protective instrument, namely by his or her human rights. This is what universal and international human rights are here for. The mechanism to determine the circle of holders of universal human rights is different to that of determining the democratic *demoi,* the scope of those entitled to take part in the exercise of popular sovereignty. The relevance of *being affected*—as opposed to *being subjected*—is mentioned in various human rights documents, for example in the UDHR, which grants the right to free information (as part of the freedom of opinion and expression) explicitly across borders, plausibly also with the very intention of strengthening the position of outsiders so as to enable them to participate in public debates of third states by whose conduct they are affected.[170]

Nonetheless, the exclusiveness of the *demoi* is not without relevance to the question at issue. In the particular diagonal relationship between a state and an individual located abroad, the individual (a nonmember of its *demoi*) is blocked from participating in the state's internal decision-making process, typically does not have the same degree of political, judicial, and societal means available to insiders, and faces far higher hurdles in opposing this state's power. It is much more difficult (if not sometimes practically impossible) for outsiders to exert influence on a state's policy, to question the legitimacy of its conduct in courtrooms, or to criticize it and demand justifications in the framework of public debate. Hence, outsiders are subjected to a *special kind of exposedness to foreign states' acts*, putting them into a position of vulnerability to which human rights respond. In this diagonal relation, human rights make a crucial difference. As shall later be argued, they provide a substitute, a minimal instrument of protection for those who cannot necessarily rely on internal means of protection such as democratic participation, constitutional rights, and judicial review. This point is crucial for explaining the importance of extraterritorial human rights obligations and will thus be returned to in the course of the analysis.

When considering the alleged tension between universal human rights and popular sovereignty, it is important to, first, avoid the conflation of *popular sovereignty* with the concept of *(external) state sovereignty*. Apparently, the group of individuals who make up the sovereign (in the sense of popular sovereignty) is different from and narrower than the group of people over whom a state can claim sovereignty (in the sense of state sovereignty) and who its sovereign acts and decisions affect. Moreover, putting constraints on external state sovereignty does not automatically reduce the scope and weight of popular sovereignty. On the contrary: Restrictions on the former, e.g., through subjecting it to norms of basic rights protection, also lead to more accountability on the part of the state (be it through subjugation to international norms like IHRL or through being placed under continuous scrutiny as a result of the universal human rights discourse and global civil society). Setting justified limits to what can be decided in the name of popular sovereignty likely increases the legitimacy of these decisions.[171]

Second, *Samantha Besson* argues that while state consent is not the source of the legitimacy of international legal norms, it adds an important (and in her view necessary) democratic dimension to their legitimacy. Likewise, every state should be able to participate in defining the 'common interest' norms of the international community and this is best realized by guaranteeing that states have an equal say in international legislation. Moreover, she adds that some decisions are legitimately left to the autonomous sovereign states, i.e., there exist some "autonomy-based exceptions" to the requirement to comply with international law in general, which are grounded in sovereignty.[172]

While it is plausible that giving weight to democratic decisions, which express popular sovereignty, is legitimate in domestically interpreting and implementing international law, the problem with Besson's claim is not only that it places the definition of common international interests at the disposal of international policymaking, running counter to the idea that at the core of these interests lie substantive normative considerations. The problem is also that it presupposes or implicitly prioritizes democratic states: If *non*-democratic states have an equal say in international norm deliberation too, then this opens the door to misrepresentation or lack of representation of many individuals (who cannot participate in decision-making in their non-democratic state of residence). But if non-democratic states do *not* have an equal say, similar risks arise: Whole populations are then excluded from having a say in defining common international interests, which may then be criticized as a paternalistic and imperialistic undertaking that lacks legitimacy.

While democratic representation is doubtlessly important, the point is that, especially in the case of human rights obligations to those beyond borders—i.e., to those who lack the ability to participate in internal decision-making processes—the influence of domestic majorities should not be unlimited. Democracy is more than the formal procedure of authorizing the majority to decide. Rather, the idea of democracy is also a substantive one, the democratic exercise of popular sovereignty is based on substantive preconditions that shall

themselves not be put at the disposal of the majority's will and the democratic procedure: Fundamental and basic individual rights. Extraterritorial obligations are an especially interesting case, as the addressees of such obligations are, in most cases, paradigmatic examples of people who *do not have a say*.[173] In that sense, the influence of decisions of those who *do* have a say on the scope of such obligations must not be unconstrained.

What looms in the background of the emphasis on popular sovereignty and democracy is a conception of equality that is foundationally different from the one advocated here: In Besson's view, equality is a social status that stems from public recognition, as a result of which the equality of the moral status (that human rights refer to) is essentially linked to democracy: Democracy provides the forum for public recognition. In her view, human rights and democracy mutually require each other.[174] In contrast, as will be advocated here, equality is not a social but a foundational status that humans have by virtue of being human. Democracy is a political conception that reflects this equal status, but human rights—the normative claims of individuals that spring from this equal human nature—precede and transcend democracy. Thereby, they also help to define the scope and limits of legitimate democratic decision-making.

Neo-republican conceptions construe non-domination as freedom from the arbitrary power or will of another agent or as self-mastery. Human rights norms, however, neither have their source in the arbitrary will of external agents nor undermine individual self-mastery. As moral and legally enshrined norms, they are not arbitrary, precisely because they set up a common framework for expectations about the behavior of others. They do not undermine the capability for self-mastery but, to the contrary, protect it. Their source is not an external one: It lies in the individual and her capability for freedom, autonomy, and self-mastery—in individuals who live both inside and outside territorial borders.

7.5 Institutionalism: Justice Within Institutions

7.5.1 The Institutionalist Objection

7.5.1.1 Justice Obligations as Institutional Obligations

A further cluster of theories from which arguments for a territorial limitation of human rights duties could be developed is typically sympathetic to the neo-republican emphasis on participation and self-determination. However, it spotlights the concept of justice and its essential link to institutions. In what follows, *Thomas Nagel's* approach will be discussed as a potential basis for what will be called an 'institutionalist' argument against extraterritorial human rights obligations.

Nagel's starting point is what he calls the "*political* conception"[175] of justice, which argues that duties of justice are not preinstitutional duties but necessarily apply within the framework of institutions: Justice is essentially an

institutional concept. This line of reasoning was importantly inspired by *John Rawls*, who claimed that "[j]ustice is the first virtue of social institutions, as truth is of systems of thought".[176] In his eyes, people in domestic political communities are related to each other through the institutional basic structure of their society and it is this very relation that defines the realm to which justice applies. As Nagel puts the first core claim of the political conception:

> Every state has the boundaries and population it has for all sorts of accidental and historical reasons; but given that it exercises sovereign power over its citizens and in their name, those citizens have a duty of justice toward one another through the legal, social, and economic institutions that sovereign power makes possible. This duty is *sui generis*, and is not owed to everyone in the world, nor is it an indirect consequence of any other duty that may be owed to everyone in the world, such as a duty of humanity. Justice is something we owe through our shared institutions only to those with whom we stand in a strong political relation. It is, in the standard terminology, an associative obligation.[177]

Nagel combines this with a second core presumption about the applicatory realm of justice: In the international sphere, such a justice-generating institutional framework does not (or not yet) exist. The current international order lacks the institutional aspects required to trigger the applicability of justice. It is only the institutions of the domestic state that relate to people in ways that subject these relationships to justice concerns. As a result, justice obligations are only to be addressed to members of the state's domestic community. Eventually, the state, its institutions, and its sovereignty are prior to justice. In other words, they provide the framework in which relevance is bestowed upon the concept of justice.[178]

Nagel starts from these main premises and refines them into a particular account. To start with, he explains the reasons on which he bases his first assumption, i.e., the claim that justice only applies in the framework of 'thick' institutions. According to Nagel, the state and its institutions involve more than a mere instrumental scheme for cooperation that aims at overcoming the collective action problem and at guaranteeing advantages for members. First, a mechanism that ensures conformity must accompany its system of mutually beneficial coordination, assuring to members that their comembers will also play by the rules and that no one has a free ride in realizing collective interests. It is the sovereign, its monopoly of force, and its means of *coercion,* that provide this mechanism.[179] Second, it is not merely by virtue of the profound impact the membership of a political community has on the individual that this membership should be regulated by justice concerns. Rather, the state is a participatory undertaking in which members act as *coauthors*, as "participants in the general will", co-responsible for the decisions taken by and within it and hence also entitled to ask for justifications.[180] In Nagel's view, the applicability of justice arises by virtue of this distinctive two-sided role individuals inhabit

within political communities: On the one hand, they are *coercively subject* to the decisions, laws, and structures of this typically non-voluntarily entered association; on the other hand, the state acts "in our name"[181] and thereby assigns the role of *coauthors* to individuals. Thus, the collective project of the state acts in the name of its members, and at the same time it does so coercively. It is exactly this type of coauthorship that is capable of rendering the coercive nature of the state and its monopoly of force politically legitimate—and it is this unique constellation that invokes the sphere of justice:

> In short, the state makes unique demands on the will of its members—or the members make unique demands on one another through the institutions of the state—and those exceptional demands bring with them exceptional obligations, the positive obligations of justice.[182]

The applicability of justice thus limits itself to the institutions of the domestic state and its collective nature as a cooperative social enterprise. Thus, in contrast to accounts that base special domestic obligations on the value of the political community through its being constitutive of identity and moral agency, Nagel regards this two-legged combination of coercion and coauthorship as the decisive touchstones for the applicability of associative justice obligations. He overlaps with the neo-republican angle insofar as his emphasis on coauthorship brings with it the assignment of foundational significance to democracy and collective self-determination. Along with his choice of terminology, this leaves little doubt that the relevant group toward which such justice obligations arise coincides with the group of *citizens*.[183]

7.5.1.2 Thick Domestic Institutions Versus Thin International Institutions

On this basis, Nagel proceeds to the second core claim, i.e., the strict differentiation between the national and the international realm: The nation-state is the only entity that fulfills the criteria of amounting to such a justice-generating institution, as it uniquely provides a framework for cooperation, coauthorship, and coercion. This particular kind of cooperative institutions that structure individuals' lives at the same time *in their name* and *by means of coercion* does not exist at the international level. As a result, no duties of justice arise in this context.

Nagel denies neither that some forms of international cooperation and interdependence exist nor that other types of regulative standards may apply to the international sphere. Yet, he asserts, these relations are not sufficient for triggering justice obligations. According to Nagel, international cooperation, including international law, is a scheme that states voluntarily enter in order to realize mutual benefits: The international sphere is based on consent and contracts, but it is the consent of states that lends authority here, not that of individuals, who do not form the constituency of international institutions and whose relation to them is always mediated through the state. There is no democratic coauthorship

behind the international system, as it is not enacted and authorized *in the name of* the individuals subjected to it. Thus, Nagel claims, while *some* kinds of institutions exist at the international level, they are categorically (not only gradually) different from the particular type of institutions that triggers justice concerns. Similar to other statists, Nagel thereby draws a dualist picture in which the national context is essentially differentiated from the international one.[184]

7.5.1.3 An Institutionalist Argument Against Extraterritorial Human Rights Obligations

With this background, we can proceed to applying the institutionalist approach to the question of extraterritorial human rights obligations. Based on its view of confining justice to the domestic sphere, the institutionalist can argue that, if human rights obligations are a subcategory of justice obligations, then their applicability should also be constrained to domestic institutional networks. If justice is a domestic issue and only pertains to the relation of the state to its members, justice concerns—such as human rights—cannot entail a restriction to state actions with foreign effects. Human rights are then, in the words of another author, regarded

> as issues of 'domestic justice' concerning the relationship between rulers and the ruled (sovereigns and their subjects) within a delimited territorial space. They do not, as such, interrogate the 'external' activities of states or the effects of their actions in relation to those abroad.[185]

While Nagel does not explicitly formulate such a thorough rejection of extraterritorial human rights obligations, it is a likely implication of his view. Nagel himself tries to avoid it by adding a qualifier: When speaking of justice, he claims to confine himself to the issue of *socioeconomic* justice and thus to onerous positive obligations. In his eyes, this kind of obligations demands equal treatment, and it is *this* demand that prerequisites thick institutional relations. Under its heading, he *inter alia* subsumes "a right to democracy, equal citizenship, nondiscrimination, equality of opportunity, and the amelioration through public policy of unfairness in the distribution of social and economic goods", and he grants that some "negative rights like bodily inviolability, freedom of expression, and freedom of religion" are different: "Those rights, *if they exist*, set universal and pre-political limits to the legitimate use of power, independent of special forms of association".[186] Thus, contrary to what is the case for socioeconomic justice, this limited class of basic rights in principle could give rise to universally valid negative obligations to respect, i.e., not to violate—*if they exist*.

Is it thus a misunderstanding to assume that an approach like that of Nagel would be in opposition to extraterritorial human rights obligations? The role of universal rights in Nagel's approach has been intensely debated, but several points indicate that the answer to this question tends to the negative.

Terminologically, Nagel defines these universal limits, which arise from a core set of negative rights, as merely constituting a "minimal humanitarian morality". On the one hand, it is not entirely clear where such minimal humanitarian moral obligations emanate from. In contrast to his careful reasoning regarding the applicability of justice, he only alludes to "our capacity to put ourselves in other people's shoes" in justifying them.[187] On the other hand, substantively, he restricts them to negative duties as well as to the core of the most basic human needs, i.e., not only to a highly limited set of duties but also to one that is not further defined. While they would include "the most basic human rights against violence, enslavement, and coercion", they have as their key element "the most basic humanitarian duties of rescue from immediate danger".[188] His choice of terminology, referring to *humanitarian* duties, also hints at their being distinct from stringent moral and legal *human rights* obligations. At the very least, though vaguely defined, his global 'minimal humanitarian morality' clearly does not equal 'human rights', and, if at all, only marginally coincides with the norms of contemporary legal human rights regimes. While Nagel avoids a general and comprehensive waiver for states in their treatment of outsiders, he merely recognizes a highly minimal set of such constraints to states' external action (which, *nota bene*, act as institutions).

Nevertheless, there is a difference that Nagel's adding the element of a universal 'minimal humanitarian morality' makes: It demarcates his approach from thorough IR Realism. While he might agree with the empirical realist description of the international realm, Nagel departs from realism insofar as at least some minimal moral norms do apply beyond the framework of the political community of the state. *Normatively*, Nagel's view is not a wholesale subscription to the thesis of moral anarchy in the international realm. Moreover, he would not need to fully abandon the idea of IHRL but only to reforge or reinterpret it: The purpose of international human rights norms would then be to ensure that every state implements them domestically.[189]

In that sense, Nagel's approach, though in principle focused on socio-economic justice and accepting some morality-based constraints on external conduct, still points us toward a further source of skepticism about extraterritorial obligations in human rights law. The aim here is not to assert that Nagel himself would straightforwardly subscribe to a territorial view but rather to reconstruct how an institutionalist argument for such a view could be developed on the basis of the theoretical framework that Nagel has developed. Notwithstanding the qualifications he introduces, it is worth bearing in mind that his framework defends not only a weak but already a *strong* version of statism, in which, according to his critics, "[t]he existence of a state is necessary and sufficient to trigger *any* norms beyond humanitarianism's moral minimum".[190] It thus has far-reaching implications on the general question of the legitimacy of state duties to outsiders that arise from legal norms—especially international legal norms—with a moral background.

Finally, the thesis that such a view can give rise to an argument against extraterritorial human rights obligations is not only of interest for more

theoretically oriented debates but also of practical relevance—as Nagel himself suggests: "I believe the political conception is accepted by most people in the privileged nations of the world, so that, true or false, it will have a significant role in determining what happens. I also think it is probably correct".[191]

7.5.2 Excursus: The Social Contract Argument

Nagel's approach finds inspiration in a *social contract* background theory, which is why a brief excursus into this theoretical framework will help shed light on what motivates the kind of skepticism about extraterritorially applying human rights law at issue.[192]

Social contract theories of moral and/or political authority have their origins in the works of *Thomas Hobbes*, *John Locke*, *Jean-Jacques Rousseau*, *Immanuel Kant* and, more recently, *John Rawls* and *Thomas Scanlon*.[193] In spite of the variety of approaches and of their normative outcomes, they share some core theses. In general, they identify the source of moral and/or political authority in an underlying agreement among the individuals subjected to them. Voluntarily consenting to this contract is seen as the *rational* course of actions for individuals, and it is this *consent* that bestows legitimacy on the binding authority of morality or on the political community and its institutions. While social contract theories spotlight the moral or political community, they differ from communitarians in that *individuals'* rational consent bears the justifying force. Though the community is constitutive of the normative authority in question, individuals and their consent are prior to its establishment. It is based on an essentially liberal understanding of the value of individual autonomy and freedom.

Different strands of social contract theories disagree on the reasons for which they consider individual consent rational. Hobbes-inspired *contractarians* motivate the compact on purely instrumental grounds by individuals' *self-interest*: Consenting is rational because it will protect one from the risks of the state of nature, enable security, well-being, and autonomy, and most efficiently maximize one's interests.[194] In contrast, *contractualist* approaches typically start from a Kantian-inspired perspective of individuals as free and equals and as entitled to mutual respect, grounding the individual's decision to enter the compact on its reasonability.[195]

A social contract approach can be relevant to the question at issue here in two ways. A theory of *moral contractarianism* could deny, in both realist and communitarian spirit, that moral obligations expand beyond the community: As moral authority is only established by the social compact, moral obligations cannot bind toward those who are not part of the community. In the *political* realm, the (hypothetical or real) compact serves as a way out of a dilemma: In the state of nature, the individual is not capable of leading an autonomous life in security and liberty. Political authority in the form of a territorial and sovereign state is required in this view, and it functions as a guarantor of individual goods. At the same time, subjecting oneself to its

coercive authority runs counter to individual autonomy and liberty. Yet, the social contract resolves the dilemma: Autonomy and liberty can be maintained by virtue of the individuals' consent to the social contract, i.e., their autonomously agreeing on equipping the state with coercive authority and with the monopoly over the use of force in exchange for its guaranteeing individual well-being, security, liberty, and other goods. The reciprocal nature of the contract is key in this argument: Free and rational consent renders the state politically legitimate in spite of its coercive nature.

Applied to the question at issue, such a theory of *political contractarianism* provides the basis of an institutionalist objection to extraterritorial human rights obligations like the one based on Nagel's account. From such a perspective, one could even grant that individuals may have moral obligations to other individuals abroad (or be agnostic on the point). What one would assert is that at least the collective and its *state*, as the political institution established through the community's contract, cannot be required to fulfill any claims of individual nonmembers of the contract: By subscribing to the contract, members establish a community through agreeing on a shared common framework of basic principles, including principles of justice and individual rights. If its justice obligations are a consequence of the contract, therefore belonging to the category of contractual duties, they only apply within the institutional framework that was inaugurated as a result of the contract. Nonmembers thus cannot be among the addressees of its obligations.[196] Hence, both for Nagel's institutionalist variant and for the social contract variant, the decisive premise in an argument against extraterritorial obligations would be that the distinctive institutional relationship between a state and an individual member of its political community is a necessary condition for justice obligations, including fundamental rights obligations, to arise.

However, one might suggest that the two variants differ in important regards. For Nagel, state coercion becomes politically legitimate by virtue of members' *coauthorship*, i.e., by the state's acting in the name of its members. In social contract theories, it is typically members' (tacit or explicit) *consent* to its authority that confers legitimacy on what would otherwise be an illegitimate coercive structure. This implies two differences. First, *consenting* to the contract appears to set fewer preconditions than actual *participation as a coauthor* does. Nagel's latter criterion appears to depend on having political rights of participation in decision-making and thus, in most contemporary political systems, limited to the community of *citizens*. Second. Nagel explicitly mentions that comembership is "arbitrary" and "involuntary".[197] In contrast, in many social contract approaches, the fact that people *voluntarily* agree plays a central role, as it is capable of explaining why people do not thereby surrender their autonomy: The community is portrayed as a voluntarily entered club with the entitlement to decide over whom to include—and thus, to whom to grant rights.[198]

While these differences can be of key importance in other respects, they will not make a crucial difference for the further discussion on the question

of *extraterritorial human rights obligations.* US constitutional jurisprudence, which has been highly influenced by a social contract background idea and where the Constitution is portrayed as a mutual agreement between the state and its 'people', helps to illustrate the point.[199] First, many of those who hold a social contract view on the US Constitution interpret membership as synonymous to citizenship (thus, to 'coauthorship' in Nagel's terms), linking the contract to the concept and institutions of democracy and portraying constitutional rights as a means to protect democracy.[200] And, even when jurisprudence has allowed for a wider conception of membership that includes (some) noncitizens on territory (e.g., those who have a "significant voluntary connection" to the state), it is unlikely to include any *noncitizen beyond territory.*[201] Hence, in both interpretations, social contract approaches can serve, in very similar ways as the institutionalist approach, as starting points for constraining human rights duties to territory.

Second, on the one hand, on the concept of *voluntariness,* social contract conceptions themselves take an ambiguous stance. In a concurring opinion to *Verdugo-Urquidez* that relied on a social contract conception, it was suggested that individuals become members of 'the people' (i.e., of the contract) whenever they are legally present on US territory—which can include individuals arrested abroad, like Mr. Verdugo, who were involuntarily brought to US soil.[202] On the other hand, the role of involuntariness in Nagel's concept of membership is ambiguous, too: Ultimately, while my initial membership may not be the result of a voluntary decision, my participation and identification as a coauthor rest upon at least partially free and autonomous choices. Even if my options are the result of an involuntary setting within which I find myself, it is still at least partly up to me whether I choose to participate and whether I can, as a result, identify as coauthor.[203]

In brief, while there are various shades of the underlying theories, the institutionalist and the social contract *arguments against extraterritorial obligations* would largely overlap, at least if the latter is based on a narrow conception of membership. What is key for both types of arguments is that the existence of the domestic institutionalist framework amounts to a precondition for the applicability of fundamental rights norms: The state only owes such obligations to those who are members of the political community of its institutional framework. Accordingly, the critique that can be raised against the institutionalist variant is likely to also target the social contract variant, and *vice versa.*

7.5.3 Countering the Institutionalist Objection

7.5.3.1 The Institutionalist Conception of Duties of Justice

As an important preliminary remark, the force of the entire following critique of the institutionalist argument hinges on whether one defines human rights as a justice-relevant domain. Yet, denying this would mean failing to recognize the crucial link between the two concepts. If human rights are grounded

in the status of *being human*, in human beings' essential humanity, then this *being human* is assigned to every human being equally. As a result, considerations of equality should guide the ascription of human rights—and, thereby, it becomes a matter of justice. This is not to say that all justice demands are human rights demands; indeed, many aspects of justice do not touch the domain of human rights. What is claimed here is that justice is a condition that fundamentally applies to the ascription of human rights and of corresponding obligations, too.[204]

Turning to the institutionalist argument, its first main claim can be criticized either (i) by arguing that justice obligations do not depend on the existence of an institutional relationship in general or (ii) by asserting that institutional relations that generate justice obligations do not need to be of the distinct kind that Nagel proposes.

Critique (i) casts doubts on the idea that institutional duties are necessarily *associative* ones and rely on *membership* of an institution. Even if it is granted that institutions are the main bearers of obligations generated by fundamental rights, that they mean the most serious threat to these rights, that compliance with such obligations necessarily requires institutions, and that *for all these reasons* they are institutional obligations, this does not yet show that they are *associative* obligations. The attribute 'institutional' in 'institutional obligations' might as well be understood as 'binding an institution'—and binding it toward everyone affected by its conduct, regardless of membership. If institutions are such justice-generating entities and their conduct (coercively) affects people in their enjoyment of fundamental rights, it is unclear why such conduct should be free from justice concerns in cases in which it affects nonmembers. Institutions have tremendous effects on individuals, and it is these effects that should be regulated—independently of whether they affect those who are formal members of the institutions or others.[205] The same objection obviously holds for social contract theories: Why should rights only protect those who consented to the contract and not everyone *affected* by the conduct of the institution state, regardless of their explicit, acquiescent, or non-voluntary acquisition of membership?

In other words, the existence of a relation of *institutional membership* is not a convincing precondition for justice obligations to pertain. Justice is not a function of institutions—rather, it is prior to institutions: Principles of justice set the framework on the basis of which institutions are set up in the first place, they provide guidance on how to design, establish, and reform institutions—and not *vice versa*: It is not the community and its institutions that decide on the content and scope of justice principles.[206] Consequently, these principles come into play before we know about who will belong to our community. As a result, they shall take into account every individual potentially affected by these very institutions and not only those who happen to become a member. It is the very essence of justice that its norms are not defined through particular interests but that it is located at a more foundational level and takes a universal perspective. The primacy of justice principles also entails that they

set the framework for the conclusion of the social contract and the principles and institutions decided therein: Foundational principles of justice form the basic preconditions for the legitimacy of the contract. Thus, we cannot independently determine the substance of justice principles from a particularized national perspective. Both domestic and international approaches to fundamental rights obligations must be based on universal considerations of justice.[207]

The so-called 'distributive objection' illustrates this preinstitutional role of justice (and is not necessarily limited to socioeconomic dimensions of justice). It maintains that special obligations toward insiders and denying obligations toward outsiders result not only in more advantages for insiders but also in more disadvantages for outsiders. The consequences of such arrangements are especially unjust in a world of inequality, i.e., when group members have more resources than nonmembers: The phenomenon of agents with more resources prioritizing each other over those with fewer resources ultimately reinforces inequality. Furthermore, this unfair aspect is even amplified by the restricted access to the group of members as well as the fact that not everyone has the virtual possibility to come and join.[208]

On a general level, this emphasis on the preinstitutional nature of justice targets the overall strategy of domesticating human rights, i.e., of accepting them as constraints on *internal* sovereignty while rejecting them as limits on *external* sovereignty. This strategy is shared by some of the other statist arguments analyzed above and below and thus, the critique can also be raised against them: How could accepting *some* individual rights-based limits on the exercise of state sovereignty be compatible with maintaining that these limits only apply to a part of states' actions, namely those with effects on their own territory, but not to others, namely those that affect people abroad? In contrast to those realists and skeptics who believe that *no* moral requirements legitimately restrict the latitude of the state, approaches such as that of Nagel accept that states are not free to disregard *some* justice and individual rights claims (those of people belonging to their community). Thereby, they must generally accept that principles are not merely just by virtue of a procedure: There seem to be *substantive* requirements, too.

The idea of normative principles depending *purely* on a procedural justification (i.e., the idea that they are justified by virtue of being decided upon in the framework of a specific procedure, such as a democratic one) would be in general tension to the idea of human rights. Human rights are intended as a threshold, a special kind of normative principle that cannot be deviated from, even if the majority (or another entity entitled to make authoritative decisions) would agree. But the point is that if there are such substantive requirements, if one accepts that fundamental rights set substantive limits on what can be justified through the legitimacy of the procedure by which it was decided, then it cannot be the case that these limits simply evaporate when it comes to conduct that happens to affect outsiders. This means, they cannot merely apply to some actions of the corresponding institution, namely to

those that have effects on its territory, but not to other actions, namely to those that have effects abroad.

That said, the aim of this critique is not to assert that there is no difference at all between effects of state conduct on members and effects on nonmembers. This draws on the second part of Nagel's first claim and the adequacy of his *thick understanding of the underlying institutional relation* that triggers justice obligations. It can and often does make a morally relevant difference if it is *my* state that infringes my human rights, the state I reside in, I work in, I vote in, I pay taxes to, and I have means to hold accountable. The state system as it exists in the world today serves as one way of dividing global moral labor (a claim that does not yet imply anything about its normative valuableness and legitimacy or about its effectualness and efficiency in doing this labor). As long as this system prevails, it is a matter of fact that our residential state is paradigmatically the one whose coercive laws affect us the most and on whose protection we depend most: It is typically this state that provides opportunities for education, social security systems, or infrastructure, which people rely on in their daily lives, and whose provider is not easily replaceable. This factual reliance is accompanied by a certain degree of dependency, exposedness, and vulnerability that can concern very basic issues of human dignity: In practice, it is *my* state of residence that can most easily and significantly hinder me from getting high-quality education, exacerbate my situation of unemployment by not foreseeing any social security mechanisms, or impede my everyday life by failing to provide basic infrastructure. It is also typically the state that *de facto* could most effortlessly search my house without a warrant, restrict my freedom to associate with others, deny my right to judicial review, or detain me on arbitrary grounds. At the same time, it is also my state of residence that can most easily and efficiently protect me from violations of third parties and work toward the full realization of my human rights. And, given the global *status quo*, it is also typically my state of residence in which I can participate in collective decision-making and thereby realize an important aspect of individual autonomy, or—if I am not entitled to participate because I am not a citizen—which most significantly hinders me from realizing this aspect (even if, from the perspective of human rights law, it might be justified in doing so).

These kinds of exposure to acts of one's territorial state and the vulnerabilities that may come with it are undeniably essential. Nonetheless, they do not yet curtail this state's human rights obligations to others. In other words, they do not imply that membership of a state amounts to a *necessary* condition for *human rights obligations to apply*.[209] To begin with, *de facto*, a particular violation of my human rights is not less true if it is perpetrated by an entity that is not identical to the state on whose territory I am currently residing and that does not claim to act in my name. Human rights violations substantially affect people, regardless of whether committed by the state that provides them with the ability to elect representatives every four years and coerces them to pay taxes or another one.[210] But more importantly, there is also a normative dimension involved, which has already briefly been alluded to above. Vis-à-vis foreign

states, another type of coercion, exposedness, and of accompanying vulnerability arises: Outside individuals are typically even less capable of avoiding becoming victims of human rights violations, of defending themselves, or of seeking justice for past violations. The impact of third states on individuals can also be of a *coercive* nature, given that the latter cannot choose to be affected or not: In this case, vulnerability *precisely arises from the status of being a nonmember*, from not having the means at one's disposal that insiders typically have, both at the level of political decision-making and at the level of judicial review. *De facto*, outsiders have much more limited means of protection available when compared to insiders, they typically do not have any political, legal, or societal means to influence the state's policies and the conduct of its state agents or to publicly question their legitimacy. In light of their restricted agency, nonmembers are confronted with another, *special kind of exposedness* and have a legitimate claim for protection, too. Extraterritorial human rights obligations are precisely one way of responding to this exposedness and the vulnerability it is accompanied by, as will later be expanded upon. Nagel's thick institutionalist conception leaves this legitimate claim of nonmembers to some minimal claim for protection unanswered.

Moreover, and as a side remark, it might as well be problematic if my home state, i.e., the institution that coercively acts in my name, violates *outsiders'* human rights—precisely because it does so *in my name*. This 'ethical patriotism' captures the idea that it matters to people whether their own state lives up to moral demands. By engaging as coauthors, they assume responsibility for their state acting justly, for its moral integrity, and it can matter to them how it treats others, be it people within or beyond its borders. It can matter to them for moral, intrinsic reasons or for instrumental reasons of self-interest, because it could affect their welfare or their trust in the state, triggering fears that potentially similar behavior could target insiders, too.[211]

By underlining the thickness of the domestic institutional context and of coauthorship, the institutionalist objection heavily relies on the concept of *citizenship* in the assignment of rights. However, the idea of differentiating on the basis of citizenship runs counter to the very idea of human rights, which has been recognized from both a moral and a legal perspective. It must be among the very points of modern IHRL to respond to the special kind of exposedness of *noncitizens*, too, whether they are located on a particular state's territory or not.

There is one further aspect that casts doubt on how adequate it is to conceptualize membership in such a thick way. Some of those who count as formal members of state communities, i.e., some who have legal citizenship, cannot convincingly be portrayed as coauthors: What about those who do not or cannot participate, who do not or cannot demand justifications? What about persons with mental disabilities, elderly people, or children? What about people lacking any sense of participatory involvement in the state and with no interest in its political development at all? What about non-naturalized residents who lack political rights and thus are unable to participate? All of them are directly

subject to the coercive legal system of the state but do not or cannot perceive themselves as coauthors. Nagel's criterion of participative coauthorship appears overly demanding: If justice obligations are only addressed to coauthors in this thick sense, then even many individuals (including citizens) on the territory will end up unprotected. The same objection holds with relation to less onerous conceptions of membership of social contract theories, according to which tacit, acquiescent, or explicit consent that triggers the relevant institutional relationship. How can it—in any convincing and nonauthoritarian way—be assumed that those on territory who are not able or not willing to participate amount to mature members of a *contract*? This hints at what has been a major problem for social contract theories, namely that they can only insufficiently explain the role of those who are directly affected but who cannot reasonably count as members of the contract. Even if the contract only serves as a thought experiment and even if it is only about hypothetical consent, it is confronted with the challenge of proving that (and if yes, how) its conception of membership can be inclusive. Whether or not it takes voluntariness to be a precondition, it must explain why it can automatically and legitimately include even those on territory who are unable or unwilling to enter the contract.

In light of these problems, some have opted for a practicable compromise solution, extending the criteria for membership in order to include those who do not participate as coauthors—thus ultimately, including *everyone on a territory*.[212] To illustrate again, the jurisprudence of the US Supreme Court has oscillated between narrower conceptions and expanding its social contract conception of constitutional protection to everyone on US territory—or at least to legal and long-term residents. This willingness to compromise appears to be a way of giving in to political and social reality, of reconciling its social contract understanding of the Constitution with the brute contemporary fact of the diversity of people that find themselves on US territory. Still, these compromise solutions would not escape the main line of critique outlined above. When foreign states influence outsiders, this also displays dimensions of coercion, exposedness, and vulnerability, generating legitimate claims for protection.

Lastly, as pointed out earlier, whether the thickness of domestic institutions also results from the *voluntariness* of individual membership remains ambiguous in both Nagel's institutionalist variant and in social contract theories. However, it is worth explaining why in both voluntary and nonvoluntary variants, applying social contract or institutionalist conceptions to the applicability of human rights protection would be irreconcilable with the idea behind human rights law. States are not like clubs where people freely assemble and that they can join and leave as they wish. Freedom of association is a normative principle but not an empirical reality for many people on the globe—at least not with regard to states: People are neither free to choose to be or not to be a state's member nor free to form new states or join any other state. While they may (at least in theory) be free to leave states, it is certainly not the case (neither in theory nor in practice) that they can *enter* states as

they wish. The freedom of association principle does not fully apply to territorial states. These are separated by borders—and "[b]orders have guards and the guards have guns".[213] Put simply, conditioning fundamental rights protection on voluntarily assumed membership would turn the purpose of human rights protection on its head.[214] Moreover, if the voluntariness of the individual decision to become a member would be so important because it expresses this *individual's autonomy*, then this primary role assigned to her autonomy must be assigned *before* she becomes a member, i.e., at a stage when she is still a nonmember. Thereby, it is irreconcilable with disregarding autonomy concerns (which often ground human rights) of other (so far) nonmembers.

This brings us to another problematic aspect of the institutionalist objection: One of the central ideas of the underlying accounts is that of *reciprocity*: Participation as coauthorship or consent to the contract legitimizes states' using coercive authority and requiring obedience in exchange for its protection of members' goods. However, such a reciprocal conception is in fundamental tension to the essence of human rights, where the relation between rights and duties cannot be conceptualized in a reciprocal fashion so that rights are only granted in exchange for a reciprocal act or commitment on the part of the individual. It is the very idea of human rights that these are inalienable rights assigned to human beings equally and independently of their particular opinions or conduct. With respect to these essential domains, all people deserve protection, regardless of how they have previously behaved or will behave in the future. Human rights are not goods we exchange. They are rights that protect human beings, irrespective of what the latter do, think, or believe.

In sum, institutionalist and social contract arguments against extraterritorial human rights obligations only see obligations of the state toward individuals arising within the context of an existing relationship that depends, *inter alia*, on a specific individual commitment—even if only a hypothetical one and even if the initial emergence of this relationship had not been based on a voluntary decision. It is not claimed that democratic participation, consent, and feeling represented are morally meaningless. Both coauthorship and consent are doubtlessly morally relevant with respect to many issues, but these relational concepts set too high thresholds *for the applicability of justice and human rights obligations.* Thus, if these kinds of obligations are indeed institutional obligations, then the underlying notion of what 'institutional' means must be framed in a broader and more inclusive way, including everyone *affected* by this institution. Outsiders, who do not participate as coauthors and who have not concluded any contract, have legitimate claims to make, too.

7.5.3.2 The Distinction Between Domestic and International Institutions

In his second main thesis, Nagel claims that there are no justice-generating institutional relationships beyond the framework of the nation-state, thus that

there is not just a gradual but a categorical difference between thick domestic and thin international institutions—it is only the former in which the specific constellation of coercion and coauthorship arises, and it is only this constellation in which justice norms apply.[215]

To begin with, there is an empirical objection to be mounted against this view: It is at least questionable whether all institutions currently existing at international level are as thin as Nagel portrays them.[216] With massive interrelatedness not only in the legal but also in the political, economic, social, and cultural realms, one can question (i) whether there are not also some international institutions that, at least to a certain extent, involve individual coercion and coauthorship, and (ii) whether the structural and institutional relations at the international level are not also as influential and important for individual's lives that considerations of justice must appertain to them, even if they do not involve coercive coauthorship.

Regarding (i), the fact that international law has recognized individuals as direct legal subjects runs counter to the picture of international institutions as mere cooperative schemes among states without any thicker impact on the individual. Contemporary international law includes domains that directly confer rights (such as IHRL) or duties (such as criminal law) on the individual, foresees the possibility of sanction regimes targeting specific individuals (such as those established by the UN Security Council, which can be legally binding for states independent of their explicit consent to particular measures), and has given rise to the establishment of human rights tribunals with direct access for individuals (such as the CCPR or the IACHR) and, sometimes, with the entitlement of ordering compensations on the part of rights-violating states (such as before the ECtHR or the IACtHR). Though not all international institutions are yet as influential, stable, powerful, socially accepted, and comprehensive as domestic ones, many of them still clearly exhibit dimensions of *coerciveness* (and some certainly come close to domestic ones, the EU being a paradigmatic example).

Moreover, the fact that decision-making processes at the international level are mediated by the state level does not yet prove that any *participative* role on the part of individuals is undermined. International decision-making is often based on principles of 'one state—one vote'. By itself, this certainly does not yet guarantee genuine representation and coauthorship of the respective individuals composing the states, in light of the fact that many states do not let their members have a real say. Yet, if (and only if) the decision-making *within* a particular state is genuinely democratic, the procedural introduction of one further level of representation (the international one) does not *by itself* undermine the democratic nature of the entire process. In addition, the impact of global civil society is constantly growing and the forums for exchange rapidly increasing, opening up a variety of partly novel ways in which individuals can influence global public discourse. Even though it is evident that this influence, in reality, often only makes a marginal difference, it still contributes to the participatory nature of the debate. Therefore, international institutions might

be *gradually thinner* than domestic ones, but it is unlikely that they are *categorically distinct*.[217]

Regarding (ii), even if individuals' relation to international institutions does not amount to one of genuine *coercive coauthorship* in Nagel's sense of the term, global cooperation must still necessarily and essentially be regulated by considerations of justice, given its quality, quantity, and its influence on individuals' lives. In other words, duties of justice cannot be swept aside as easily when transcending state borders and must apply to those thinner institutions.

An interesting argument that can be applied to the question at issue is provided by *Mattias Kumm*.[218] In his view, the legitimacy of domestic constitutional law is not self-contained but depends on being integrated into the system of international law. It is not self-contained because states' acts can have negative externalities that affect nonmembers abroad. If such externalities are *justice-relevant*, they need to be justified: In this case, states do not have the unilateral authority to decide and act. In contrast, in areas *beyond what justice demands,* states may have legitimate authority for unilateral action and special obligations could legitimately arise. Thus, states must not necessarily consider all effects on outsiders: In non-justice-relevant domains, they might legitimately prioritize insiders. They do not have a general unlimited duty to devote themselves to furthering or maximizing outsider's well-being. But when it comes to conduct that concerns justice, and the enjoyment of human rights amounts to such a justice-relevant domain, states cannot claim such authority. In this domain, it is not states but international law that gets to decide on the principles regulating externalities, based on moral considerations of justice—*whether or not* states have consented to the obligations this regulation entails for them. According to Kumm, there are various domains in which justice-relevant externalities arise, prominent among which are the establishment of borders and accompanying exclusionary practices as well as the extraterritorial effects of national policies, such as pollution or terrorism. For example, he argues, universal respect for human rights then amounts to a precondition for being justified in excluding outsiders: Such exclusion is only justifiable if they have another place to go where their human rights do not get violated. Otherwise, if their exclusion results in their rights being violated elsewhere, this constitutes an unjust negative externality of the excluding state's conduct.[219]

What stands behind this view and its rejection of narrow institutionalist approaches to the applicability of justice obligations is that, foundationally, the *demos* is not the starting point from which legal and political obligations are assigned—the starting point is the equal moral status assigned to individual human beings.[220] Justice is essentially a preinstitutional concept, a concept that is prior to and should inform the set-up of institutions—it is not a consequence of institutions.

In general, the notions invoked by Nagel such as coercion, coauthorship, and participation as well as those emphasized by social contract theories such as reciprocity and consent might be relevant to a variety of questions of moral,

political, and legal philosophy. Yet, again, they do not seem adequate as criteria for categorically differentiating addressees of *human rights obligations*. These kinds of obligations hold on a very foundational level, they aim at protecting a basic level of human dignity up to which the prior existence of a relationship—whether personal, political, or institutional—does not constitute a precondition. *Beyond* this basic level that human rights set, such relationships may plausibly be of much more moral significance and give rise to special obligations. *Up* to this basic threshold, they are not a legitimate basis for generally ascribing obligations. However, as the analysis will later turn to, residence in a state might make a difference for the question of how to *distribute* these duties to various actors in particular situations.[221] Before doing so, there is another hurdle to overcome, resulting from yet an alternative way of arguing against the legitimacy of extraterritorial human rights obligations.

7.6 Relativism: Ethnocentrism, Parochialism, and Human Rights Imperialism

7.6.1 The Relativist Objection

The last theoretical framework to be discussed and which can be employed as a starting point for an argument against extraterritorial human rights obligations is that of *relativism*. Because it serves as an umbrella term for a wide variety of approaches, relativism is not an easily definable notion. It can refer to a metaethical position as well as to various applications of this position onto concrete normative questions. Criticizing human rights is not necessarily the point on which relativists converge: Many relativist approaches do not address or do not generally oppose human rights, some focus on the descriptive relativist claim, others on its metaphysical claim.[222] In what follows, however, the focus is on those who do, from a relativist point of view, criticize the idea of *universal human rights* and corresponding obligations. This section will discuss a particular version of a potential argument against extraterritorial human rights obligations, which rests on a relativist rejection of the concept of universal human rights and entails a statist position, without claiming to thereby capture the entirety of what is claimed under the heading of relativism (which is not *per se* a statist theory).

In brief, the argument states: Every society—here political community—has its own set of values, norms, and principles: These hold relative to a society, its context, and history. The idea of universal human rights is foundationally mistaken: The norms subsumed under this concept, today enshrined in IHRL, do not reflect values of a universal nature but rather a particular set of values that is relative to contemporary Western, liberal societies. By declaring these particular Western values behind IHRL as being of a universal nature, they are imposed onto others in a parochial way. Now, if we extended states' human rights obligations to foreign territories, this would multiply the illegitimate ascription of a particular Western conception of rights to outsiders who may

not share it. Confining states' obligations to territory and upholding solid external sovereignty are thus necessary shields against such human rights imperialism.

7.6.1.1 Cultural and Moral Relativism

In what follows, the premises of the argument will be discussed one by one. The first claim captures the general assumption of *moral relativism*.[223] On the metaphysical dimension, relativism entails that there are no objective, universal values and moral principles but only relatively valid and legitimate ones. This claim draws on a descriptive theory of *cultural relativism*, which asserts—as an empirical fact—that every society has its own moral code, which is determined relative to its sociocultural context: It is just a matter of fact that people foundationally diverge on sets of values, conceptions of the good, and theories of rights.[224] While generally labeled 'cultural' relativism, the approach can be (and often has been) transposed to societies and political communities. In the case law discussed earlier, the cultural relativist perspective has been exemplified in the US Supreme Court's perception of other territories as inhabited by "alien races"[225] with categorically different modes of deliberation, or, more recently, in a concurring opinion on *Verdugo-Urquidez* that argued against extraterritorial applicability of the Fourth Amendment on grounds of the "wholly dissimilar traditions and institutions" and "the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad".[226]

To the above, many relativists add a normative premise: Because of the metaphysically relative nature of and the descriptively existing diversity of value sets and moral codes, none of them is superior and all of them ought to be mutually respected and tolerated.[227] A statement issued on behalf of the *American Anthropological Association* during the UDHR drafting process illustrates the application of such a normative claim to the field of human rights. On the one hand, it asserts the descriptive presumption that "(w)hat is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history".[228] On the other hand, it involves a normative claim, insisting that all cultures and moral codes be respected as equally valid for the respective societies that hold them. Accordingly, so it continues, if universal standards shall be established, these must assert "that man is free only when he lives as his society defines freedom, that his rights are those he recognizes as a member of his society", and, based on what is claimed to be the scientific fact of cultural relativism, must include a "right of men to live in terms of their own traditions".[229]

Another example of a relativist background theory from which normative implications were drawn could have stood behind the ECtHR's position in *Banković* and its introduction of the idea of an *espace juridique* to the ECHR. For example, Sarah Miller interpreted it as reflecting, on the one hand, the shared value set holding within the European context and, on the other hand,

the demarcation between this value set and those held elsewhere, implying that the former foundationally relative conception cannot simply be extended to other territories.[230]

The cultural relativist claim is also one of contextualism and historicism: Values and norms are defined and held relative to a context, which itself is a product of history, culture, religion, climate, and so on. In this view, moral norms are socially enacted historical constructs of these contexts, intended to govern specific local and historical circumstances. As *Raymond Geuss* or *Martti Koskenniemi* argue, rights are not products of philosophy but of history—and we should study them accordingly. The idea of universal human rights is then deceptive, lacking contextualism and historicism, since they "claim to protect our (person, group) identities *without ever questioning how we came to have them*".[231]

This perspective again reflects the normative premise often (implicitly or explicitly) involved in cultural relativism: Because of their essentially local, bottom-up nature, none of the moral codes developed within a particular context shall be prioritized or assigned authority over others. On these grounds, the relativist claim is generally sympathetic to neo-republican demands for communal self-determination, demanding that the norms regulating a community be negotiated among its members, or to communitarian-inspired claims that moral norms are essentially of a local, particular, historically contingent nature, as morality should orient itself at human inclinations and dispositions.[232]

In this spirit, the relativist can also criticize the idea that rights arise by virtue of being human, generated by a common human nature: If we are essentially historically conditioned social beings, whose identity is determined by the particular social, cultural, economic, environmental, and political conditions we find ourselves in, then the idea of objectively valid universal rights that spring from natural, innate, universal faculties of human nature is deeply mistaken, "nonsense upon stilts",[233] and "belief in them is one with belief in witches and in unicorns".[234]

7.6.1.2 Eurocentrism and Ethnocentrism

As a second premise in an argument against extraterritorial obligations, relativists can claim that the conception of rights that stands behind IHRL is not of a universal nature but actually reflects a particular set of values of *contemporary Western liberal societies*. On the one hand, the objection is one of *eurocentrism*. According to it, IHRL predominantly aims at the protection of individual autonomy and freedom, which are highly valued in European and other Western countries but not elsewhere. It criticizes the contemporary human rights regime as "simply a contemporary, institutionalized and universalized version of the liberal position on rights".[235] Since other societies do simply not agree, these rights and the prior status they assign to individual values, primarily to autonomy, have no claim to universality, being "rooted in an arrogant Eurocentric rhetoric and corpus".[236]

The *Bangkok Declaration on human rights*, issued prior to the *Vienna World Conference on Human Rights* in 1993, prominently put this objection on the agenda. In the Declaration, a variety of Asian states—though in diplomatically sensitive ways not straightforwardly rejecting the idea of universal human rights—emphasized the importance of sovereignty, noninterference, and self-determination, the significance of the local context and culture in the evolvement of IHRL, the need to avoid the risk of politicization of IHRL, and the primacy of national institutions in human rights protection.[237] This sparked an intense scholarly debate on *Asian Values* and the legitimacy of the universality assumption expressed in IHRL. Critics assessed Western liberalism and its atomized and abstract picture of the autonomous individual as diametrically opposed to Non-Western values of collectivity, who are characterized by their preference of social harmony and communal obedience over individual autonomy and self-fulfillment, of the family over the individual, of tradition over legitimacy, of common spirituality over material goods, of development over liberties, of order over democratic participation, of authoritarian and centralized governments over federalism and pluralism—in sum, by the preference of the common good over the individual good.[238]

On the other hand, the objection of *ethnocentrism* denotes the general problem of declaring one's own particular, essentially relative normative value set to be the universally valid and objective conception (i.e., universal human rights). It targets what is sees as the ideological undertaking of equipping the Western idea behind IHRL with a claim to objective and universal validity, resulting in sociocultural biases and ethnocentric tendencies. Following this critique, Judge Kennedy was not mistaken to deny constitutional protection abroad by virtue of the "wholly dissimilar traditions and institutions" to be found there—relativism would also need to be reflected at the legal level.[239]

7.6.1.3 Parochialism, Imperialism, and Neo-Colonialism

Third, the relativist objection is one of *parochialism*: If IHRL originates in a merely relatively legitimate Western conception of rights, then (ethnocentrically) bestowing a claim to universality upon it results in an illegitimate *parochialist imposition* of this conception onto outsiders, who do not share it. A uniform Western picture is thrust onto the entire global community, destroying diversity. In this view, the project of IHRL is an *imperialistic* enterprise, "an act of hubris".[240] As already Schmitt suggested, the concept of " 'humanity' is an especially useful ideological instrument of imperialist expansion and in its ethical-humanitarian form a specific vehicle of economic imperialism".[241]

On the one hand, the critique is a left critique typically stemming from the theoretical frameworks of post-colonialism and 'Third World Approaches to International Law' (TWAIL).[242] Its imperialistic orientation, so the objection goes, turns IHRL into a *neo-colonialist* enterprise with evident similarity to the 19th-century idea of the 'White men's burden' and the perceived civilizing mission of colonialism. In the eyes of post-colonialist critics, like *Makau*

Mutua, there are obvious "parallels between Christianity's violent conquest of Africa and the modern human rights crusade", which use the "same methods (…), similar cultural dispossessions (…) without dialogue or conversation. The official human rights corpus, which issues from European predicates, seeks to supplant all other traditions, while rejecting them".[243] The pressure to participate in the liberalist project of IHRL out of reputation concerns forces non-Western political communities to a process of "*acculturation*",[244] having to conform to norms without understanding or sharing the values behind them. Accordingly, in post-colonial contexts, the framework of IHRL is to be rejected for failing to consider the historical contingency and embeddedness of particular human experience and local moral outlooks. In these and other cases, human rights might just be "one thought too many".[245] Following Schmitt and along the lines of what realists claim, human rights are criticized as a hegemonic means to defend states' power positions, deployed to cover what is actually narrow-minded egoism.[246] An example to which such a critique is often applied is the alleged tendency of the EU to extend its legislation with extraterritorial effects, which is perceived as an imperialistic means to impose its own values and goals abroad. By contrast, the US Supreme Court's recent recurrence to the 'presumption against extraterritoriality' in civil litigation is portrayed as a reflection of modesty and a move away from unilateralist, hegemonic American parochialism.[247]

This general critique has been refined into many subvariants. As postmodern identity theorists claim, human rights are imposed from a particular perspective, from a limited human experience of the Western white male, and they cannot consider plurality, differences, and otherness: Their atomized individualistic picture results in "the annihilation of the 'Other' ".[248] From a neo-Marxist perspective, the human rights project is regarded as a neoliberal project of the empire, i.e., of Western-like global capitalism, the true aim of which is to globalize the free market.[249] This view on human rights as—actually weak and ineffective—tools of neo-liberalism has also gained support among normative-oriented historians: In the words of *Samuel Moyn*, "[h]uman rights have been the signature morality of a neoliberal age because they merely call for it to be more humane".[250]

On the other hand, the objection of imperialism is maintained by conservative and communitarian approaches, which regard IHRL as a utopic ideology, an imperialistic secular attempt to replace religion, an attack on structures of local solidarity and community bonds, and a position of ignorance regarding cultural richness and tradition. In this view, the elitist worldview of cosmopolitanism aims to overcome the essential political, social, and cultural differences between societies, ignoring the simple truth that people think and feel in nationalist not universal terms. Again, the critique emphasizes the relevance of otherness, which *de facto* matters to people: People do not recognize common and shared humanity, they do not perceive the other as the bearer of universal rights—primarily, people recognize "difference and otherness".[251] From this perspective, and similar to what realists claim, the weak theoretical underpinning of IHRL also helps to explain why *de facto*, it has not had any substantive

real-world impact on states' conduct: Its purpose is mainly one of serving as an imperialist rhetoric means. Today, however, this Western hegemonic tendency is increasingly challenged by stronger reference to the Eastern (or Southern) "counter-norm" of sovereignty.[252]

7.6.1.4 A Relativist Argument Against Extraterritorial Human Rights Obligations

Now, one could argue, if IHRL serves as a means for imperialism, *extraterritorial obligations* are an additional parochially motivated instrument to impose norms on the territory of other states, the communities of which hold different sets of values. Equipping this domain of international law with an extraterritorial reach multiplies its illegitimate and parochialist nature. When acting on or with effects on the territory of state B, foreign state A shall follow the norms that the sovereign domestic state B has set, i.e., it shall adhere to the law of B as the territorial state, even if it is different to its own. If A was compelled to follow its own constitutional or international human rights norms when acting with effects on the territory of B, this would multiply their parochialist potential. Limiting obligations to individuals on a state's own territory thus mitigates the risks of ignorant paternalism and neo-colonialist imperialism.[253]

Applied to the ECHR, this would again support the idea of its *espace juridique*: If the Convention is to be applied extraterritorially, then at most, this can be done within its legal space. By virtue of the shared value set among ECHR states, extraterritorial application within this space would then not amount to a parochialist imposition of values, while outside, for example for UK soldiers in Iraq, this is different and extraterritorial obligations do not hold.[254]

According to such a conception, sovereignty again plays a crucial role in countering imperialist tendencies. In this view, it is misled and dangerous to understand *sovereignty as responsibility*—i.e., to regard respect for human rights as a precondition for the ascription of sovereignty: If sovereignty were based on the idea of universal human rights, then this would sneak in a non-universalist and non-neutral conception of values into a basic pillar of international law.[255] Thus, the relativist fears that extraterritorial obligations provide yet a further excuse for increasing interventions in foreign states, conducted on the pretext of human rights: State A could rationalize its decision to intervene in state B by referring to its extraterritorial duties to protect and fulfill rights of inhabitants of B. In Posner's words: "The wisdom of the Westphalian system lay in the recognition that an excessive concern with the lives of foreigners, not too little concern, can be a major source of conflict in international relations".[256]

7.6.2 Countering the Relativist Objection

7.6.2.1 Empirical and Normative Universalism

The relativist objection starts with a descriptive claim, namely with the observation of the factually existing disagreement in moral and legal matters, which

are held relative to context—including human rights. To begin with, even if the empirical observation were true, it would not yet have any normative consequences: As discussed at various places earlier, there is a gap between *Is* and *Ought*. The alleged fact that people disagree about moral principles does not yet imply that relativists are right in denying universally justifiable principles. There is a difference between the universal *acceptance* of principles and the universal nature of the *justification* of principles: The former is not a necessary condition of the latter.[257] Disagreement can also result from the fallible nature of human reasoning—our judgment can be clouded by a variety of factors, such as epistemic shortcomings, restrained resources, factual misinformation, biases, or ideologies—or from the effects of nonmoral factors such as emotions, nonmoral interests, different preferences, factual presumptions and the like, which can all depend on the actual situation we find ourselves in at a particular moment in time: People in emergency situations like war zones are likely to set different priorities than affluent Westerners on the golf course. These factors might explain why people *de facto* arrive at different conclusions—but factual diversity and disagreement do not yet prove the absence of universally shared and justified basic *moral principles.* Put differently, the outcomes of 'moral performance' do not in themselves provide sufficient data for conclusions about the content of people's 'moral competence': Performance is susceptible to being influenced by a variety of cognitive, emotional, or other nonmoral factors. Competence could be much richer than actual instances of performance suggest.[258]

Furthermore, the claim behind IHRL is one about basic universal principles. Basic moral or legal principles, however, must always be translated into more concrete and action-guiding norms. This process of translation and implementation and its outcome are regularly influenced by concrete and particular modes of human reasoning, but that does not mean that the underlying normative principles must be so, too: "[U]niversalism is a regulative idea of the legitimacy of law, not a descriptive account of constitutional reality".[259] When converting universal principles into concrete positive norms about how basic goods will concretely and most effectively be realized within a particular context, a variety of formulations might result, influenced by contextual factors. While these factors are likely to influence human deliberation, this does not make the underlying justificatory theory of basic goods and rights a historically conditioned, context-dependent, and only relatively valid theory. Foundational universal principles are thus still compatible with the liberal ideas of pluralism and of individual freedom to live according to what one has chosen as one's conception of the good, and it is still autonomous individuals who conduct deliberation about how to imply such principles, not states, history, or culture. Lastly, if human rights derive from universal principles, this does not imply that *all* kinds of moral and legal norms emanate from such universal standards—the focus here is on the universal nature of the basic rights human beings have.[260]

Hence, even if the descriptive claim of cultural relativism were true, it would not necessarily undermine the normative idea of universal human rights. Yet,

the truth of the former can itself be questioned. While it is beyond the scope of this analysis to inquire into its empirical validity, it seems that it at least tends to underestimate the extent of agreement that actually exists: People of various backgrounds, societies, and cultures *de facto* also converge on the most basic values and principles. Even communitarian authors like Walzer concede that some thin and minimal set of moral norms might *de facto* be universally accepted, even though in his eyes, they cannot reflect universal values.[261]

Similarly, the relativist rejection of the idea of a common and shared human nature is mistaken. While it is also beyond the scope of this discussion to inquire into the century-long debate on the role of human nature for morality, what is important to assert at this point is that it would not imply that all humans are identical. People obviously differ with respect to a variety of aspects, such as abilities, talents, non-basic interests, or cultural orientations, experiences, and priorities—to name just a few. They are influenced by their upbringing, their culture and society, the point of history they live in, political, social, and economic conditions, climate, personal experiences, and, undeniably, by good or bad luck. Still, all of this is compatible with the idea of universally shared elements of human nature. If these elements are conceptualized as the core aspect of being human, it is not in opposition to diversity in all these other aspects.[262]

Related assumptions have recently been supported by studies in the realm of cognitive sciences, indicating the existence of such a shared core of human nature, its potential of explaining why certain goods are goods for human beings, and its moral relevance, i.e., its giving rise to certain basic normative principles such as foundational human rights. The mentalist idea of an inborn moral faculty, a 'Universal Moral Grammar', has proven to amount to a plausible thesis in approaching the subject.[263]

In sum, the cultural relativist assumption of *de facto* deep moral disagreement can be countered in manifold ways. However, many cultural relativists do not confine themselves to it but add normative assumptions, postulating a duty to preserve cultural diversity and to tolerate other cultures and moral outlooks, including their differing conceptions of or opposition to the idea of fundamental rights. Two replies can be made.

First, the postulate involves a contradiction. If cultural relativists demand tolerance for all cultures, they make a universal claim themselves: They assert a universal moral duty to uphold and promote cultural diversity by ensuring cultural respect, tolerating other outlooks, and avoiding the imposition of relative conceptions on anyone who does not share them. In doing so, they risk having recourse to concerns that actually underlie the case for universalism: If such a duty to avoid imposing own conceptions to others is ultimately justified via the value of respecting individual autonomy, then it directly relies on a universal conception similar to that on which human rights typically rely. Analogously, if she deploys sovereignty as the legal concept for protecting cultural diversity, the relativist adheres to a general principle of international law. Even though sovereignty itself does not entail any normative conclusions

about moral universalism, she must then conceptualize sovereignty as a principle of (at least legal) universal validity.[264]

Second, in stepping from the descriptive claim about cultural diversity to the normative claim about cultural respect, relativists often fail to explicate an implicit premise: The argument tacitly presumes that cultural diversity is worth preserving. While highly plausible, this is still a substantial thesis that needs to be argued for. What seems especially problematic is to assume that *every* culture, society, political community, and their moral codes are worth preserving. This is not only difficult to grasp in light of the fact that cultures, societies, political communities, and their moral codes, first, are entities in constant flux that evolve in reaction to both internal and external developments and second, are not *per se* normative entities: If they provide grounds for normative claims, this must be justified. But also, as discussed earlier, not every political community and its moral code are worth preserving. Some involve repellent and, in colloquial language, 'intolerable' elements, indicating that toleration is not intrinsically good and *per se* morally required—we cannot be demanded to tolerate the intolerable. However, in order to evaluate and determine which moral codes are worth preserving and which are not, we precisely need to rely on external principles. The cultural relativist cannot criticize racist, sexist, or otherwise objectionable elements in specific cultures, as he would thereby need to fall back on external and plausibly universal standards.[265]

7.6.2.2 The Universality of Human Rights

Starting from the assumption of cultural relativism, the objection proceeds by asserting that the conception of rights and values behind IHRL arises from a particular moral outlook, namely that of contemporary Western liberalism, and thereby amounts to a *eurocentric* conception. The fact that the ECHR is the oldest and likely the most efficacious regional human rights regime and the similarity of its content to that of the ICCPR could be taken as an indication that the contemporary set of IHRL rights, especially civil and political rights, are indeed rooted in European, Western values. Accordingly, the ECtHR would have had a point in introducing the idea of an *espace juridique*, of common principles on which European states converge but that are not necessarily shared by third states.

Considering the wording of the Preamble of the ECHR and its explicit reference to the UDHR, however, such a relativist interpretation is unconvincing: The UDHR explicitly and essentially inspired treaties like ECHR and the ICCPR. The point of regional conventions is not that they only reflect regionally shared values or only protect individuals located within this particular regional area, but rather that they only legally oblige states of this very region, i.e., only these particular states can legally be held accountable. While they legally allocate *obligations* only to a particular set of states, *rights* are still of a universal nature: The addressees of these obligations, i.e., the holders of the corresponding rights, are not confined to the corresponding regional space

of the specific convention. This is no exotic claim: It is analogous to the idea of constitutional rights, which are typically conceived as reflecting *universal rights,* but which only *bind one specific state* through their being enshrined in its foundational legal document. Human rights can be legally implemented at different levels, be it national, regional, supranational, or international ones—but the level of legal implementation does not affect the universality of these basic claims.

On a more foundational level, as *Matthias Mahlmann* points out, we must distinguish the genesis of human rights from their normative validity or legitimacy: The fact that some rights first appeared in place X does not imply that they are only valid for place X. In justifying rights and their applicatory scope, one cannot simply point to their historical evolution—foundational justification is essentially independent of contingent historical factors. Their having first appeared in Western contexts would not yet provide sufficient ground for opposing the universal *justifiability* of these rights. In addition, on the one hand, it might as well be questioned whether today's IHRL is indeed a product of the West: Western states have also been notorious for disregarding and infringing human rights in the most repulsive ways—Christian Crusades, slavery, racial segregation, colonialism, or the Holocaust provide just some of many horrendous examples.[266] On the other hand, the UDHR, the keystone of contemporary IHRL, was the outcome of an inclusive and participatory drafting process to which a diversity of states from all over the world had substantially contributed. In the later course of the legal implementation of rights in the form of international treaties, many states from the Global East and South have campaigned vigorously for pouring the Declaration into hard law, while precisely some of the 'Western' states have been more hesitant in doing so. The UN's human rights system has at least attempted to mirror an "institutionalized commitment to inclusiveness", perhaps precisely because of the awareness of the risk of parochialism.[267] All of this casts doubt upon the characterization of the process as a thoroughly and blatantly *ethnocentric* enterprise, in which the West dictated to others what values should be regarded as the universal and objective ones.

Still, the critique remains that the individualistic underpinning of today's set of human rights is not reconcilable with many non-Western societies. Three points are relevant in response. First, if the term 'right' is not used within a particular society, this does not mean that its members cannot grasp the concept or do not share the normative content of a particular right. People can assign high value to something and perceive it as giving rise to normative claims, even though in their everyday language, they do not express this by using the term 'right'. As Mahlmann points out, the existence of deontic categories is not conditional on the usage of corresponding deontic terminology. The valuing of goods and the conviction that these goods give rise to basic norms can also express themselves in nonlinguistic ways—which has repeatedly and impressively occurred over the course of history, in a wide range of

human practices and struggles in which individuals have ultimately aimed at being treated as a being with dignity.[268]

Second, it is difficult to determine what particular set of rights and values a particular society holds. On the one hand, conceptions of the good vary widely within one political community; on the other, people often share them across borders. It does not seem adequate to portray non-Western states as adhering to the 'Asian values' of collectivity, community, and authoritarianism, while Western ones as valuing only individuality, autonomy, liberty, and democracy. This alleged dichotomy is too simplistic: It overlooks the manifold influences societies and cultures have on one another, today facilitated through global means of communications, transportation, and mass mobility. But also, as *Amartya Sen* has prominently asserted, many Asian states have embraced or are embracing liberalist outlooks, while many Western ones have leaned or are leaning toward authoritarian conceptions. Differences between societies are typically exaggerated while diversity within them is downplayed. Moreover, if 'Asian values' reflect what is typically promoted in public debate as the goods a particular Asian political community values, this does not mean that its members actually share them. For example, if they have no or only limited possibilities to participate in public debate, to form their own opinion based on free education and information, to express disagreement without fear of punishment, then it is dubious whether they feel represented by the officially publicly embraced values of the authoritarian regime they live under.[269]

Third, IHRL is not merely grounded in the value of individual autonomy. It also centrally incorporates rights that apply to communities (such as the rights to culture, to self-determination and free association, or rights of indigenous peoples) as well as social, cultural, and economic rights. While it is true that IHRL is to a considerable part formulated and conceptualized in the form of individual rights, this does not yet mean that it opposes all kinds of community concerns. Its protection of freedom, justice, fairness, subsistence, flourishing, and autonomy are precisely means of enabling and protecting diversity, avoiding parochialism, and allowing people to live according to what they themselves have chosen as their own conceptions of the good. Autonomy and liberty in choosing and following one's own conception of the good can enable people to put greater weight on, for example, the pursuit of relationships or communities, insofar as these belong to what they regard as elements of a life worth living, and insofar as they are compatible with others' autonomy and liberty. Such individual goods do not *per se* undermine collectivity, and human rights are not absolute and boundless claims. As rights held by every human being, they must essentially be compatible with ascribing the same rights to others.[270]

Lastly, IHRL is only one domain of international law, and it is not intended to do all the work there is to do in realizing global justice. While it importantly shields many community concerns, there exist additional global structures or frameworks that are specifically entrusted with the protection of such concerns.

Still, notably, many of these additional community-oriented mechanisms again explicitly refer to human rights as their foundational justificatory principles or, for example, to the central role human rights instruments assign to self-determination, revealing that IHRL is compatible with them.[271]

Certainly, it is important that the process of implementing, interpreting, and developing IHRL and the institutions set up for dealing with these tasks be designed and overlooked in ways that ensure maximally possible inclusiveness, diversity, and participation so as to avoid attempts to sneak in parochialist elements.[272] While this is certainly not without challenges and requires constant efforts and awareness-raising, it can learn from previous experiences: The UN system not only looks back on and benefits from a variety of 'lessons learned' but, while doubtlessly with ample room for improvement, provides a platform for genuinely global collaboration.

7.6.2.3 The Protective Potential of Universal Human Rights

The next step the relativist objection proceeds to is to argue that the extension of human rights obligations beyond borders provides yet another parochialist means to impose this Western conception of rights onto outsiders, a neo-colonial form of human rights imperialism.

It is certainly true that there is more than one stain on the history of human rights: The flag of universal human rights has been misused in the name of many undertakings that were based on entirely different motives than that of making the world a better place. In this respect, they have undeniably been abused to further imperialistic projects and to cover the economic or ideological rationales behind these projects.[273] However, some people or states availing themselves of human rights language in order to promote their imperialistic projects does not imply that the core idea behind human rights is of an imperialistic nature. Human rights, like many other phenomena that are located at a foundational level and therefore naturally lack some concreteness, are prone to be abused—not only by hegemonic states, which deploy them as a cover for other interests, but also by (Eastern, Southern, Western, or Northern) authoritarian regimes. However, the fact that human rights are misused by the powerful does not turn them into mere imperialistic or authoritarian instruments of power. Moreover, human rights *critique* can likewise serve as a strategy to rationalize the resort to authoritarianism, namely if authoritarian regimes downplay their human rights violations by pointing to the distinct set of values their societies adhere to.[274]

Human rights in general and extraterritorial obligations in particular, if deployed in line with their foundational idea, are not instruments of the powerful but of everyone, including of those less privileged: They provide means to protect individuals from potent and powerful agents like the state. As discussed before, in extraterritorial situations, the individual is typically also exposed to foreign states' act. This exposedness is not necessarily *greater* than that of insiders, but it is *of a specific kind*, leaving outsiders with much fewer

means to defend themselves. Subjecting states to human rights obligations to these individuals empowers the latter with an instrument to defend themselves and their most basic interests against the power of the former.[275]

A similar objection must be raised against the critique of human rights as a neoliberal enterprise: Modern IHRL was mainly initialized after the Second World War. Its central inspirational document, the UDHR, was issued in 1948, thus decades before the rise of the neoliberalist ideology. While some of its legal codifications in the form of international treaties were indeed adopted *roughly* in parallel to the rise of neoliberalism, this does not turn the former into a product or side-product of the latter. Likewise, extending obligations beyond borders is not an instrument of expanding economic power and markets—rather, human rights can be and often have been used as shields against the exploitative natures of states' and their private partners' projects abroad.[276] This is illustrated in the current debate on 'Business and Human Rights', within which it is, *inter alia*, asserted that home states of TNCs are required to protect individuals abroad from the conduct of these companies, e.g., by subjecting their activities abroad to certification and authorization procedures, by introducing corresponding legal regulation, and by holding perpetrating companies accountable.[277]

Is it still legitimate to assume that human rights are norms that only fit white affluent men, thus only encapsulate a very particular human experience, which is then taken as an abstract model of universal validity, applied to everyone without considerations to identificatory aspects of difference?[278] Do extraterritorial obligations serve as yet augmented means to impose the old white man's experience onto outsiders? Would it, to take a fictional example, be a sign of *disrespect* when the US subjects its agents surveilling a refugee camp on the Mexican side of the border (say, because they assume it is used as a hub for drug trafficking) to comply with constitutional or international human rights vis-à-vis a Nicaraguan woman stranded in this very camp? The question is not easy to answer. In reality, given the political climate, it might well be the case that the US (or any other state) rationalizes its offenses against the dignity of the Nicaraguan refugee under the pretext of human rights obligations (to its own citizens). However, again, that these tragic kinds of misuse of human rights language happen does not mean that human rights, as conceptualized in IHRL, simply do not fit the case, nature, or values of this woman. On the contrary, her circumstances impressively illustrate that it is most likely *not* the protection by IHRL she is fleeing from—it is most likely *not* autonomy and liberty she feels most threatened by. What is said to be of basic importance for the white affluent man might also be at the core of what she regards as constitutive of leading a life in dignity.[279]

Lastly, adhering to human rights and asserting the need for stringent extraterritorial obligations do not provide a slippery slope: It does not imply a free ticket for unconstrained (humanitarian) interventionism.[280] One misses the point of human rights if one assumes that extraterritorial obligations would generally compel states to intervene whenever the benefits of doing

so outweigh its costs (which can include, *inter alia*, the commission of further human rights violations). The nature of human rights as foundational claims indicates that a simple utilitarian calculus is insufficient for justifying interventions. However, what is certain is that *if* states make interventions (whatever their motives), then human rights duties follow the flag. It is worth bearing in mind that calls to avoid human rights imperialism can also serve as an excuse for disregarding basic human interests in such extraterritorial interventions. Hence, while it is too provocative to describe human rights imperialism as "particularly seductive", Judge Bonello still has a point when he asserts:

> It ill behoves a State that imposed its military imperialism over another sovereign State without the frailest imprimatur from the international community, to resent the charge of having exported human rights imperialism to the vanquished enemy. It is like wearing with conceit your badge of international law banditry, but then recoiling in shock at being suspected of human rights promotion (…). For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the opprobrium of being labelled human rights imperialists.[281]

7.7 Conclusion: Statist Objections to Extraterritorial Human Rights Obligations

The above critique has not sought to deny the significance of associating with others, the importance of collectively deciding on regulative standards, the plausible justifiability of certain kinds of partiality, or the legitimacy of certain claims for toleration to protect pluralism and diversity. Neither has it held that the state, its institutions, or the concept of sovereignty should be overcome in order to realize human rights at home and abroad. What has been argued is that the attempts to derive a fundamental moral argument for constraining human rights obligations to states' territories based on statist premises of IR realism, communitarianism, patriotist special obligations, neo-republican non-domination, Nagel's institutionalism, or relativism are unconvincing. Above all, the analysis of their different argumentative strategies has revealed that they would need to resort to extreme and untenable premises in order to arrive at the desired conclusion—and it is these very premises that rob the arguments of their plausibility.[282] While more moderate exponents might not (at least not straightforwardly) embrace these premises, it is still worth bearing in mind that the theoretical frameworks they associate themselves with can accommodate such premises and the untenable views that flow from them.

The other side of the coin is that, in defending the extraterritorial applicability of human rights law, one does not necessarily have to take an *extreme* cosmopolitan stance: Specifically, one does not have to fully reject the idea of a certain degree of legitimate moral partiality, of certain obligations toward

coresidents, or of certain sovereign rights. What must be denied is merely that partiality, special obligations, claims for self-determination, institutional obligations, or any sovereign rights would allow a state not only to prioritize members but also to *disregard* nonmembers' claims *in the area of human rights*.

This position does not yet entail any conclusions on whether, for example, special obligations exist in other domains. It only asserts that human rights set a very basic threshold: Up to this threshold, a kind of partiality that allows not only *prioritizing insiders* but also *disregarding outsiders* is not justified. Up to this threshold, the very existence of corresponding obligations does not depend on the existence of a relational basis—at least not on a fundamental level: While there may be *instrumental* reasons to assign some special obligations to domestic states in order to most efficiently realize human rights universally (as will later be discussed),[283] there are no intrinsic reasons for doing so.

On the basis of this critique, Chapter 8 elaborates a justificatory theory of extraterritorial human rights obligations of states. From the element it identifies as pertinent, it draws the conclusion that human rights embody obligations owed to every human being, by virtue of being human, irrespective of location—and which thus clearly need to be applied extraterritorially. The nature of the duty-bearer state that is at issue here underlines the moral necessity, significance, and urgency of applying these duties abroad, too.

Notes

1 For an overview over the arguments in this chapter, Müller, *Justifying*, 55 ff.
2 Machiavelli, Niccolò, *Der Fürst [Il principe]*, Zorn, Rudolf (ed.), [1532], 6th edn (Stuttgart: Kröner, 1978); cf. Forde, Steven, 'Classical Realism', in Nardin, Terry & Mapel, David R. (eds.), *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992), 62–84, 64 ff.
3 Hobbes, *Leviathan*, chapter 13, XIII.
4 Ibid., chapter 28, XXVIII; cf. Forde, *Classical Realism*, 77.
5 Hegel, Georg Wilhelm Friedrich, 'Grundlinien der Philosophie des Rechts', in Moldenhauer, Eva & Michel, Karl Markus (eds.), *Werke*, [1820] (Frankfurt a.M.: Suhrkamp, 1979), para. 209, 258, 322, 333 ff.
6 Schmitt, *Politische Theologie*, 13 ff.; Dyzenhaus, David, 'Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought', *Theoretical Inquiries in Law*, 16/2 (2015), 337–366, 347. See Section 4.2.
7 Schmitt, *Begriff des Politischen*, 26, original emphasis, translation A.M.
8 Ibid., 54 ff.
9 References for these theses appear in, e.g., Waltz, Kenneth N., *Theory of International Politics* (Boston et al.: McGraw-Hill, 1979), 88 ff., 102 ff., 126; Morgenthau, Hans J., 'The Primacy of the National Interest', *The American Scholar*, 18/2 (1949), 207–212; Morgenthau, Hans J., *Politics among Nations: The Struggle for Power and Peace*, Kenneth W. Thompson (ed.), 4th edn (New York: Alfred A. Knopf, 1967), 5 ff.; cf. further Bell, Duncan, 'Realist Challenges', in Brown, Chris & Eckersley, Robin (eds.), *The Oxford Handbook of International Political*

Theory (Oxford: Oxford University Press, 2018), 641–651, 642; Lomasky, Loren E. & Tesón, Fernando R., *Justice at a Distance: Extending Freedom Globally* (New York: Cambridge University Press, 2015), 183; Donnelly, Jack, 'Twentieth-Century Realism', in Nardin, Terry & Mapel, David R. (eds.), *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992), 85–111, 86 ff.; Donnelly, Jack, *Universal Human Rights in Theory and Practice*, 3rd edn (Ithaca: Cornell University Press, 2013), 210 f.; Forde, *Classical Realism*, 62; Dunne, *Ethical Foreign Policy*, 498; Carr, E.H., *The Twenty Years' Crisis, 1919–1939*, Cox, Michael (ed.) (London: Palgrave Macmillan, 2016), 140 ff. IR Realism is distinct from 'Legal Realism', though some core premises are shared, such as the separation of law and morality, see also, e.g., ibid., 104, 209. On the last seventh point, Galston, William A., 'Realism in Political Theory', *European Journal of Political Theory*, 9/4 (2010), 385–411, 400 f.

10 Hom, Andrew R., 'Truth and Power, Uncertainty and Catastrophe: Ethics in International Relations Realism', in Steele, Brent J. & Heinze, Eric A. (eds.), *Routledge Handbook of Ethics and International Relations* (Abingdon/New York: Routledge, 2018), 130–145, 136; Scheuerman, William E., 'Reconsidering Realism on Rights', *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Dordrecht: Springer, 2012), 45–60, 50, 58.

11 Buchanan, *Justice, Legitimacy, and Self-Determination*, 29 ff.

12 First established by Waltz, *International Politics*.

13 For example, Williams, Bernard, *In the Beginning was the Deed: Realism and Moralism in Political Argument*, Hawthorn, Geoffrey (ed.) (Princeton: Princeton University Press, 2005); Geuss, Raymond, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008). For an overview and defense of contemporary realism, Galston, *Realism*; cf. Hall, Edward & Sleat, Matt, 'Ethics, Morality and the Case for Realist Political Theory', *Critical Review of International Social and Political Philosophy*, 20/3 (2017), 278–295, 280 f.

14 For the discussion at hand, it is not necessary to draw a sharp distinction between realism and neorealism, given that authors of both camps tend to oscillate between an empirical analysis and a normative approach.

15 For example, Waltz, *International Politics*, 126, 169 ff., 201 ff., 209; Keohane, Robert O., *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984), 245 ff.

16 Bull, Hedley, *The Anarchical Society: A Study of Order in World Politics*, 4th edn (New York: Columbia University Press, 2012), 80, see also 80 f., 146 f.

17 Buchanan, *Justice, Legitimacy, and Self-Determination*, 35 f. Cf. Dembour, Marie-Bénédicte, 'Critiques', in Moeckli, Daniel; Shah, Sangeeta & Sivakumaran, Sandesh (eds.), *International Human Rights Law*, 3rd edn (Oxford: Oxford University Press, 2018), 41–62, 45; Forde, *Classical Realism*, 62; Nardin, Terry, 'Ethical Traditions in International Affairs', in Nardin, Terry & Mapel, David R. (eds.), *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992), 1–22, 15 f.

18 Nardin, *Traditions*, 16.

19 Morgenthau, *Politics among Nations*, 10, emphases added.

20 Waltz, *International Politics*, 58. See also Kaufman, Robert, 'Morgenthau's Unrealistic Realism', *Yale Journal of International Affairs*, 1/2 (2006), 24–38, 27, 36; Morgenthau, Hans J., *Human Rights and Foreign Policy*, CRIA Lecture on Morality & Foreign Policy (New York: Council on Religion and International

Affairs, 1979), 7. Some say that this was the only claim *classical* realists made: They did not criticize the general idea of universal human rights but only pointed to their limited effectualness, Scheuerman, *Reconsidering Realism*, 51 ff. Similar claims, highlighting the limited real-world effects human rights have, are made by *Eric Posner*, even though he does not consider himself a realist, Posner, Eric A., *The Twilight of Human Rights Law* (New York: Oxford University Press, 2014), 70. However, others detect realist dimensions in Posner's work, see Etinson, Adam, 'Introduction', in Etinson, Adam (ed.), *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2018), 1–38, 26, fn. 93.

21 For example, Isensee, Josef, *Grenzen: Zur Territorialität des Staates* (Berlin: Duncker & Humblot, 2018), 197 ff.

22 Geuss, *Real Politics*, 9.

23 Goldsmith, Jack L. & Posner, Eric A., *The Limits of International Law* (Oxford: Oxford University Press, 2005), 185 ff., 202 f.; Craven, Matthew, 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality', in Coomans, Fons & Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004), 233–257, 237 ff.

24 Morgenthau, *Primacy*, 212; Morgenthau, *Politics among Nations*, 249.

25 Goldsmith & Posner, *Limits*, 201; also Geuss, Raymond & Hamilton, Lawrence, 'Human Rights: A Very Bad Idea', *Theoria: A Journal of Social & Political Theory*, Interview of Raymond Geuss by Lawrence Hamilton, 60/135 (2013), 83–103, 88.

26 Carr, *Twenty Years' Crisis*, 19, 65; Morgenthau, *Human Rights and Foreign Policy*, 4, 10; Morgenthau, *Politics among Nations*, 10. On relativist approaches, Section 7.6.

27 Novak, William J., 'Legal Realism and Human Rights', *History of European Ideas*, 37/2 (2011), 168–174, 169. See also, e.g., Geuss, *Real Politics*; Geuss & Hamilton, *Human Rights*; Koskenniemi, Martti, 'Rights, History, Critique', in Etinson, Adam (ed.), *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2018), 41–60; Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870—1960* (Cambridge: Cambridge University Press, 2002); Zolo, Danilo, 'The Political and Legal Dilemmas of Globalisation', *Theoria: A Journal of Social and Political Theory*, 103 (2004), 28–42.

28 Koskenniemi, *Gentle Civilizer*, 514 f.; similarly Moyn, *Last Utopia*, 227. This line of critique will again be taken up in Section 7.6.

29 Cf. Caney, *Justice*, 239 f.

30 Morgenthau, *Primacy*, 210.

31 Goldsmith & Posner, *Limits*, 211. See also Neuman, *Whose Constitution?*, 984.

32 Forsythe, David P., *Human Rights in International Relations*, 4th edn (Cambridge: Cambridge University Press, 2018), 224.

33 Koh, Harold Hongju, 'On American Exceptionalism', *Stanford Law Review*, 55/5 (2003), 1479–1527, 1498, original emphasis.

34 Kaufman, *Morgenthau's Unrealistic Realism*, 37, also 27, 30 f.; also Kaufman, Robert G., *In Defense of the Bush Doctrine* (Lexington: University Press of Kentucky, 2007); Walt, Stephen M., *The Hell of Good Intentions: America's Foreign Policy Elite and the Decline of U.S. Primacy* (New York: Farrar, Straus and Giroux, 2018); Walt, Stephen M., 'The Myth of American Exceptionalism', *Foreign Policy*, 11 October 2011.

35 Ignatieff, Michael, 'Introduction: American Exceptionalism and Human Rights', in Ignatieff, Michael (ed.), *American Exceptionalism and Human Rights*

(Princeton: Princeton University Press, 2005), 1–26, 23; Forsythe, *Human Rights in International Relations*, 223 ff.; Donnelly, *Twentieth-Century Realism*, 104.

36 Exemplified in Bolton, John, 'Should We Take Global Governance Seriously?', *Chicago Journal of International Law*, 1/2 (2000), 205–221; Bradley, Curtis A. & Goldsmith, Jack L., 'Treaties, Human Rights, and Conditional Consent', *University of Pennsylvania Law Review*, 149/2 (2000), 399–468. For a discussion, Ruggie, John Gerard, 'American Exceptionalism, Exemptionalism, and Global Governance', in Ignatieff, Michael (ed.), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005), 304–337; also Foot, Rosemary, 'Exceptionalism Again: The Bush Administration, the "Global War on Terror" and Human Rights', *Law and History Review*, 26/3 (2008), 707–725, 709; Koh, *American Exceptionalism*, 1485 ff.

37 Forsythe, *Human Rights in International Relations*, 400; also Ignatieff, *Introduction*, 15 f.

38 Bradford, Anu & Posner, Eric A., 'Universal Exceptionalism in International Law', *Harvard International Law Journal*, 52/1 (2011), 2–54; Ličková, Magdalena, 'European Exceptionalism in International Law', *European Journal of International Law*, 19/3 (2008), 463–490. See Chapter 3.

39 For example, CCPR, *CO USA*, 2014, para. 4; also CCPR, *CO USA*, 1995, para. 284; CCPR, *CO USA*, 2006, para. 10.

40 Koh, *American Exceptionalism*, 1500, see also 1498, 1509; Foot, *Exceptionalism Again*, 713.

41 *US v. Verdugo-Urquidez*, 273 f.

42 Ibid., 275. Similarly *Boumediene v. Bush*, 831, 833 f., 842 (Scalia J., dissenting).

43 *US v. Verdugo-Urquidez*, 278 (1990) (Kennedy J., concurring).

44 Posner, *Boumediene*, 43.

45 Ibid., 38, 46.

46 *Kiobel v. Royal Dutch*, 124.

47 Cf. Anderson, *Symposium: After 'Universality'*.

48 Dunne, *Ethical Foreign Policy*, 505; also Bell, *Realist Challenges*, 642 ff.; similarly other contributions in Brown & Eckersley (eds.), *International Political Theory*. For an analysis, Diggelmann & Altwicker, *Constitution of International Law*, 628 f.

49 Cf. Besson, Samantha & Tasioulas, John, 'Introduction', in Besson, Samantha & Tasioulas, John (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 1–27, 7 ff., 17.

50 Ibid., 12.

51 Ibid., 17 f.; Section 10.3.

52 Ignoring this gap constitutes an 'Is-Ought-Fallacy', Hume, David, *A Treatise of Human Nature*, Norton, David Fate & Norton, Mary J. (eds.), [1740], The Clarendon Edition of the Works of David Hume, 2nd edn, vol. I (Oxford: Oxford University Press, 2007), book III, part I, sec. I.

53 Caney, *Justice*, 276.

54 Besson & Tasioulas, *Introduction*, 15.

55 Caney, *Justice*, 239.

56 Forde, *Classical Realism*, 82.

57 Ryngaert, *Unilateral Jurisdiction and Global Values*, 103 ff.

58 For example, Keohane, *After Hegemony*, 257; cf. Goldsmith & Posner, *Limits*, 111, 120 f., 132 f.

59 Benvenisti & Versteeg, *External Dimensions*, 15.

60 Neuman, *Whose Constitution?*, 985.
61 De Schutter & Tinnevelt, *David Miller's Theory*, 373. Cf. Section 6.2.
62 Not all authors cited below would share the conclusions of such a hard approach as outlined below, even if they share some of its premises, cf. also the methodological approach explained in Section 6.1. Moreover, other definitions of communitarianism exist, cf., e.g., Bell, Daniel, 'Communitarianism', in Zalta, Edward N. & Nodelman, Uri (eds.), *Stanford Encyclopedia of Philosophy*, Fall 2022 edn (Stanford: Stanford University, 2022), https://plato.stanford.edu/archives/fall2022/entries/communitarianism/. Moral relativism is the object of Section 3.2.5 and not understood as a subclass of communitarianism.
63 Sandel, *Justice*, 235. Also Margalit, Avishai & Raz, Joseph, 'National Self-Determination', *Journal of Philosophy*, 87/9 (1990), 439–461, 447, who cannot be categorized as hard communitarians (ibid., 450) but who share many of the communitarian premises at stake here.
64 Fletcher, George P., *Loyalty: An Essay on the Morality of Relationships* (New York/Oxford: Cambridge University Press, 1993), 15.
65 Also Taylor, Charles, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985), 187 ff., 205 ff.; Sandel, Michael J., *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge/London: Belknap Press of Harvard University Press, 1996), 203 ff., 339 ff.
66 For example, Sandel, *Justice*, 235; Sandel, Michael J., *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Taylor, *Philosophical Papers*, 187 ff.; Miller, David, *On Nationality* (Oxford: Oxford University Press, 1995), 50.
67 Rorty, Richard, *Contingency, Irony, and Solidarity* (Cambridge/New York: Cambridge University Press, 1989), 191.
68 Ignatieff, *Idolatry*, 79. Also, e.g., Goldsmith & Posner, *Limits*, 212; Miller, David, *National Responsibility and Global Justice* (New York: Oxford University Press, 2007), 264; Galston, *Realism*, 407; cf. Forsythe, *Human Rights in International Relations*, 401.
69 Miller, *On Nationality*, 80.
70 The phrase originally goes back to Godwin, William, *Enquiry Concerning Political Justice, and Its Influence on Morals and Happiness*, 3rd edn, vol. I (London: Robinson, 1798), book II, chap. II. Since, it has been adopted by many authors, e.g., prominently Wellman, Christopher Heath, 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun "My"?', *Ethics*, 110/3 (2000), 537–562.
71 Margalit & Raz, *National Self-Determination*, 449; Sandel, *Liberalism*, 172 f.; Miller, *On Nationality*, 50 f., 64 f., 79. In later work, Miller accepts both general universalist and special associative obligations, which is why his later view will be analyzed in Section 7.3 below.
72 On this distinction, cf. MacIntyre, Alasdair, 'The Magic in the Pronoun "My"', *Ethics*, Review of Moral Luck by Bernard Williams, 94/1 (1983), 113–125, 123.
73 Williams, Bernard, *Moral Luck* (Cambridge: Cambridge University Press, 1981), 18.
74 Ibid., 16 ff.; Williams, Bernard, 'A Critique of Utilitarianism', in Smart, J.J.C. & Williams, Bernard (eds.), *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), 75–150, 116; Horton, John, *Political Obligation* (London: Macmillan, 1992), 148 f. Other authors explicitly assert a conflict between relationships, which are of a nonmoral nature, and morality, which is

impartial, e.g., Brink, David O., 'Utilitarian Morality and the Personal Point of View', *The Journal of Philosophy*, 83/8 (1986), 417–438, 432 ff.

75 Fletcher, *Loyalty*, 21, emphases added; also Posner, *Twilight*, 104 ff.

76 Cf. Langford & Darrow, *Moral Theory*, 421 ff.; Ratner, *World Public Order*, 201.

77 MacIntyre, Alasdair, *After Virtue*, 2nd edn (Notre Dame: University of Notre Dame Press, 1984), 220, also 216 f. Similarly Sandel, *Justice*, 221 f.; Taylor, Charles, 'The Politics of Recognition', in Taylor, Charles & Gutmann, Amy (eds.), *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), 25–73, 32.

78 MacIntyre, *After Virtue*, 220 f., 250 f.; MacIntyre, Alasdair, *Is Patriotism a Virtue?*, The Lindley Lecture (Lawrence: University of Kansas, 1984), 4 ff., 9 ff., 19 f.

79 MacIntyre, *After Virtue*, 252 ff.

80 Audi, Robert, 'Nationalism, Patriotism, and Cosmopolitanism in an Age of Globalization', *The Journal of Ethics*, 13/4 (2009), 365–381, 367 f.; Miscevic, Nenad, 'Nationalism', in Zalta, Edward N. (ed.), *The Stanford Encyclopedia of Philosophy*, Fall 2020 edn (Stanford: Stanford University, 2020), https://plato.stanford.edu/archives/fall2020/entries/nationalism/; Primoratz, Igor, 'Patriotism', in Zalta, Edward N. (ed.), *Stanford Encyclopedia of Philosophy*, Winter 2020 edn (Stanford: Stanford University, 2020), https://plato.stanford.edu/archives/win2020/entries/patriotism/, chap. 1. The label patriotism will again be explained in Section 7.3. On the distinction between the political and the territorial community, Section 6.2.2.

81 Berlin, Isaiah, 'Nationalism: Past Neglect and Present Power', in Hardy, Henry (ed.), *Against the Current: Essays in the History of Ideas* (Oxford: Clarendon Paperbacks, 1989), 333–355, 341 ff. Next to the authors mentioned above and below, nationalist theories include Tamir, Yael, *Liberal Nationalism* (Princeton: Princeton University Press, 1993); Isensee, Josef, 'Staat und Verfassung', in Isensee, Josef & Kirchhof, Paul (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 3rd edn, vol. II (Heidelberg: C.F. Müller, 2004), para. 15, chap. C, sec. IV; also chap. B, sec. III; similarly also Koskenniemi, Martti, 'What Use for Sovereignty Today?', *Asian Journal of International Law*, 1/1 (2011), 61–70, 69. However, not all authors advocating for a nationalist approach understand themselves as communitarians, e.g., Tamir, *Liberal Nationalism*; Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995). Still, e.g., Kymlicka's otherwise far-reaching conclusions drawn from the nationalist premise cast doubt upon this perception of his account as liberal, Barry, Brian, 'Statism and Nationalism: A Cosmopolitan Critique', *Nomos*, 41 (1999), 12–66, 31 ff.

82 Miller, *National Responsibility*, 39, also 37 ff. Miller, David, *Is Self-Determination a Dangerous Illusion?* (Cambridge: Polity, 2020), 54 ff.; similarly Horton, *Political Obligation*, 150 ff.; Margalit & Raz, *National Self-Determination*, 448 ff. On collective self-determination, further Section 7.4. Especially earlier work of David Miller appears to be based on a hard communitarian background conception, e.g., Miller, David, 'In Defence of Nationality', *Journal of Applied Philosophy*, 10/1 (1993), 3–16; Miller, *On Nationality*.

83 Miller, *Self-Determination*, 55.

84 Moore, Margaret, 'Is Patriotism an Associative Duty?', *The Journal of Ethics*, 13/4 (2009), 383–399, 395; Miller, *On Nationality*, 24 f.

85 Walzer, Michael, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 64, also 52 ff. Similarly Wellman, Christopher Heath, 'Immigration and Freedom of Association', *Ethics*, 119/1 (2008), 109–141, 125 f.

86 Walzer, *Spheres of Justice*, 62, original emphasis, also 34, 39, 50, 64 ff., 313 f., 319; Walzer, Michael, 'The Moral Standing of States: A Response to Four Critics', *Philosophy & Public Affairs*, 9/3 (1980), 209–229, 211.

87 Isensee, *Grenzen*, 20 ff.

88 Barry, *Statism and Nationalism*, 30, also 29 ff. In Miller's case, see, e.g., Miller, David, *Market, State, and Community: Theoretical Foundations of Market Socialism* (Oxford: Clarendon Press, 1989), 245; Miller, *In Defence of Nationality*, 11; Miller, *On Nationality*, 11, 70, 82 ff.

89 Horton, *Political Obligation*, 150 ff., 167 ff., 173 ff. Horton's focus lies on *political obligations*, i.e., individual obligations obey the law of one's state, but his approach illustrates the conception of the political community of the objection discussed here.

90 For a similar argument, Caney, *Justice*, 41 ff.; Wellman, *Relational Facts*, 558 f. For a different view, Griffin, James, *On Human Rights* (Oxford: Oxford University Press, 2010), 226.

91 Ignatieff, *Idolatry*, 79. Ignatieff acknowledges the latter in passing, Ignatieff, Michael, 'Human Rights, Global Ethics, and the Ordinary Virtues', *Ethics & International Affairs*, 31/1 (2017), 3–16, 14.

92 Primoratz, *Patriotism*, chap. 2.2.

93 For a prominent critique of such a model of concentric circles of moral concern, Shue, Henry, 'Mediating Duties', *Ethics*, 98/4 (1988), 687–704, 691 ff.; cf. also Nussbaum, Martha, 'Patriotism and Cosmopolitanism', in Cohen, Joshua (ed.), *For Love of Country?* (Boston: Beacon Press, 2002), 3–20, 9 f.

94 Wellman, *Relational Facts*, 552 ff.

95 Kolodny, Niko, 'Which Relationships Justify Partiality? General Considerations and Problem Cases', in Feltham, Brian & Cottingham, John (eds.), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford: Oxford University Press, 2010), 169–193, 186 ff.

96 Langford & Darrow, *Moral Theory*, 422 f.; Mutua, Makau, 'The Complexity of Universalism in Human Rights', in Sajó, András (ed.), *Human Rights with Modesty: The Problem of Universalism* (Leiden: Brill, 2004), 51–64; Tan, *Justice*, 184; Brilmayer, *Justifying International Acts*, 97 f.

97 Moore, *Patriotism*, 396 f.

98 Wellman, Christopher Heath, 'Friends, Compatriots, and Special Political Obligations', *Political Theory*, 29/2 (2001), 217–236, 221 ff.

99 The terminology varies. The respective debate in moral philosophy are also discussed under the headings of 'particularism' vs. 'universalism', 'partialism' vs. 'impartialism' or 'partiality' vs. 'impartiality'. For an overview, Feltham, Brian & Cottingham, John (eds.), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford: Oxford University Press, 2010).

100 For example, Scheffler, Samuel, *The Rejection of Consequentialism* (Oxford: Oxford University Press, 1982), 61 ff.; Scheffler, Samuel, *Equality and Tradition* (Oxford/New York: Oxford University Press, 2010), 47 ff., 56 ff., 68 ff.; Kolodny, *Relationships*, 174 ff.; Nagel, Thomas, *Equality and Partiality* (Oxford: Oxford

University Press, 1991), 10 ff., 38 ff. While an agent-neutral reason derives from a common value that all agents share, an agent-relative reason depends on the particular agent's agent-relative value, Parfit, Derek, *Reasons and Persons* (Oxford: Oxford University Press, 1984), 27; Nagel, *Equality and Partiality*, 40.

101 Jeske, Diane, 'Special Obligations', in Zalta, Edward N. (ed.), *Stanford Encyclopedia of Philosophy*, Winter 2021 edn (Stanford: Stanford University, 2021), https://plato.stanford.edu/archives/win2021/entries/special-obligations/

102 Scheffler, Samuel, 'Families, Nations, and Strangers', *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), 48–65, 52; cf. Goodin, Robert E., 'What Is So Special about Our Fellow Countrymen?', *Ethics*, 98/4 (1988), 663–686, 672 f.

103 Scheffler, *Equality and Tradition*, 74, also 47 ff., 72 ff.; Scheffler, *Families*, 48 ff., 53 ff.; similarly Kolodny, *Relationships*, 170 ff.; Nagel, *Equality and Partiality*, 10 ff., 38 ff.; Cottingham, John, 'Ethics and Impartiality', *Philosophical Studies*, 43/1 (1983), 83–99, 89 ff.; Kekes, John, 'Morality and Impartiality', *American Philosophical Quarterly*, 18/4 (1981), 295–303, 299 ff.

104 Or, in Scheffler's terminology, "associative duties", Scheffler, *Families*, 49 f. Similarly Cottingham, *Ethics and Impartiality*, 89 ff.; Friedman, Marilyn, 'The Practice of Partiality', *Ethics*, 101/4 (1991), 818–835, 826; Hooker, Brad, 'When Is Impartiality Morally Appropriate?', in Feltham, Brian & Cottingham, John (eds.), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford: Oxford University Press, 2010), 26–41, 34.

105 Scheffler is a typical representative. However, it is a matter of debate whether such partialists could still be categorized as communitarians or not, see Wellman, *Relational Facts*, 538, fn. 4.

106 One could of course make both claims without necessarily risking any inconsistency, but the conceptual distinction is analytically helpful.

107 Moore, *Patriotism*, 388.

108 This view has a long tradition, see, e.g., Hutcheson, *Inquiry*, treatise II, sec. V, para. I; Smith, Adam, *The Theory of Moral Sentiments*, 11th edn (London, 1812), part VI, sec. II, chap. 1 ff. cf. Glanville, *Responsibility to Protect*, 1088 ff. For a critique, below and Shue, *Mediating Duties*, 691 ff.

109 Walzer, *Spheres of Justice*, 39 ff. Following this logic, some hold that membership of political communities is based on a voluntary decision and *thereby* plays this essential role for our personal flourishing. This voluntarist justification of special obligations is not in spotlight here, but voluntarist arguments are discussed in Sections 7.4 and 7.5.

110 Sternberger, Dolf, *Verfassungspatriotismus*, Schriften, vol. 10 (Frankfurt a.M.: Insel Verlag, 1990); Habermas, Jürgen, 'Staatsbürgerschaft und nationale Identität', *Faktizität und Geltung* (Frankfurt a.M.: Suhrkamp, 1992), 632–660, 658 f.; Müller, Jan-Werner, *Constitutional Patriotism* (Princeton: Princeton University Press, 2007).

111 Schaar, John Homer, 'The Case for Patriotism', *Legitimacy in the Modern State* (New Brunswick: Transaction, 1981), 285–311.

112 Scheffler, Samuel, 'Relationships and Responsibilities', *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), 97–110, 110; Dworkin, Ronald, *Law's Empire* (Cambridge/London: Belknap Press of Harvard University Press, 1986),

206 f. It is a thesis that many communitarians share, illustrating the overlap between the two approaches. One could object that this argument only takes us so far as to legitimize a moral *permission* to prioritize comembers. But if the aim is to argue against extraterritorial human rights obligations, then it must assume the existence of special *obligations*, which is why it is this variant that is discussed here.

113 For example, Dworkin, *Law's Empire*, 206 ff.; Horton, *Political Obligation*.

114 Sandel, *Justice*, 229.

115 Cf. *Hannah Arendt*, who assigns the 'right to have rights' to every human being but emphasizes that it can only be guaranteed for members of a political system, Arendt, Hannah, *Elemente und Ursprünge totaler Herrschaft: Antisemitismus, Imperialismus, totale Herrschaft*, 20th edn (München/Berlin: Piper, 2017), 613 ff.

116 Scheffler, *Families.*

117 Only in the most exceptional circumstances of a state's sheer impossibility to comply with them through no fault of its own are other states obliged to take over, Miller, *On Nationality*, 75 f., 79 f.

118 Miller, *National Responsibility,* e.g., 43 ff., 164 ff., 182 f.

119 Similarly, e.g., Friedman, *Partiality*, 824 f.

120 Tan, *Justice*, 146 f.

121 Caney, *Justice*, 269 f.

122 Also Wellman, *Relational Facts*, 552 f.; Caney, *Justice*, 134.

123 Shue, *Mediating Duties*, 693 ff.

124 Of course, one could make a *pragmatic* argument that limiting human rights obligations to the domestic state provides the most efficient way of realizing universal human rights enjoyment, see Section 10.3. Here, the focus is on those who propose *foundational* moral reasons for limiting obligations to territory.

125 Similarly Tan, *Justice*, 155; cf. also Kumm, *Integrated Conception* and his idea of 'justice-relevant negative externalities'; and Caney's criterion of 'domestic-compatibility', Caney, *Justice*, 268 f.

126 Cf. de Gaynesford, Maximilian, 'The Bishop, the Valet, the Wife, and the Ass: What Difference Does It Make if Something Is Mine?', in Feltham, Brian & Cottingham, John (eds.), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford: Oxford University Press, 2010), 84–97, 95.

127 Miller, *National Responsibility*, 46 ff., 81 ff.

128 van der Veen, Robert, 'Reasonable Partiality for Compatriots and the Global Responsibility Gap', *Critical Review of International Social and Political Philosophy*, 11/4 (2008), 413–432, 418.

129 Goodin, *Fellow Countrymen*, 673.

130 Miller suggests that domestic and global obligations shall be weighed according to two criteria: positive or negative obligation; and relation between duty-bearer and addressee, Miller, *National Responsibility*, 48.

131 For such a view, e.g., May, Larry, 'Conflicting Responsibilities to Protect Human Rights', in Holder, Cindy & Reidy, David (eds.), *Human Rights: The Hard Questions* (New York: Cambridge University Press, 2013), 347–361, 352 ff.

132 Contrary to moderate accounts such as Baron, Marcia, 'Patriotism and "Liberal" Morality', in Weissbord, David (ed.), *Mind, Value, and Culture: Essays in Honor of E.M. Adams* (Atascadero: Ridgeview, 1989), 269–300; Nathanson, Stephen, 'In Defense of "Moderate Patriotism"', *Ethics*, 99/3 (1989), 535–552.

133 On the distinction, Ratner, *World Public Order*, 212; Section 1.3.1.
134 Goodin, *Fellow Countrymen*, 686, also 681 ff.; Caney, *Justice*, 269 f.; Tan, *Justice*, 19, 168, 179; LaFollette, Hugh, *Personal Relationships: Love, Identity, and Morality* (Oxford: Blackwell, 1996), 198 ff.
135 Cassee, *Globale Bewegungsfreiheit*, 60.
136 For a full argument, Chapter 8. See also, e.g., Pogge, Thomas, 'Concluding Reflections', in Brock, Gillian (ed.), *Cosmopolitanism Versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations* (Oxford: Oxford University Press, 2013), 294–320, 298; Hooker, *When Is Impartiality Morally Appropriate?*; Tan, *Justice*, 158 f., 190 f., 197 ff.; Barry, Brian, *Justice as Impartiality*, A Treatise on Social Justice, vol. II (Oxford: Clarendon Press, 1995); Baron, Marcia, 'Impartiality and Friendship', *Ethics*, 101/4 (1991), 836–857, 856.
137 In what follows, 'autonomy' and 'self-determination' are used interchangeably.
138 Benvenisti, Eyal, 'The Future of Sovereignty: The Nation State in the Global Governance Space', *GlobalTrust Working Paper*, 1 (2015), http://globaltrust.tau.ac.il/wp-content/uploads/2015/01/Eyal-Future-of-Sovereignty-WPS-01-151.pdf, 2 f.; cf. Berlin, Isaiah, 'Two Concepts of Liberty', in Hardy, Henry (ed.), *Liberty* (Oxford: Oxford University Press, 2008), 166–217.
139 Art. 1(2) *UN Charter*; ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)*, ICJ Reports 2019 (25 February 2019), 95, para. 144 ff., 180.
140 Ibid., para. 144. The concept of self-determination has also played an essential role in the decolonization process—a topic that is related but goes beyond the scope of this book, cf. Burke, Roland, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010).
141 For example, Rousseau, Jean-Jacques, *The Social Contract & Discourses*, Cole, G.D.H. (tran.), [1762] (London/Toronto: J.M. Dent & Sons, 1920); cf. Habermas, Jürgen, 'Zur Legitimation durch Menschenrechte', *Die postnationale Konstellation* (Frankfurt a.M.: Suhrkamp, 1998), 170–194, 189.
142 Moore, *Patriotism*, 391, emphasis added, also 392 f.; Miller, *Self-Determination*, 28.
143 Sandel, *Democracy's Discontent*, 5 f., 203 ff. Cf. also Margalit & Raz, *National Self-Determination*, 451. See also Miller, *Self-Determination*, 45 f.
144 On the distinction between the two branches, Bellamy, Richard, 'Republicanism, Democracy, and Constitutionalism', in Laborde, Cécile & Maynor, John (eds.), *Republicanism and Political Theory* (Rochester, NY: Blackwell, 2008), 159–189, 159, 161 f. Proponents of the civic humanist approach are, e.g., Sandel, *Democracy's Discontent*, 274; Taylor, Charles, *Philosophical Arguments* (Cambridge/London: Harvard University Press, 1995), 200. For the neo-roman branch, Pettit, Philip, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Skinner, Quentin, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998).
145 Pettit, Philip, 'The Globalized Republican Ideal', *Global Justice: Theory Practice Rhetoric*, 9/1 (2016), 47–68, 48; also Pettit, Philip, *Just Freedom: A Moral Compass for a Complex World* (New York/London: W. W. Norton & Company, 2014).
146 Pettit, *Globalized Republican Ideal*, 50 f., 55 f., 66.
147 According to Pettit, "I will have a power of *arbitrary interference* in the choice to the extent that I have the ability to interfere intentionally in one of the options without your permission or control", ibid., 51, emphasis added.

148 Ibid., 60, also 56, 59.
149 Ibid., 51, 56 ff., 60, 66 f.
150 Cohen, Jean L., *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge: Cambridge University Press, 2012), 203; Gans, Chaim, 'Historical Rights: The Evaluation of Nationalist Claims to Sovereignty', *Political Theory*, 29/1 (2001), 58–79, 63, 71; Walzer, Michael, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd edn (New York: Basic Books, 1992), 87 ff.
151 Cohen, *Globalization and Sovereignty*, 202 f.; similarly Posner, *Twilight*, 119 ff. Sandel adds that the contemporary world, where sovereignty is dispersed on a multiplicity of levels and where citizens display a variety of loyalties, carries with it the risks of fundamentalism, loss of identity, and "storylessness", Sandel, *Democracy's Discontent*, 351, also 350.
152 Pettit, *Globalized Republican Ideal*, 57 f., 64.
153 Cohen, *Globalization and Sovereignty*, 203 f., 217; cf. also the discussion of this objection in Besson, *Extraterritoriality of the ECHR*, 882 f. Cohen follows a strategy of rescuing sovereignty by minimalizing international norms *and* domesticating human rights, Cohen, *Globalization and Sovereignty*, e.g., 208 ff. Cf. the discussion in Cohen, Joshua, 'Minimalism About Human Rights: The Most We Can Hope For?', *Journal of Political Philosophy*, 12/2 (2004), 190–213; Lafont, *International Protection of Human Rights*, 431. Such minimalism sometimes finds inspiration in Rawls, John, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 64 ff. On adjudication, Gyorfi, Tamas, 'The Legitimacy of the European Human Rights Regime—a View from the United Kingdom', *Global Constitutionalism*, 8/1 (2019), 123–156, 132, 137, 144.
154 Cf. the description in Müller, *Security Measures*, 108 f.
155 In the *Lotus Case*, it is stated that: "The rules of law binding upon States therefore emanate from their own free will", PCIJ, *S.S. Lotus*, 18. Cf. Criddle, Evan J. & Fox-Decent, Evan, 'Mandatory Multilateralism', *American Journal of International Law*, 113/2 (2019), 272–325, 290 f. See also, e.g., Parrish, Austen L., 'The Interplay between Extraterritoriality, Sovereignty, and the Foundations of International Law', in Margolies, Daniel S. et al. (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (Abingdon/New York: Routledge, 2019), 169–182, 178. From this view, one could also simply resort to saying that current IHRL treaties are not extraterritorially applicable—making an exclusively legal argument that would beg the (moral) question at issue here.
156 There is an ongoing debate about *territorial rights*, which might be defined as "rights that a 'group' has over things and persons because of their location within a specific area, the territory", and on *rights over territory*, i.e., "property-like entitlement[s] that a 'group' enjoys over the territory as a whole", Angeli, Oliviero, *Cosmopolitanism, Self-Determination and Territory* (London: Palgrave Macmillan, 2015), 59. As these topics are to be distinguished from the question of *human rights obligations* to those *not* on the territory, they go beyond the scope of the present inquiry. On territorial rights, see, e.g., Simmons, John A., 'On the Territorial Rights of States', *Philosophical Issues*, 11/1 (2001), 300–326; Kolers, Avery, *Land, Conflict, and Justice: A Political Theory of Territory* (Cambridge: Cambridge University Press, 2009); Stilz, Anna, 'Nations, States, and Territory', *Ethics*, 121/3 (2011), 572–601; Miller, David, 'Territorial Rights: Concept and Justification', *Political Studies*, 60/2 (2012), 252–268; Ypi,

Lea, 'A Permissive Theory of Territorial Rights', *European Journal of Philosophy*, 22/2 (2014), 288–312; Moore, Margaret, *A Political Theory of Territory*, Oxford Political Philosophy (Oxford/New York: Oxford University Press, 2015).

157 On individuals, e.g., Stilz, *Nations*, 583 ff.; Ypi, *Permissive Theory*, 295. On communities, Miller, *National Responsibility*, 216 ff.; Gans, *Historical Rights*, 71 ff.

158 Arendt, *Elemente*, 605 ff., 614 ff.

159 Ignatieff, *Introduction*, 22; Bolton, *Global Governance*, 212 ff., 221.

160 Cf. Benvenisti, *Future of Sovereignty*, 4 ff.

161 Criddle & Fox-Decent, *Mandatory Multilateralism*, 291.

162 Similarly Moore, Margaret, 'Cosmopolitanism and Political Communities', *Social Theory and Practice*, 32/4 (2006), 627–658, 635 f.

163 Some moderate republicans accept that individual non-domination is a universal good and that this has implications for the question of global justice, e.g., Lovett, Frank, 'Should Republicans be Cosmopolitans?', *Global Justice: Theory Practice Rhetoric*, 9/1 (2016), 28–46.

164 Milanović, *Extraterritorial Application*, 65, 107.

165 Such a situation was addressed in *Hernández v. Mesa* (2017), see Section 2.3.1. It illustrates the absurdity of assuming an act of domination over Mexico if the US had put its agents under obligations to refrain from violating rights of people on Mexican soil. Notably, the Supreme Court omitted to determine whether the border patrol agent who had fired the deadly bullet had been under such obligations.

166 These instrumental considerations will be taken up in Section 10.3.

167 See Section 8.3.

168 Murphy, Alexander B., 'Territory's Continuing Allure', *Annals of the Association of American Geographers*, 103/5 (2013), 1212–1226, 1224.

169 Cf. Besson, *Extraterritoriality of the ECHR*, 873 f.

170 Cf. Müller, *Security Measures*, 111. Similarly, Cole, *Rights over Borders*, 60; Gardbaum, *International Constitutional Rights*, 764 ff. Art. 19 *UDHR* says: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and *regardless of frontiers*", emphasis added. Cf. also the concept of universal jurisdiction, which entitles domestic courts to seek justice in the name of people *affected*, even if they do not belong to those *subjected*; Section 1.3.2.

171 Benhabib, *Kosmopolitismus ohne Illusionen*, 187 ff. And, as Benhabib also stresses, challenges to state sovereignty do not only stem from human rights but also from de-territorializing processes (globalization, privatization, fragmentation, migration, or, earlier, imperialism), some of which are actively fostered by states, ibid., 164 ff.

172 Besson, Samantha, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?', in Benvenisti, Eyal & Nolte, Georg (eds.), *Community Interests across International Law* (Oxford: Oxford University Press, 2018), 36–49, 45 ff.

173 Benvenisti lists this as one of the fundamental democratic deficits that make a reinterpretation of sovereignty necessary, Benvenisti, *Trustees of Humanity*, 304.

174 Besson, *Bearers*, 249.

175 Nagel, Thomas, 'The Problem of Global Justice', *Philosophy & Public Affairs*, 33/2 (2005), 113–147, 120, original emphasis.

176 Rawls, John, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971), 3.
177 Nagel, *Global Justice*, 121, original emphasis.
178 Ibid., 115 ff., 130 ff.
179 Ibid., 115 f.
180 Ibid., 128 f.
181 Ibid., 129.
182 Ibid., 130, see also 140.
183 Nagel often explicitly refers to "citizens", ibid., 120 f., 130, 132, 135, 139. See also Stilz, *Nations*, 593 ff. On the difference to special obligations accounts, Miller, *National Responsibility*, 277 f.
184 Nagel, *Global Justice*, 137 ff.; see Cohen, Joshua & Sabel, Charles, 'Extra Rempublicam Nulla Justitia?', *Philosophy & Public Affairs*, 34/2 (2006), 147–175, 152 ff., 159 f.
185 Craven, *Realm of Order*, 237, 241.
186 Nagel, *Global Justice*, 127, emphasis added.
187 Ibid., 131.
188 Ibid., 131.
189 Cf. Craven, *Realm of Order*, 237 f.
190 Cohen & Sabel, *Extra Rempublicam Nulla Justitia?*, 150.
191 Nagel, *Global Justice*, 126.
192 Ibid., 126.
193 Hobbes, *Leviathan*, chap. XVII; Locke, *Second Treatise*, para. 89 ff., 95 ff., 117 ff.; Rousseau, *Social Contract*, book I; Kant, *Metaphysik der Sitten*, 312 ff.; Rawls, *Theory of Justice*; Scanlon, T.M., *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998).
194 More recent contractarians include Narveson, Jan, *The Libertarian Idea* (Philadelphia: Temple University Press, 1998); Gauthier, David, *Morals by Agreement* (Oxford: Oxford University Press, 1986).
195 For example, Scanlon, *What We Owe to Each Other*; Rawls, *Theory of Justice*.
196 Views that come close to such an argument include Doehring, Karl, 'Der Status der Fremden im Verfassungsrecht der Bundesrepublik Deutschland unter dem Gesichtspunkt der normativen Verschränkung von Völkerrecht und Verfassungsrecht', *Die staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland*, Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer (Berlin/New York: Walter De Gruyter, 1974); Walzer, *Moral Standing*, 211, 226 ff.; Blake, Michael, 'Distributive Justice, State Coercion, and Autonomy', *Philosophy & Public Affairs*, 30/3 (2001), 257–296.
197 Nagel, *Global Justice*, 128.
198 For example, Doehring, *Status der Fremden*, 44. The aspect of voluntariness is also important for neo-republican theories and the emphasis they put on individual and collective freedom.
199 See the references to "the people" in *U.S. Const.* Preamble; amend. I; amend. II; amend. IV; and Neuman, *Whose Constitution?*, 917 ff.
200 For example, *Reid v. Covert*.
201 *US v. Verdugo-Urquidez*.
202 Ibid., 260, 271 ff., 290 (Stevens J., concurring).
203 For a discussion, Nagel, *Global Justice*, 128 ff.

204 For a full argument, Section 8.1, cf. Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 429.
205 Similarly Caney, *Justice*, 112 f.
206 Tan, *Justice*, 33 f., 169 f., 174 f.
207 Ibid., 190 f., 198 f. Arguably, this is why Rawls is mistaken to introduce different principles for the domestic and the international realm: Rawls thereby fails to fulfill the 'domestic-compatibility' criterion, Caney, *Justice*, 65 f., 107, 124 ff.
208 Similarly also Tan, *Justice*, 199 f.; cf. Scheffler, *Families*, 56 ff.
209 Cf. Blake, *Distributive Justice*, 294.
210 Of course, one difference is that in situations of human rights violations committed by foreign states, the victim may hope to receive some sort of support—paradigmatically in the form of *diplomatic protection*—on the part of her home state. However, often, such support will not hinder the violation from happening, and depends on the situation and the home state in question.
211 Primoratz, *Patriotism*, chap. 2.2.5; Waldron, Jeremy, 'Torture and Positive Law: Jurisprudence for the White House', *Columbia Law Review*, 105/6 (2005), 1681–1750, 1740 f.; Rivlin, Galia, 'Constitutions beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question', *Boston University International Law Journal*, 30 (2012), 135–227, 171 ff.
212 See also Section 6.2.2.
213 Carens, Joseph H., 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics*, 49/2 (1987), 251–273, 251. See also Cassee, *Globale Bewegungsfreiheit*, 45 ff., 57 ff. For an account that draws such an analogy between political communities and clubs, Walzer, *Spheres of Justice*, 35 ff. For an approach that bases the political community on the principle of freedom of association, Wellman, *Immigration*.
214 Fields, *Guantánamo to Syria*, 47 f.; Keitner, *Rights beyond Borders*, 64. For such a voluntarist conception, again *US v. Verdugo-Urquidez*, 260, 271 ff.
215 Nagel, *Global Justice*, 137 ff.; cf. Cohen & Sabel, *Extra Rempublicam Nulla Justitia?*, 152 ff.
216 For example, Benhabib, *Claiming Rights*, 692; Tan, *Justice*, 169 ff.
217 For a similar but slightly different critique, Habermas, *Legitimationsprobleme einer verfassten Weltgesellschaft*, 412 ff., 420.
218 Though Kumm focuses on the issue of global constitutionalism, many of his considerations pertain to the present discussion, as the position he objects to (which he names "Big C Constitutionalism") comes very close to Nagel's conception, e.g., Kumm, *Integrated Conception*, 611 f.
219 Ibid., 612 ff., 618 ff. Again, the pertinence of Kumm's argument to the present discussion depends on whether human rights amount to a justice-relevant domain, see also Chapter 8.
220 Kumm, Mattias, 'Constitutionalism and the Cosmopolitan State', Working Paper, (2014), www.law.nyu.edu/sites/default/files/upload_documents/2014KummCosmopolitanState.pdf, 25.
221 Chapter 10.
222 Caney, *Justice*, 25 f.
223 Brown, *Universal Human Rights*, 54 f. Prominent moral relativists include Velleman, J. David, *Foundations for Moral Relativism*, 2nd edn (Cambridge: Open Book Publishers, 2015); Harman, Gilbert, 'Moral Relativism Defended', *Explaining*

Value and Other Essays in Moral Philosophy (New York: Oxford University Press, 2000), 3–19.

224 Descriptive cultural relativism was mainly inspired by the work of anthropologists, e.g., Boas, Franz, *Race, Language and Culture*, [1940] (Chicago/London: The University of Chicago Press, 1982); Benedict, Ruth, *Patterns of Culture*, [1934] (Boston/New York: Houghton Mifflin, 2005).

225 *Downes v. Bidwell*, 287.

226 *US v. Verdugo-Urquidez,* 278 (Kennedy J., concurring).

227 Gowans, Chris, 'Moral Relativism', in Zalta, Edward N. (ed.), *Stanford Encyclopedia of Philosophy*, Spring 2021 edn (Stanford University, 2021), https://plato.stanford.edu/archives/spr2021/entries/moral-relativism/

228 Executive Board of the American Anthropological Association, 'Statement on Human Rights', *American Anthropologist*, 49/4 (1947), 539–543, 542.

229 Ibid., 543. For a critique, Mahlmann, *Universalism*, para. 33 ff.

230 Miller, *Revisiting*, 1236, 1245.

231 Koskenniemi, *Rights, History, Critique*, 55 f., original emphasis, see also 42 ff. Geuss, *Real Politics.*

232 MacIntyre, *Is Patriotism a Virtue?*, 17; Rorty, *Contingency*, 192, also 190 ff., 198. Rorty, a pragmatist, shares relativist assumptions about historical contingency, ibid., 192.

233 Bentham, Jeremy, 'Anarchical Fallacies: Being an Examination of the Declarations of Rights Issued During the French Revolution', in Bowring, John (ed.), *The Works of Jeremy Bentham*, vol. II (Edinburgh: William Tait, 1843), 489–534, 501.

234 MacIntyre, *After Virtue*, 69, also 67 ff. See also Rorty, *Contingency*, 59, 192, 195 f.; Ignatieff, *Idolatry*, 78 ff.

235 Brown, *Universal Human Rights*, 43.

236 Mutua, Makau, 'What Is TWAIL?', *Proceedings of the Annual Meeting of the American Society of International Law*, 94 (2000), 31–40, 37. See also Zolo, *Dilemmas of Globalisation*, 40.

237 For example, Art. 5, 6, 7, 8, 12, 13, 24 *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights [Bangkok Declaration]*, 2 April 1993.

238 For example, Zolo, Danilo, *Victor's Justice: From Nuremberg to Baghdad* (London: Verso Books, 2009), 74 ff. Cf. Paul, Gregor, 'Der Diskurs über "asiatische Werte"', in Pollmann, Arnd & Lohmann, Georg (eds.), *Menschenrechte. Ein interdisziplinäres Handbuch* (Stuttgart/Weimar: J.B. Metzler, 2012), 348–352, 348; Ignatieff, *Idolatry*, 62; Habermas, *Zur Legitimation durch Menschenrechte*, 183 ff.; Bauer, Joanne R. & Bell, Daniel A. (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

239 *US v. Verdugo-Urquidez,* 278 (Kennedy J., concurring). For the ethnocentrist objection, e.g., Hopgood, *Real World*, 313; Miller, *Revisiting*, 1236 ff.; cf. the analysis in Buchanan, *Legitimacy of the International Order*, 40.

240 Posner, *Twilight*, 148.

241 Schmitt, *Begriff des Politischen*, 54 f., translation A.M. For a recent overview over the debate on imperialism in global justice approaches, Bell, Duncan (ed.), *Empire, Race and Global Justice* (Cambridge: Cambridge University Press, 2019).

242 Mutua, *TWAIL.*

243 Mutua, Makau, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002), xi.

244 Gyorfi, *Legitimacy*, 148, original emphasis.

245 Hope, Simon, 'Human Rights: Sometimes One Thought Too Many?', *Jurisprudence*, 7/1 (2016), 111–126, 123 ff. Next to the authors cited above and below, other contemporary critics arguing from a postcolonial perspective include, e.g., Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2004); Baxi, Upendra, *The Future of Human Rights*, 3rd edn (New Delhi: Oxford University Press, 2008); Mamdani, Mahmood, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (New York: Pantheon, 2009). From the perspective of pragmatism, Rorty, *Contingency*.

246 For example, Koskenniemi, *Rights, History, Critique*, 53; Zolo, *Victor's Justice*, 84; more generally Bob, Clifford, *Rights as Weapons: Instruments of Conflict, Tools of Power* (Princeton: Princeton University Press, 2019).

247 Cf. Wouters, *EU Charter*, 8 f.; Parrish, Austen L., 'Fading Extraterritoriality and Isolationism? Developments in the United States: The 2016 Earl A. Snyder Lecture', *Indiana Journal of Global Legal Studies*, 24/1 (2017), 207–225, 220 ff., also 216 ff.

248 Dembour, *Critiques*, 57; cf. for a discussion Buchanan, *Legitimacy of the International Order*, 52.

249 Douzinas, Costas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge, 2007); Hardt, Michael & Negri, Antonio, *Empire* (Cambridge: Harvard University Press, 2000); for a discussion cf. Benhabib, *Kosmopolitismus ohne Illusionen*, 132, 179 f.

250 Moyn, Samuel, *Not Enough: Human Rights in an Unequal World* (Cambridge/London: Belknap Press of Harvard University Press, 2018), 217.

251 Ignatieff, *Ordinary Virtues*, 11, also 11 ff.; Isensee, Josef, 'Die heikle Weltherrschaft der Menschenrechte: Zur Dialektik ihrer Universalität', in Depenheuer, Otto (ed.), *Staat und Verfassung: Gesammelte Abhandlungen zur Staats- und Verfassungstheorie* (Heidelberg: C.F. Müller, 2018), 665–690, 666, 675 ff., 680 f., 684 f.; Huntington, *Dead Souls*. Ignatieff concedes the existence of three systems of morality—human rights, global ethics and ordinary virtues—but asserts that only the latter moves individuals, Ignatieff, *Ordinary Virtues*, 9 ff., 13 f.

252 Hopgood, *Real World*, 312. See also Isensee, *Weltherrschaft der Menschenrechte*, 679 ff.; Posner, *Twilight*, 70; Moyn, *Last Utopia*; Brown, *Universal Human Rights*, 53 ff.

253 Isensee, Josef, 'Die staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 32 (Berlin/New York: De Gruyter, 1974), 49–106, 63.

254 See the position of UK in ECtHR, *Al-Skeini*, e.g., para. 109.

255 Cohen, Jean L., 'Whose Sovereignty? Empire Versus International Law', *Ethics & International Affairs*, 18/3 (2004), 1–24, 10. See also Cohen, *Globalization and Sovereignty*, 176 f.

256 Posner, *Twilight*, 122.

257 Caney, *Justice*, 49.

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259 Mahlmann, *Universalism*, para. 44.

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261 Walzer, Michael, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, Indiana: University of Notre Dame Press, 1994), 1 ff.

262 Caney, *Justice*, 39 f. For a plausible conception of the common human nature, Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 452 ff.; Mahlmann, *Mind and Rights*. For a further argument, Section 8.1.

263 Mikhail, John, 'Universal Moral Grammar: Theory, Evidence, and the Future', *Trends in Cognitive Science*, 11/4 (2007), 143–152; Mikhail, *Moral Grammar and Human Rights*, 165 ff.; also Mahlmann, Matthias & Mikhail, John, 'Cognitive Science, Ethics and Law', in Bankowski, Zenon (ed.), *Epistemology and Ontology*, Archiv für Rechts- und Sozialphilosophie—Beiheft, 102 (Stuttgart: Franz Steiner Verlag, 2003), 95–102, 98 ff.; Mahlmann, *Mind and Rights*.

264 Coomaraswamy, Radhika, 'Universalism of Human Rights and Cultural Relativism', in Sheeran, Scott & Rodley, Nigel Sir (eds.), *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), 127–139, 53, 56; Caney, *Justice*, 50 ff.

265 Mahlmann, *Universalism*, para. 42; Coomaraswamy, *Universalism*, 52; Peters, *Humanity*, 528; Caney, *Justice*, 93 f.

266 Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 488 ff.

267 Buchanan, *Legitimacy of the International Order*, 47 f.; Gilabert, Pablo, 'Reflections on Human Rights and Power', in Etinson, Adam (ed.), *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2018), 375–399, 382.

268 Mahlmann, *Mind and Rights*, 95 ff.; Caney, *Justice*, 87.

269 Sen, Amartya, 'Thinking about Human Rights and Asian Values', *Human Rights Dialogue*, 1/4 (1996), 1–4; Sen, *Elements*, 353 ff.

270 Coomaraswamy, *Universalism*, 52; Nussbaum, Martha, *Women and Human Development: The Capabilities Approach* (New York: Cambridge University Press, 2000), 51 f.

271 For example, *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514 (XV). See Buchanan, *Legitimacy of the International Order*, 49 f.

272 Buchanan, *Legitimacy of the International Order*, 47 ff., 60 ff.

273 For an impressive illustration, Chomsky, Noam, 'The Backroom Boys', *For Reasons of State* (New York: Vintage Books, 1973), 3–171; Chomsky, Noam, 'The Responsibility of Intellectuals', in Peck, James (ed.), *The Chomsky Reader*, [1966] (New York: Pantheon, 1987), 59–82.

274 Caney, *Justice*, 52 f.; Donnelly, *Universal Human Rights*, 118; Habermas, *Zur Legitimation durch Menschenrechte*, 186.

275 See further Chapter 8.

276 Benhabib, *Kosmopolitismus ohne Illusionen*, 134 f.

277 See discussions in Section 4.5.3; HRC, *Guiding Principles on Business and Human Rights [Ruggie Principles]*, 2011; and the reports of the 'Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises', *OHCHR*, www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx.

278 One obvious objection is the existence of IHRL instruments particularly concerned with specific groups of (vulnerable) people, e.g., the *CRDP*, the *CEDAW*, the *CRC*, or the *ICERD*, Buchanan, *Legitimacy of the International Order*, 53.

279 Similarly Brilmayer, *Justifying International Acts*, 103.

280 Caney, *Justice*, 56.

281 ECtHR, *Al-Skeini*, Concurring Opinion Judge Bonello, para. 37 f.

282 Cf. analogously Brilmayer, *Justifying International Acts*, 100, who points to "the lengths to which one must go to devise political theories that accord no protection to someone simply because he or she is not a citizen".

283 Section 10.3.

8 A Justificatory Theory of Extraterritorial Human Rights Obligations

8.1 The Nature of Human Rights Obligations

What is it about human rights that grounds their claim to transcend borders? Above all, it is the *universality* of human rights and their corresponding obligations.[1] If one takes seriously the normative idea behind them—an idea that stands both behind domestically protected, constitutionally enshrined fundamental rights and behind internationally guaranteed human rights—one should agree with five broad and general claims, as will be argued in what follows. First, *human rights are rights of every human being qua being human*. If this basic claim is not accepted, it makes no sense to name them *human* rights. Proponents of the territorial view do not need to deny this first basic claim, insofar as they are still proponents of a system of *fundamental* or *human rights*. What they deny is that third states are responsible for respecting, protecting, and fulfilling these rights.

Second, *as the morally relevant and distinct core of this being human, i.e., of human nature, is universally shared by everyone, it is a requirement of justice to ascribe human rights to everyone equally*.[2] Human rights derive from the essence of what it means to be human and what this status calls for. By embarking on the idea behind and the realization of human rights, one cannot omit the premise that these rights arise from something all human beings share—a *something* in which we are all equal. Though this amounts to one of the foundational premises of cosmopolitanism, even non-cosmopolitans can hardly deny the equal moral worth of all human creatures.[3] If this premise is not accepted, then there is no point in conceptualizing the rights one is talking about as *human* rights. If this fundamental premise is denied from the outset, there is no point in entering the human rights project and employing human rights language. If it is accepted, however, it makes a strong case for the assumption that the *default position* consists in respecting the rights of everyone equally.

What does this shared *something* consist of? What is so distinctive about *being human*? What is the *morally relevant core of human nature*? Human beings are essentially agents and persons, potentially capable of reasoning, of ethical, rational, and aesthetic deliberation, of self-reflection, of autonomously

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choosing their own conceptions of the good, and of emotional experience. This cognitive and emotional makeup, the very *human* nature, provides people with human dignity. And this core human essence is of foundational significance for morality: Human dignity essentially comes with a normative claim, namely the claim to respect this dignity.

For human beings, living a life in dignity means living a life in which one has agency, in which the preconditions for realizing the human potential are fulfilled, and the possibility for enjoying autonomy, liberty, and well-being exists—a life in which one is treated as an end in itself, a life one lives as a subject, not as an object.[4] People share the core of what it means to be human and therefore also share what basic goods they need in order to be able to live such a human life in dignity. These goods are of social, economic, political, psychological, intellectual, cultural, and physical types, and they satisfy a variety of universally shared basic needs and interests, covering different aspects of human nature, including most fundamentally our life, our subsistence, our being treated in ways compatible with our dignity, and our giving meaning to our lives.[5]

Human rights translate these basic needs into practice, i.e., into action-guiding moral norms on what it means to have human dignity respected: They describe what goods human beings, living in a world like ours, require in order to have their basic needs and interests fulfilled and thus to be in a position to live a life in dignity. These are the goods we as humans have a fundamental right to. Thus, while basic needs and interests are universally shared, and shared over history, by translating them into practice, human rights are still able to respond to contemporary threats to these interests and needs. For example, while a minimal degree of privacy is likely a constant universally valid foundational precondition for a dignified life of a human person, a "sine qua non"[6] of personhood, and has most plausibly been so in other ages too, what it means to have one's privacy respected (thus what exact moral norms this basic good generates) is certainly different in today's world of social media platforms, digital surveillance, and algorithmic decision-making.

Moreover, human rights do not protect every *actual* need or interest human beings might happen to have. Rather, they protect the very ability to lead a human life in dignity, providing the basic threshold that must be fulfilled in order to reach a position in which one can live a dignified life and follow one's own conception of the good. Above the basic threshold that human rights set, interests and needs might be contingent on individual preferences, political conditions, cultural contexts, or social settings, but it is up to this threshold where contingent factors shall not be relevant. Up to this basic threshold, everyone shares the needs and interests that must be covered to realize it. They translate into basic moral principles—human rights—which aim at ensuring that human beings have the means to live according to the claim their human nature gives rise to, i.e., the claim to dignity.

Human dignity explains why human beings are of *moral worth*—and, given that dignity springs from the shared core of human nature, why they all are of *equal* worth (even if they differ as to the degree to which they realize their

core human potentials). As a result of the equal moral worth of all human beings, the basic principles dignity gives rise to must apply to everyone equally. In this respect, it is crucial to emphasize the key role of human nature: The anthropological fact of a shared human nature, able of rationality, of cognitive, emotional, and aesthetic deliberation comes with a normative dimension—dignity—and thereby gives rise to a normative claim, namely, to respect the human claim to a life in dignity. For reasons of justice, this claim must have equal importance with regard to every human being. For this reason, it is also implausible that the burden of proof essentially lies with the universalist position, as statists typically assert.[7] If the essence of morality, based on our human nature, is to regulate human conduct, then it rather seems one has to provide justifying reasons for restricting ethical concerns to only a subset of human beings. Based on the idea of justice, moral principle X should apply equally to everyone that is equal in the way that is morally relevant to X. What is morally relevant to human rights is the morally relevant core of human nature. As every human being is equal in this respect, these foundational moral principles apply to everyone equally—thus, universally.[8]

Thus, one can agree with communitarians or partialists that morality must take the nature of the being it regulates—i.e., human nature—into account but disagree on the implications of this claim: The most basic aspect of our nature is that it is, in its core, a *shared* human nature—and thus, it is one of the most basic aspects of morality that it should apply to everyone *equally*. If morality is a normative system that regulates conduct with effects on human beings, then it must acknowledge this universal equal status of the core of human nature.

At this point, the communitarian or partialist could object that if an approach assigns such a foundational role to human nature, then it must also acknowledge the natural inclinations of human beings, such as their disposition to be partial. It is indeed likely that human beings are *per se* beings with a tendency to favor sociality over isolation and thus have a natural disposition to seek and enter personal relationships—which, also plausibly, essentially involve partiality. However, first, basing an account of human rights on the morally relevant and universally shared *core* of human nature does not mean that every possible natural disposition of individuals comes with a blank check. When acting on such dispositions has morally relevant effects on others, it is always in need of moral justification. Morality does not necessarily follow human motivation. The point behind the coerciveness or binding nature of moral and legal norms can sometimes exactly lie in overcoming counteracting inclinations of human subjects.[9] Second, there is a justificatory gap to be bridged from asserting a natural tendency to *pursue personal relationships* to assuming that *partiality within state communities* is a natural necessity for human beings.

Three further claims are relevant to the general idea behind human rights. As a third claim, *rights do not only consist of claims but also of corresponding obligations*. The debate terminologically and conceptually tends to center on the universality of human *rights* as claims. However, subjective rights are, as it

has been discussed, complex webs of normative positions, including primarily a claim of the right-holder and an obligation of the addressee.[10] When talking about human rights, and on whether or how to apply them extraterritorially, a focus on obligations is key. One needs to be aware of what they signify for duty-bearers: Human rights obligations set *essential restrictions to their freedom of action*. Applied to the duty-bearer at issue here, human rights draw the boundaries of states' legitimate room to maneuver; they set the restrictions that state conduct may not cross.

Rights and duties essentially correlate. Accordingly, based on humans' equal claim to have one's dignity respected, the default position should consist in the universality of human rights implying the universality of corresponding obligations.[11] Human rights are moral principles that translate what respect for human dignity requires. By default, this generates obligations for others that cannot depend on a preexisting underlying relationship. Being partial to some and thereby paying less attention to others may be justifiable or not, but, starting from the claim to universality that is inherent to the idea of human rights, the burden of proof rests with those who would want to argue for such limitations.

At the same time, as suggested before, this universality does not entail that every potential duty-bearer is constantly under direct duties to secure every single human right on each of its dimensions for each and every individual human being on the globe. Normatively and in principle, rights are "everyone's business",[12] i.e., respect for rights can be demanded by any entity. However, when it comes to legal institutions, the foundational ethical universality of human rights obligations might, for reasons of effectiveness and efficiency, be realized at a second level and thereby not only legitimize but also guide the allocation of specific duties to specific duty-bearers at the first level. In many cases, it might be more efficient to legally distribute and prioritize duties at this first level. As a result, it is also likely the case that the domestic state is often and typically (but not necessarily) under more stringent duties to its residents, given the fact that it is *de facto* in the best position to protect them, as will later be expanded upon. Nevertheless, these considerations of efficiency in legal implementation do not undermine the basic claim that human rights duties are essentially and foundationally universal duties. While critics argue that it is "unclear why the universality of human rights (and human rights-holders) ought to imply the universality of human rights *duty-bearers* vis-à-vis any right-holder without reference to their political and legal relationship",[13] the argument here is on a different issue, holding that when it comes to the foundational moral level and in view of the core idea behind human rights, it is more than unclear why their universality should *not* imply the universality of corresponding *obligations* (whereas the *distribution* of these obligations to *duty-bearers* is a separate question, which will be addressed when thinking about practically implementing universal obligations).[14]

Fourth, *the foundational moral idea behind human rights and their obligations is mirrored in their legal protection at different levels*. Domestic

constitutions, supranational charters, and international treaties all regularly refer to this foundational universalist idea as the source of the rights protected within them. It is generally accepted that the core moral idea behind human rights is the "*raison d'être*"[15] of modern IHRL, and that moral human rights are prior to their legal counterparts, merely finding their declaration and implementation in human rights treaties. Legal human rights instruments also clarify that these norms do not only contain rights and liberties for the individual agent but at the same time imply duties and restrictions for others—as of today, primarily for states. These instruments protect rights-holders, but they address duty-bearers. By enshrining fundamental rights into its constitution or by signing international human rights treaties, a state officially, explicitly, and publicly subjects itself to obligations and restrictions on its own scope of sovereign conduct (even if they *morally* bind states independent of their legal recognition).

Moreover, it is significant that these essential restrictions have also been introduced through *international* law, which does not only apply to international relations between states but also to transnational, diagonal relations between states and individuals. These relations are no longer only regulated by power and politics but also by legal norms, which, *inter alia*, oblige states to protect individuals. According to Habermas, this amounts to the "innovative core" of Kant's idea of world citizenship: a cosmopolitan condition, transforming international law from interstate law to a law of individuals and making the distinction between internal and external sovereignty disappear.[16]

Fifth, *states* are among the entities to which moral and legal human rights obligations shall apply. As alluded to above, states are of a special kind: They are likely not only the agents that pose the *most serious threat* to human rights, but, at the same time, also the agents that can *best protect* individuals' human rights. The next section will analyze in which way the nature of the duty-bearer state is relevant to conceptualizing extraterritoriality.

The above five general claims, reflecting the core idea behind human rights, serve as a common denominator across various conceptions: If one rejects them, it is no longer clear why one even chooses to speak of *human rights*. While there is much heat in discussions about whether human rights amount to normatively valid claims in the first place and whether human beings indeed share a core that generates such rights or not, one can hardly deny that *if* one chooses to talk about human rights, then it is *this* idea that is referred to. Obviously, the usage of human rights terminology does not by itself amount to an ethical or a legal argument, but it nevertheless hints at the very foundational idea that is captured by it and that motivates people's speaking this way. When people speak of *human rights*, what they mean is that we all have these basic rights because we are humans, and that we do so for especially important reasons. Different approaches might disagree on the content of the *something* in which humans are equal (i.e., on the exact conceptualization of what has been described under the second claim), but it appears that all of them must

at least agree, if they choose to speak of human rights, that *there is* such a something.[17]

It is important to clarify that emphasizing this common denominator behind the idea of human rights does not entail that the only thing we may hope for is universal agreement on a (minimal) *list* of rights, an 'overlapping consensus' in Rawlsian terms, whereas it will neither be possible nor advisable to defend a universally valid *justification*.[18] On the one hand, it is certainly true that, *de facto*, not everyone uses human rights terminology or acknowledges the universal normative legitimacy of human rights. But again, universality is an attribute of the justificatory potential of norms and not a descriptive claim about their level of acceptance. On the other hand, the point is that *as long as one accepts the general legitimacy and validity of (some of) these claims*, whatever conception of human rights one holds and even if one disagrees on specific issues, one cannot justifiably dismiss the core idea behind them.

Now, and this brings us to the topic at issue, taking this idea seriously, neither can one legitimately dismiss obligations to individuals located abroad. It is this core idea, manifested in the five claims outlined earlier, which is essentially at odds with the position that states can legitimately ignore human rights claims of *most* human beings on the globe (namely of all those not residing on their territory). These are rights that are, neither morally nor legally, based on nation states, sovereignty, territory, or the like. Morally, they are universally based on *being human*. Legally, they are based on this core moral idea and enshrined, *inter alia*, within international law. Applied to the extraterritorial question, this clearly speaks against allowing states to affect people abroad in ways they would not be allowed to do at home. To extricate individual rights protection and justice demands "from ties of blood and land"[19] is the very intention behind IHRL.

Arguing for a generally territorial allocation of duties in human rights law means arguing for a *systematic* exclusion of extraterritorial obligations. This is different from saying that in a particular situation X, the value of, for example, security (of insiders) outweighs that of autonomy (of outsiders) and therefore, a state might justifiably disregard the latter's claims in this particular situation. Generally constraining the applicability of human rights law to states' own territories would exclude extraterritorial duties even in cases in which no countervailing concerns of insiders were present. When states, politicians, or academics defend such territorial views and assert that this mirrors commonsense morality, state practice, or *opinio iuris*, they seem to be at odds with the core idea, the essence of why we have human rights in the first place. Prioritizing some and downgrading or disregarding others' human rights claims may in particular situation X be justifiable or not, but the burden of proof rests with those who would want to argue for the legitimacy of a sweeping and systematic differentiation between people on state territory and people beyond—at least if they at the same time wish to remain committed to the core idea of what we mean when we talk about human rights. It is thus the

core idea behind human rights that provides the moral case for extraterritorial obligations.

8.2 The Nature of States as Human Rights Duty-Bearers

Following the focus of the present inquiry, this section narrows the analysis to the duty-bearer *state*, claiming that the specific nature of the *state* implies and urgently suggests the significance and necessity of subjecting it to stringent extraterritorial obligations at the moral and the legal level.[20] While the nature of human rights plausibly entails other types of duty-bearers, and while statehood is thus not necessarily a *necessary* condition for being a human rights duty-bearer, the aim of the section is to justify why it is a *sufficient* condition—and, as a consequence, that states are constantly under human rights duties, whenever, wherever, and however they act.

According to the initial paradigm behind moral and legal human rights the state is the traditional and paradigmatic (though not necessarily the only) duty-bearer. While moral human *rights* are preinstitutional, the analysis of human rights *obligations* of *states* presumes the existence of this institution, whose nature thus plausibly shapes the nature of the obligation.[21] At the legal level, this initial state-centered paradigm is reflected by the fact that constitutional, supranational, and international bills of rights primarily oblige states. While there are (plausibly legitimate) calls for expanding the diversity of human rights duty-bearers, and while many voices today recognize that companies are at least under a duty to respect human rights, this does not change the fact that, given the contemporary global system, the state still amounts to the paradigmatic and primary bearer of obligations. At the constitutional level, it is the political community that subjects its state to fundamental rights constraints. In supranational law, subjugation to fundamental rights duties primarily arises from a state's membership of a specific framework, which at the same time enables it to co-formulate the norms members of this framework are governed by. In international law, subjugation to human rights norms *partly* already arises from mere legal statehood (for customary law and *ius cogens*), and partly still depends on the initial expression of state consent (for treaties). However, as treaties' nearly universal ratification rates show, the overwhelming majority of states have explicitly accepted these constraints on their room to maneuver. And, once a state has expressed its consent to a particular set of norms (be it at constitutional or international level), it is bound by these norms and cannot simply withdraw at a whim.

Why does statehood imply human rights obligations? The paradigm of the state being the key agent to which such duties are addressed essentially springs from a duality in its nature: On the one hand, a state is the "Principal Violator"[22] of human rights, the agent that has the most effective power and means to affect individuals' in ways that disable them to live a life in dignity. On the other hand, the state is the "Essential Protector"[23] of human rights: Simultaneously, it is also the agent that has the most effective power,

means, and opportunities to protect individuals and their ability to live a dignified life. In treaty law, this ambivalent role of states is reflected by the fact that they are the entities that consent to human rights treaties and, concomitantly, those that then are subjected to the treaties' norms.

This ambiguity in states' nature is linked, so it will be suggested, to a triad of foundational elements of their nature as a human rights duty-bearer—and it is this triad that so urgently suggests the stringency of obligations to those abroad.[24]

First, a state is an entity with *distinctive* means at its disposal. States are exclusively entitled to instruments of authority to which no other agent is: States can legally coerce, sanction, and detain people, can claim their property in order to install a system of redistribution, to establish and fund collective institutions, or to provide (or fail to provide) infrastructure, they can design compulsory education systems for millions of people and use military force and lethal weapons for self-defense. By these means, states are in a special position to structure and affect individuals' lives in a way that, probably, no other agent can. It is true that other kinds of public authority have come into existence, like the institutional structure of the EU impressively illustrates, and some of them have also been equipped with means of normative authority. Still, in today's world, due to its legal coercive authority and its monopoly on the use of force, the state continues to have the most far-reaching and comprehensive capacity to directly affect the individual without this being mediated by any further levels. Whereas the exercise of this normative, legal, and coercive authority is by no means factually limited to the state's territory or jurisdiction, it often tends to be primarily associated with domestic state conduct.

Second, in addition to their qualitatively distinctive means of authority, states are also paradigmatically agents with quantitatively enormous *de facto* power: To achieve their interests, they can make use of administrations, police, armies, intelligence services, estate, and land as well as of extensive resources of financial, personal, natural, and technological kinds they typically have at their disposal. It means overlooking a key aspect if states are merely described as agents with legal, normative authority. In addition, and importantly, they are also *factually* tremendously powerful and resourceful agents that—not only but especially in the international arena—act accordingly. In this respect, the empirical realist analysis makes a critical point.

This type of conduct does not directly relate to their being bearers of normative authority. Vast amounts of resources and power instruments are not exclusively available to states. Thus, these latter means enable states to act in ways in which other similarly powerful non-state agents may act, thus in principle no longer in a *categorically* different way to non-state agents. Moreover, this type of behavior is not limited to the domestic sphere—and can be on the brink of legality, if not thoroughly illegal: When states extraterritorially kidnap people, when they commit extraordinary renditions, when they torture people on other states' territories, they do not act upon their means of legal authority. These and other types of conduct, displaying their enormous

factual power as to which they no longer necessarily differ from other powerful non-state agents, must be taken into account in the assignment of human rights obligations to states. Their being subjected to such obligations cannot be limited to the space in which the state acts as a paradigmatic agent of normative legal authority. Human rights can be relevant to *all* domains of actual state conduct.

Third, the moral status of states is neither self-standing nor morally equivalent to that of the individual—it is a derived status that depends on the status, interests, and needs of human beings. Contrary to human beings, states do not have any intrinsic and inalienable moral value: Rather, their value is of a mere instrumental nature, depending on their contribution to the aim of protecting individuals. As it was recently put by an ICJ judge, "[s]tates exist for human beings and not vice-versa",[25] or, in a scholar's words, "states are, unlike individuals, not entities in their own right, but institutional resources for human beings",[26] acting as their "custodians", "trustees", or "fiduciaries".[27] They are essentially collective, institutionally realized projects of justice that aim at realizing, securing, maintaining, and protecting individual goods, and whose object and purpose cannot be to maximize self-interest, power, and independence.[28] The interests of states must not run counter to humanity-based interests in general or to human rights protection in particular. States are institutionally designed to serve human beings and to cater to human needs—and this not only is what bestows them with legitimacy but also exhausts the aims of their existence. Serving individuals is all there is to this institution: There are no further reasons or aims behind its existence.

Due to these different elements of their distinctive nature, states are the agents that pose the biggest threat to human rights enjoyment as well as, simultaneously, the agents best equipped with the means for dealing with such challenging demands. Consequently, the initial idea behind human rights had been motivated by the—by no means new[29]—insight that the scope of states' authority must not be without constraints, and that individuals need to be shielded from becoming the objects of their potential misuse of power. Human rights provide a distinct way to secure basic human needs and interests *against and from* this extraordinarily mighty agent by protecting the basic core of leading a human life in dignity. Moral and legal human rights constrain and define states' legitimate room to maneuver in order to ensure this very protection.[30] And, so it will be argued in what follows, the *moral* reasons for statehood being a sufficient condition of subjugation to human rights obligations also provide the case for statehood to serve as an equally sufficient condition in the *legal* sphere—and thus also regarding both territorial and extraterritorial effects of state conduct.

What does the nature of states and the three elements tell us about the nature of their *human rights obligations*? The different dimensions of human rights obligations, obliging states to respect, protect, and fulfill rights, reflect the three characteristic elements of states' nature: It is their being collective and institutional projects of justice that aim to enable and promote individual

goods that explains why states must *fulfill* human rights and strive toward circumstances in which human rights enjoyment is realized. It is thanks to their having normative authority and access to special means, like legal coercion and sanctions, that states possess the ability to *protect* individuals from violations by third parties. And it is due to their extraordinary factual power that they are obligated to *respect* human rights, to refrain from violating them with the help of the diverse means and enormous resources they have at their disposal.

However, the dimensions are mutually interlinked: For example, the fact that states have enormous factual power, including financial resources, also contributes to the weight of their obligation to *fulfill* human rights—and so does the fact that they, as agents with normative authority, have the means to claim private property and assets in order to redistribute (as thereby, they can contribute to fulfilling human rights by introducing social security systems and the like). Likewise, their having the normative authority to sanction individuals by depriving them of their freedom is directly related to their obligation to *respect* human rights, which have an important function in situations of detention. Analogously, their being institutional projects in the service of humans certainly contributes to their obligations to *respect* and *protect* human rights, as actively violating or failing to safeguard them against infringements by third parties would be in contradiction to this element of their nature.

Overall, the claim here is not that each of the three elements of states' nature separately generates a specific dimension of human rights obligations or that, in situations in which one element (e.g., the exercise of *de facto* power) dominates, only one dimension of obligation pertains. Rather, the argument is that the multidimensionality of human rights obligations captures the multifaceted nature of states. All these dimensions of human rights obligations apply to states—by virtue of their very essence, their statehood.

An obvious objection looms at the horizon. As mentioned, one element of states' nature, namely their enormous *de facto* power, is shared by other kinds of agents, such as TNCs, some of which even have more economic resources at their fingertips as the least developed states.[31] Given the degree of their factual power, they are just as likely to have a tremendous impact on people's life conditions and human rights situation. This, however, is not by itself an objection: It may simply provide a reason for subjecting such corporations to respect human rights obligations, too.[32] At this point, the aim is to justify why statehood qualifies as a sufficient condition for human rights duty-bearership, without this implying that other types of agency might not also qualify: It is not claimed that statehood amounts to a necessary condition. Nonetheless, the qualitative difference between states and TNCs can still be relevant: It is precisely because of the latter's *lack* of normative authority and of being projects of justice with the essential aim to serve human interests that they most likely are not under *as multidimensional* obligations as states are: They are typically not required to protect and fulfill human rights—and there are good reasons why they should not be, which precisely has to do with their different nature.

What does all this entail for the question of extraterritoriality? One of the main points behind the argument made above is that conceding the extraterritorial reach of human rights may require a change of perspective, which regards both *rights* and *obligations* as central. Human *rights* spring from the essential core of human nature, which generates certain interests and needs in order to live a life in dignity. Human rights *obligations* constrain states and do so in light of the nature, aims, means, and potentials of this collective agent. They normatively delimit and define the space within which a state may legitimately act and within the boundaries of which all other obligations, permissions, and privileges arise. If universality serves as the guiding standard for human rights, it should also guide the application of the scope of addressees of obligations—here, of states. In raising the extraterritoriality question, the decisive point is not only whether *rights* pertain to *extraterritorially located individuals*. The decisive point is also whether a *state* that is morally and legally subject to human rights obligations (and, in the latter case, has even voluntarily consented to be so) may permit its organs to *disobey these principles* whenever the effects of its actions happen to manifest themselves abroad.[33]

Thus, the focus on obligations underlines why a state, whenever its conduct (including actions and omissions) has effects on individuals, is obliged to consider human rights. If such obligations are urgently suggested by states' nature, then they condition the entirety of the actions of their authorities that affect individuals, whether these are based on and conform with law or not; whether they are of a formal legislative, executive, judicative, administrative, or factual, nonlegal nature; and whether their effects materialize at home or abroad. Legally, if a state commits itself to human rights, it commits itself to accepting them as the margins of its room to maneuver, regardless of the geographical location at which the effects of its conduct happen to materialize.[34]

That said, acting in conformity with human rights obligations does not yet guarantee that a state acts legitimately—its actions could also be illegitimate for other reasons that do not directly stem from human rights concerns. Moreover, not every state action touches upon domains relevant to the enjoyment of human rights: Acting on human rights obligations does not exhaust state conduct. And even if a state act touches human rights, there might be countervailing reasons that justify circumscriptions. What is suggested here is only that *not breaching human rights obligations* is a *necessary* condition for an action being legitimate (while it is not argued that it is a *sufficient* one). Thus, obligations to respect human rights condition and constrain what states might legitimately do, and obligations to protect and fulfill define substantial parts of what states should do.[35]

All three elements of states' nature can manifest themselves in domestic and extraterritorial contexts.[36] The risks associated with the extraterritorial reach of states are often most evident when they *factually* act as powerful agents, as they can then—especially in today's globalized world—easily affect human rights abroad. At the same time, states acting with *normative authority* abroad have long ceased to be the exception, as not only colonialism and imperialism

taught the world. Furthermore, if states are set up for nothing other than to serve human beings, they cannot make this dependent on the whereabouts of the individual human being affected by its conduct. If states are "agents of humanity",[37] they must take the interests of and effects on humans into account, be it on their territory or beyond.

When considering the nature of states as human rights duty-bearers, another critical point is worth bearing in mind. It is not (or at least no longer) true that only the domestic state is in a position to threaten the individual, its autonomy, security, and liberty. New border-transcending relations have long emerged, including diagonal relations between individuals and third states. If the idea of human rights is to protect individuals from the extraordinary power of states, which brings with it a considerable risk of abuse, then these diagonal, transnational relations should be subject to the same normative standards. This is not to say that human rights only gained universal reach in today's globalized world: Their universal reach stems from the universalist moral idea behind them. Nevertheless, today's world, in which state acts can easily have tremendous consequences abroad, and in which foreign affairs are not or no longer categorically different from other fields of state action, makes it even more evident why acts with effects abroad should be guided by the same conditions that apply to domestic actions.[38] In today's world, if human rights obligations continue to be conceptualized within the framework of a system of externally fully sovereign states, this leaves a significant protection vacuum.

At this point, it is important to come back to another aspect touched upon above: In extraterritorial relations between states and outsiders, the latter are subject to a *special kind of exposedness,* one that comes with a specific kind of vulnerability. This exposedness and vulnerability do not by themselves justify extraterritorial human rights obligations but help explain their urgency and necessity. To recapitulate, due to the reach of state actions beyond borders—which, today, is multiplied by modern technologies and transport—outsiders are more and more exposed to being affected by third states' conduct. At the same time, they do not have the means typically available to insiders to defend themselves against infringements of human rights.

First, they generally only have limited—if any—political tools: They are not able to take part in the decision-making that governs state conduct, as a result of which, when extraterritorial violations occur, there is typically a gap between those that make the decisions behind state policy and those that are affected by it. Second, outsiders often do not have the same level of judicial instruments available. On the one hand, some states, as we have seen in the case of the US, regularly deny constitutional protection to noncitizens located abroad. On the other hand, it is likely the case that a state's domestic courts are not as easily accessible for outsiders who would want to initiate legal proceedings against this very state. This might be due to formal reasons or simply by virtue of practicability issues, such as limited knowledge and insight into judicial mechanisms and procedures, lacking means of travel and financial resources, or language barriers. Third, outsiders are in a paradigmatically weaker position

when it comes to raising public awareness or taking part in public debate about human rights violations by third states. Also, extraterritorial violations are often less likely to spark public outcry simply because public awareness of conduct abroad is generally more limited, civil society tends to be focused on domestic issues, and extraterritorial state activities are often surrounded by a shroud of secrecy. For that reason, some argue that it may even be more likely for human rights violations to occur in extraterritorial circumstances.[39] At the very least, it seems that states' potential to affect human rights is not necessarily smaller abroad than at home.[40]

Considering this special kind of exposedness and the limited means available to them, outsiders must be able to rely on other protective instruments. They have a right to be assured that foreign states are not exempt from moral and legal norms, that they must act within the limits of what governments may legitimately do, and that they have to justify their conduct. In essence, outsiders rely on regimes of human rights protection. These can function as a substitute that equips outsiders with at least a minimally protective instrument in their diagonal relationship to third states, in which they typically lack a considerable part of the means that insiders have access to. When they are affected by state policies and acts that spring from procedures over which they themselves do not exert any influence—or only to a very limited degree—then they should at least be able to rely on the guarantee that these effects are not free from any constraints but regulated by fundamental human rights norms.[41]

Enabling this form of reliance and thereby mitigating the vulnerability to which outsiders are exposed must also be among the core intentions of implementing legal human rights protection at the *international* level. In this sense, IHRL also complements the tendency for partial and non-cosmopolitan decision-making within states and provides "a self-binding mechanism for democratic peoples to help counteract this structural bias".[42] Institutionally, it is typically judicial bodies that play a vital role in ensuring that this 'self-binding mechanism' is triggered, in countering the inevitable tendency of majoritarian decisions to disregard rights and interests of minorities, and in taking on responsibility for rights protection of those who cannot raise their voice in the political arena[43]—which crucially includes affected outsiders. These functions are typically performed by domestic courts, but international bodies serve as an important backstop, or may even take over, should domestic bodies prove unwilling or unable to perform them. Moreover, the introduction of international judicial bodies is precisely one way of responding to the fact that outsiders often have limited access to domestic courts, be it for formal or practical reasons. That said, it is worth bearing in mind that similar issues can also hinder specific individuals from accessing international courts. The recognition of the extraterritorial applicability of constitutional and international human rights must thus come with making the competent judicial bodies—both formally and practically—genuinely accessible to those who claim infringements by states other than their domestic state of residence.[44]

Two qualifications must be made. First, it is not argued that this special kind of exposedness of outsiders is more significant than those to which insiders are paradigmatically subject. The latter might likely be greater, insofar as insiders are more directly exposed to the effects of state conduct and more directly coerced by its laws.[45] It is precisely due to this fact that typically, insiders not only can rely on a system of fundamental rights protection but also have other means at their disposal to defend themselves against abuses of state power. The point is merely that in diagonal extraterritorial relations, human rights norms function as a minimal response to the vulnerability to which outsiders are subject.

Second, their special kind of exposedness and the vulnerability that can accompany it do not bear the justificatory force of the argument, i.e., are not the decisive element that would by itself ultimately justify extraterritorial human rights obligations. Thus, the picture drawn here does not perceive the outsider as a vulnerable object, incapable of autonomy and self-protection. Rather, the fact that outsiders—who are equally autonomous human subjects and holders of human rights as insiders are—are exposed to such vulnerability helps explain why state actions must not only be constrained in domestic contexts. Eventually, it helps explain the significance, urgency, and necessity of accepting and implementing human rights duties that do not stop at state borders.

Such extraterritorial duties are demanding, stringent, and inconvenient. But they apply to states as collective institutions, the purpose of which essentially lies in the protection of the individual. This points to another, *transversal dimension* of the nature of states that is reflected in all of the above-mentioned three elements: States are *institutions*. By virtue of their nature and their institutional makeup, they are precisely intended for accommodating stringent demands: The moral principles applicable to states *shall* be different and more stringent than those that guide individual, interpersonal behavior. As argued earlier, at this institutional level, there is no room for prioritization on the basis of mere relatedness. It is this second-order impartiality that justice calls for: Impartial and universal justice is to be realized at the level of institutions.[46]

This might indeed be one of the reasons why we have institutions like the state (and supranational unions or international organizations) in the first place: Given the global *status quo*, they precisely enable the dischargement of stringent universal duties, provide a way of impartially dividing moral labor and, thereby, ultimately enable individuals to autonomously pursue personal conceptions of the good, including projects and relationships—and they do so, to a considerable degree, through *law*. This is routinely reflected by the foundational idea behind the law as an institutionalized phenomenon: Premised on the idea of impartiality, domestic, supranational, and international legal systems ascribe stringent principles to institutions like the state, while identifying and distributing legitimate manifestations of partiality at the level of

interpersonal relations, i.e., while defining which manifestations of first-order partiality are legitimate, on what conditions, and to what extent.

Moreover, states may or may not legitimately prioritize their residents within other domains. The question at issue concerns the principles of human rights law in assigning obligations to states, asking about whether we would want *law* to allow *this type of agent* to turn a blind eye to outsiders' claims *to live a life in dignity*. Hence, the thesis here is more modest and more specific: By virtue of the nature of the state as a collective institution, the purpose of which lies in serving human beings and which functions as both the essential protector and the main threat to human rights, its conduct shall be guided by universal considerations when it comes to the basic domain of *human rights*. At least for this actor, at this level, and within this field, obligations are not triggered by any underlying special relationships that bear intrinsic moral magic. And one way of securing that impartial principles of justice govern the institution state when it addresses the most basic human concerns exactly consists in recognizing and solidly implementing human rights obligations to both insiders *and* outsiders.

To conclude, the general idea behind human rights obligations and the distinctive nature of the institution state, including its ambiguous role when it comes to human rights protection, suggest that *statehood amounts to a sufficient condition for being subject to human rights obligations*. If it is such a sufficient condition, then this subjugation pertains to all domains of state conduct, regardless of where its effects materialize. In human rights law, it is this essential insight that should guide the interpretation of the applicability conditions of states' obligations—or, as the legal analysis has suggested, its *re*interpretation. Taken together, the concept behind human rights, the nature of the state, and the reality of the contemporary globalized world suggest that it is no longer the territory–extraterritory distinction but rather the general idea that human rights obligations condition all of the states' conduct that provides the starting point for assigning corresponding legal obligations.

Such reinterpretation does not necessarily require a departure from positive law, a complete abandonment of the concept of 'jurisdiction', or a radical overthrow of existing interpretative approaches. But before the third part spells out in more detail what this implies at the legal level, the following section outlines the implications of the findings for the concept of sovereignty.

8.3 Extraterritorial Human Rights Obligations and State Sovereignty

If states are essentially institutional projects in the service of human beings, this implies that human rights and the various systems that legally protect them do not merely *put limits* on sovereignty. Rather, the issue is much more foundational.[47]

From a *judicial* point of view, sovereignty is not a prelegal or independent standard on which law is based. Rather, it is *vice versa*: The principle

of sovereignty is determined, assigned, and administered by and within the framework of international law and thus conditioned on being in line with its principles—which include human rights. As early as 1931, international judges asserted that external sovereign independence is not concomitant with absolute freedom of action or with not being bound by international law (but rather with not being subject to the authority of other states). Accordingly, obligations stemming from international law do not undermine states' sovereignty, as the latter is essentially preconditioned on the former.[48] Exemplified by the words of the German Constitutional Court,

> [t]he Basic Law abandons a self-serving and self-glorifying concept of sovereign statehood and returns to a view of the state authority of the individual state which regards sovereignty as "freedom that is organised by international law and committed to it".[49]

Accordingly, the same Court recently held that the extension of the state's domestic fundamental rights duties—which are inextricably linked to its parallel duties arising from international law—to foreign territories conflicts neither with the prohibition of intervention nor with other states' sovereignty.[50]

From a *normative* point of view, the value of sovereignty is of an instrumental type: It is a status that is not ascribed to states for its own sake but rather to equip them with the means to protect individuals and their dignity, i.e., to cater to humans' interests, needs, and goods, such as, centrally, autonomy.[51] It is guided by the aim of enabling states to pursue the realization of these goods—and its value depends on its contribution to this overall aim.

Hence, states are not merely constrained by the sovereignty of other states but, at the same time, by the 'sovereignty' of individual human beings, manifested in fundamental human rights that aim at protecting the core preconditions of what it means to lead a human life in dignity. Yet, these human rights norms do not just *curtail* what would otherwise be an unlimited sovereign liberty to act, but they provide the very starting point for *construing* and *defining* the legitimate scope of sovereign conduct. Human rights do not merely express conflicting values one has to weigh against sovereignty. Rather, they are what bestows sovereignty with value in the first place. In *Anne Peters*' words, "[h]umanity is the A and Ω of sovereignty", lending sovereignty the status of a secondary norm and indicating a presumption in favor of human rights from the very outset:

> The starting point of the analysis is not the presumption that states enjoy freedom of action, unless this is prohibited by a norm of international law. States are not analogous to individual persons in the state of nature, and state sovereignty is no inalienable, natural or fundamental right. (…) Therefore, the starting point of analysis must be the needs of human beings (…).[52]

But if sovereignty is based on humanity, it cannot consistently be employed as the very opposite: It cannot serve as a shield against human rights duties—*even if the latter happen to protect individuals abroad*. Misusing it as such a bulwark against human claims undermines its very foundation.[53] Thus, strategies of domesticating the sovereignty-constraining reach of human rights are unpersuasive. From a normative point of view, a conception that accepts curbs on sovereignty through individual rights in the *domestic* context but that rejects these curbs whenever sovereign conduct has effects abroad stands on shaky ground. From a legal point of view, such a conception is not in accordance with today's international legal system, which acknowledges individuals as direct legal subjects and thereby also enables the regulation of diagonal, transnational relations between foreign states and individuals. If domestic human rights infringements *run counter* to sovereignty and are regarded as a matter of international concern, it cannot be the case that extraterritorial infringements are *secured* by the principle of sovereignty:[54] From a practical point of view and with respect to today's world, which offers countless possibilities for states to have an impact on human rights abroad, such a conception of sovereignty would entail a dramatic protection gap.

A modern account that recognizes the *raison d'être* of sovereignty, the motives behind its ascription—i.e., its instrumental role in protecting human goods—and thus also its being inherently limited by fundamental rights, is not compatible with a systematic sovereign prerogative to disregard fundamental rights of people on the other side of the border fence. The concept of sovereignty including such a prerogative would not accord with what states exist for in the first place. The "veil of sovereignty" must not be used as a "veil of ignorance" that allows states to ignore outsiders' rights.[55] Or, in *David Cole's* words, "[s]overeignty is no longer absolute, territorial, and sacred, but conditional and limited by legal obligations to the individual that simultaneously pierce the border (…) and extend beyond the border".[56]

What this implies is that the burden of proof lies with territorial views: It is the *exclusion* of human beings from the scope of those protected that must be justified.[57] In order to consistently deny obligations to those abroad, one would need to argue for extreme premises, resorting to a much more far-reaching notion of sovereignty, less constrained—and less modern. Such a conception could, however, neither be reconciled with a general commitment to human rights nor with today's globalized world: "[N]o state can claim that its state sovereignty forbids cross-border concern for humanity: to make a sovereign claim is to declare oneself open to inspection in that regard".[58] Human rights fundamentally matter, for all dimensions of sovereignty.

Notes

1 On some of the main theses of this chapter, Müller, *Justifying*, 60 f.
2 Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 452 ff., 471 f.; Mahlmann, *Elemente*, 518; also Mahlmann, *Mind and Rights*, 108.
3 Sutch, *Normalization*, 38.

4 Kant, Immanuel, 'Grundlegung zur Metaphysik der Sitten', in Königlich Preussische Akademie der Wissenschaften (ed.), *Gesammelte Schriften*, [1785], Akademie-Ausgabe, vol. 4 (Berlin, 1911), 385–464, 428 ff.
5 Here, 'cultural' is understood as relating to the arts.
6 Bignami & Resta, *Human Rights Extraterritoriality*, 379.
7 Scheffler, *Equality and Tradition*, 73 f.; Miller, *On Nationality*, 80.
8 Caney, *Justice*, 35 ff.; Mahlmann, *Elemente*, 490, 518; Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 452 ff., 471 f.
9 A point conceded by, e.g., Ignatieff, *Idolatry*, 79, also 80.
10 Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 395; Section 1.3.1.
11 According to *Sigrun Skogly*, the universality of human rights obligations has received little attention, Skogly, *Extraterritoriality*, 833 f.; Skogly, *Global Responsibility*. See also HRC, *Report of SR on Right to Food*, 2014, para. 38.
12 Cruft, Rowan, 'Human Rights as Rights', in Ernst, Gerhard & Heilinger, Jan-Christoph (eds.), *The Philosophy of Human Rights: Contemporary Controversies* (Berlin/Boston: De Gruyter, 2011), 129–158, 134.
13 Besson, *Extraterritoriality of the ECHR*, 859, emphasis added.
14 In that sense, extraterritorial human rights obligations might be regarded as a way of substantiating 'common interests', cf. Benedek, Wolfgang, 'Humanization of International Law, Human Rights and the Common Interest', in Benedek, Wolfgang et al. (eds.), *The Common Interest in International Law*, Law and Cosmopolitan Values, 5 (Cambridge: Intersentia, 2014), 185–196, 195. On the distribution of duties at the level of legal institutions, Sections 10.2 and 10.3.
15 Roxstrom & Gibney, *State Jurisdiction*, 136, original emphasis.
16 Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, 323, translation A.M.
17 Cf. Buchanan, *Legitimacy of the International Order*, 56 ff.
18 Rawls, John, *Political Liberalism*, expanded edn (New York: Columbia University Press, 2005), 133 ff.; cf. Taylor, *Unforced Consensus*.
19 Craven, *Realm of Order*, 247.
20 See also Müller, *Justifying*, 60 f.; Müller, *Security Measures*, 110 f.
21 Cf. Buchanan, Allen, 'Human Rights', in Estlund, David (ed.), *The Oxford Handbook of Political Philosophy*, 2012, 279–297, 286.
22 Donnelly, *Universal Human Rights*, 33.
23 Ibid., 33.
24 For the following considerations, see also Müller, *Security Measures*, 110.
25 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, ICJ Reports 2010 (22 July 2010), 403, Separate Opinion Judge Cançado Trindade, para. 239; also Caney, *Justice*, 272.
26 Peters, *Foreign Relations Law*, 332.
27 For an approach of "fiduciary sovereignty", Criddle, Evan J. & Fox-Decent, Evan, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford: Oxford University Press, 2016). For "custodial sovereignty", Scholtz, Werner, 'Human Rights and Climate Change: Extending the Extraterritorial Dimension via the Common Concern', in Benedek, Wolfgang et al. (eds.), *The Common Interest in International Law*, Law and Cosmopolitan Values, 5 (Cambridge: Intersentia, 2014), 127–142, 137. For sovereignty as "trusteeship", Benvenisti, *Trustees of Humanity*.

28 Cassee, *Globale Bewegungsfreiheit*, 60 f.
29 Cf., e.g., Locke, *Second Treatise*, chapter IX, Section 131; chapter XI, Section 135 ff.
30 Müller, *Security Measures*, 110.
31 '69 of the Richest 100 Entities on the Planet Are Corporations, Not Governments, Figures Show', *Global Justice Now*, 17 October 2018, www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show; Khanna, Parag & Francis, David, 'Rise of the Titans', *Foreign Policy*, 217 (2016), 50–55.
32 For example, Weissbrodt, David & Kruger, Muria, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', *American Journal of International Law*, 97/4 (2003), 901–922, 901; Pavlakos, George, 'Transnational Legal Responsibility: Some Preliminaries', in Vandenhole, Wouter (ed.), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Abingdon/New York: Routledge, 2015), 136–157.
33 Müller, *Security Measures*, 110. Similarly Pavlakos, *Transnational Legal Responsibility*, 136, 136 fn. 3.
34 Some have analyzed whether this would violate the principle of non-discrimination, see Skogly, *Global Responsibility*, 834. The ECtHR has denied that differentiating on the basis of *geographical location* constitutes discriminatory treatment as prohibited by Art. 14 *ECHR*, see ECtHR, *Magee v. the United Kingdom*, 28135/95, 6 June 2000, ECHR 2000-VI, para. 50; ECtHR, *Big Brother Watch*, para. 517.
35 Of course, there are many domains of state actions by which human rights are not concerned and here, human rights obligations are not directly relevant, see Section 4.3.3. Still, the requirement of acting in conformity with human rights obligations comprehensively pertains to all domains of state conduct. Moreover, it is clear that the respective act must be attributable to the state according to the rules of state responsibility, Art. 4–Art. 11 *Draft Articles on State Responsibility*; cf. Sections 4.3 and 10.2.2.
36 Brilmayer, *Justifying International Acts*, 91 ff.
37 Benvenisti, *Trustees of Humanity*, 300.
38 Peters, *Foreign Relations Law*, 335. See also Habermas, Jürgen, *Zur Verfassung Europas: Ein Essay* (Berlin: Suhrkamp, 2011), 37; Brilmayer, *Justifying International Acts*, 1 f., 27 f., 50, 84 f.; Caney, *Justice*, 65, 97 (n.7), 124 f.; Peters, *Humanity*, 542; Pogge, *Cosmopolitanism and Sovereignty*, 66.
39 Wilde, *Legal 'Black Hole'?*, 754 ff.
40 Peters, *Humanity*, 542.
41 Müller, *Security Measures*, 111.
42 Buchanan, *Why International Legal Human Rights?*, 256.
43 Cole, *Rights over Borders*, 60.
44 Further Section 10.3.
45 On the way in which *insiders* are exposed, Section 7.5.3.
46 Section 7.3.2; similarly Barry, *Justice as Impartiality*; Tan, *Justice*, 158 f., 190 f., 197 ff.; Hooker, *When Is Impartiality Morally Appropriate?*; Pogge, *Concluding Reflections*, 298.
47 On the concept of sovereignty as interpreted in this section, see also Müller, *Security Measures*, 109 ff.

48 PCIJ, *Customs Régime between Germany and Austria (Advisory Opinion)*, 5 September 1931, Series A/B no. 41, Individual Opinion Judge Anzilotti, para 83 f. See also Besson, *Sovereignty*, para. 109; Peters, *Humanity*; Donnelly, *Universal Human Rights*, 212.
49 BVerfG, *Urteil des Zweiten Senats vom 30. Juni 2009*—2 BvE 2/08, para. 223, BVerfGE 123, 267 <346>.
50 BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 100 ff.; also para. 93 ff.
51 Cf. Mahlmann, *Konkrete Gerechtigkeit*, 81 ff.
52 Peters, *Humanity*, 514, 534 f. See also Mahlmann, *Konkrete Gerechtigkeit*, 81 ff.
53 Salomon, *Global Responsibility*, 26; cf. Skogly, *Global Responsibility*, 839 f.; Müller, *Security Measures*, 109 f.
54 Skogly & Gibney, *Transnational Human Rights Obligations*, 798.
55 Lafont, *International Protection of Human Rights*, 438.
56 Cole, *Rights over Borders*, 61.
57 Benvenisti, *Trustees of Humanity*, 307.
58 Peters, *Humanity*, 543.

Part III

From Normative Justification to Legal Implementation

9 Translating Ethical Principles to Legal Interpretation

The previous part concluded by outlining a justificatory theory of extraterritorial human rights obligations: If the general idea behind moral human rights is accepted, then what human rights obligations mean for states is that they essentially define and delimit the scope of their room to maneuver, the boundaries within which they are permitted to act. Thus, with statehood being a sufficient condition for being a human rights duty-bearer, these duties also apply to state conduct that affects individuals abroad. If the idea and intention behind human rights and their corresponding obligations are taken seriously, a categorical distinction cannot be drawn between state actions with territorial effects and those with extraterritorial effects—both are essentially subjected to human rights obligations. Thus, extraterritorial human rights obligations are inherent in and ultimately justified by the very idea behind human rights.

As a next step, the aim is to translate these philosophical findings, based on the core idea behind moral human rights, to the legal sphere, i.e., to extraterritorial obligations in human rights law.[1]

As addressed in the introduction, this analysis is based on the assumption that moral principles constitute one of the central starting points for how to conceptualize legal human rights. This does not mean that human rights law simply mirrors human rights morality. Rather, in *human rights law,* the legal justification, design, application, and interpretation of norms (i.e., of both rights and obligations) and thus the institutionalization and allocation of duties cannot be independent from moral justifications but must essentially consider the justificatory principles behind moral duties—rather than be guided by contingent historical or political factors. The abstract way in which human rights norms are formulated as well as the reference to their prelegal nature in central documents of human rights law and practice only underline this need for ethical guidance.[2] Backing their interpretations by foundational normative principles is what judicial bodies routinely do: In the famous words of the Human Rights Committee,

> 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

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> Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[3]

At the same time, and as also previously explained, the influence of moral principles on concrete legal norms also has limits. First, ethical guidance, important as it is for the creation, interpretation, and evolution of norms, cannot ignore what, for example, the wording of positive law stipulates. Thus, if moral principles orient the application of their legal counterparts, this cannot mean that the former must overthrow and reinvent the latter. Rather, ethical reasoning on the issue must ultimately be directed at concepts that *de facto* regulate corresponding obligations in positive law. Accordingly, for the question of extraterritorial applicability, the moral idea behind human rights obligations shall inform the interpretation and implementation of the main applicability conditions of these obligations in human rights law. In other words, the debate on the unresolved legal task of how to conceptualize the applicability standard that positive law defines—in IHRL, jurisdiction—should be mindful of what has been identified as justificatory elements of a theory of extraterritorial human rights obligations. As the outline of the legal debate also showed, this ethical guidance appears critical in order to address the controversies unfolding around the concept of jurisdiction and improve the cogency of interpretative approaches to it. This third part addresses this task.

A second factor that moderates the influence of ethical reasoning is instrumental considerations of practicability. When moving from the moral to the realm of concrete legal norms and institutions, it is evident that practical, political, and judicial considerations must be factored in: Institutional aspects, real-world limitations, considerations of effectiveness and efficiency are all brought into play.

Linked to these two considerations on the limits of ethical reasoning is the preference for an *incremental approach* when it comes to legally realize extraterritorial obligations. In order to be relevant to practice, the aim here is not to argue for abandoning the current regime of human rights law or for rewriting (almost universally ratified) human rights treaties. Rather, the claim is primarily one of *reinterpretation*. Nevertheless, the core moral idea might still point to gaps in human rights protection and to the need for evolving current legal regimes, be it at the domestic, supranational, or international level.

It might be objected that the structure of the contemporary system of human rights law, particularly the international regime with its heavy reliance on consent-based treaty law, is essentially in tension with the justificatory theory developed in the last chapter. However, first, it is vital to emphasize the role of customary international law, arguably already covering a wide scope of human rights protection that is not directly conditional on explicit state consent, even though it depends on how states behave. Second, it is still more appropriate, promising, and fruitful—not least for strategic reasons and in light of current political developments—to work with and improve the existing system rather than to risk subverting the level of protection achieved

so far, and thus to concentrate on contributing to well-informed and justified (re)interpretations of its concepts, such as that of *jurisdiction,* on their application to contemporary challenges, and on proposals for the incremental expansion of norms.[4] This incremental approach of the study is also mirrored in its focusing on human rights obligations of *states.* As long as the empirical background conditions that the world is still divided into territorial states and that the current human rights regimes primarily bind states hold, it appears worth avoiding naiveté and exploring what universal and cosmopolitan duties states are subject to.[5]

In that sense, the argument here is that extraterritorial obligations are not a new element to be added to the current regimes of human rights law—rather, they are incorporated into them and follow from a coherent and justified interpretation of the object and purpose of their norms. For example, to a large part, the extraterritorial use of drones can be regulated via a context-sensitive application of various existing human rights norms at different levels, such as the right to life or the right to privacy. Nonetheless, whether such reinterpretation is sufficient in order to transpose the basic moral idea doubtlessly hinges on the particular positive legal regime one studies, as the second part of this book has indicated.[6]

Lastly, in moving to the legal question, the following reflections will center on *international* human rights law, where jurisdiction functions as the central applicability threshold: In some treaties, it is explicitly mentioned, while for many others, its pertinence has been read into them. Having said that, the idea remains that there is no categorical normative difference to the protection of rights in other treaties or at other levels that do not explicitly refer to jurisdiction. The difference to domestic or supranational levels lies in the fact that human rights norms at these levels are *legally* directed at only one or a specific limited group of particular duty-bearers, that only these duty-bearers can legally be held accountable through a particular regulatory framework, and that some of them also legally limit the group of potential right-holders who can seek justice for alleged violations. Still, normatively speaking, constitutional rights, fundamental rights at supranational level, and international human rights are essentially linked and all spring from the same principles, the justification of which claims universal validity.[7] Hence, considerations about the applicability conditions of international human rights are directly relevant to other legal levels, too.

At the same time, a focus on international law suggests itself because the enshrinement of individual rights within this specific system epitomizes the cogency of the argument. First, by contractually consenting to international human rights treaties, states implicitly acknowledge individuals universally as holders of human rights, explicitly declare human rights to be an area in need of international regulation and make a promise to the entire global community.[8] IHRL introduces what Kant called a *cosmopolitan* law, in which individuals are direct holders of rights vis-à-vis states. In Kantian terms, this category of law suggests the evolution of a global community—to such a degree that

violations of law at one place on the earth are felt on all other places, too. This, in its essence, reflects the contemporary legal idea of conceptualizing the core IHRL norms as *erga omnes* rights, the systematic and substantive violation of which infringes not only the victims' rights but those of the international community as a whole.[9] In addition, the incorporation of human rights into international law—which provides additional means to realize universal, impartial obligations and to address global challenges—reflects the insight that universal human rights fulfillment cannot be secured unilaterally but requires international cooperation.[10] In sum, while applicability conditions at different legal levels should not foundationally differ, the international nature of IHRL more urgently underlines the need for cross-border application and can provide guidance for addressing extraterritoriality at other legal levels. Thus, it is the applicability criteria of IHRL to which the discussion now turns.

Notes

1 See also Müller, *Justifying*, 61 f.
2 Mahlmann, *Elemente*, 13 ff., 27 ff.; see also Mahlmann, *Mind and Rights*, 92 f., 109. Cf. Buchanan, *Legitimacy of the International Order*, 40 ff., 56. This link between moral and legal principles might (or might not) be different in other legal domains. The assumption here limits itself to human rights. Plus, while moral human rights essentially include a claim to some form of legal implementation, they also generate duties to realize them via other means, such as via social recognition and active agitation, Sen, *Elements*, 326 ff., 342 ff.
3 CCPR, *López Burgos*, para. 12.3, emphasis added; referred to also in ECtHR, *Issa*, para. 71.
4 Differently, e.g., Kanalan, *Extraterritorial State Obligations*, 55 ff., who regards the concept jurisdiction as too restrictive and argues for replacing it.
5 Section 1.3.1. Cf. the approach in Beardsworth; Brown & Shapcott (eds.), *Cosmopolitan Responsibilities*. In this edited volume, the aim is to investigate whether and to what degree the state can amount to an agent of cosmopolitanism, though contributors differ on their evaluation of the statist system. In the present analysis, it is nothing more than a descriptive fact.
6 It is beyond the scope of the discussion to make suggestions about concrete legal proposals as to which specific regimes of human rights law would have to be expanded.
7 BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 94 ff.
8 Milanović, *Extraterritorial Application*, 106.
9 ICJ, *Barcelona Traction*, para. 33. On cosmopolitan law ("Weltbürgerrecht"), Kant, *Zum Ewigen Frieden*, 349 ff., 360. While Kant focuses on the right not to be treated with hostility on foreign territory, its "innovative core" consists in its transforming international law to a law of individuals, Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, 323, translation A.M.
10 Buchanan, *Why International Legal Human Rights?*, 255 f.; Gibney, *International Human Rights Law*, 118 f.

10 Interpreting the Concept of 'Jurisdiction'

If it is not territory and membership of the political community that triggers states' human rights obligations, what is it? What other criteria are relevant? How can the conclusion of the second part, namely the basic idea that universal human rights obligations constrain the entire scope of state conduct, be translated into the legal concept of *jurisdiction*? The intention of this chapter is, first, to apply the argument developed so far to an evaluation of selected jurisdictional models and, second, to suggest how to interpret jurisdiction in a way that captures the foundational insight of the argument, but that is still responsive to reality and well-disposed to being implemented as a practical tool.

10.1 The Inadequacy of Current Jurisprudential Models of 'Jurisdiction'

In case law on IHRL, two main jurisdictional models have been developed. To sum up the main conclusions drawn earlier, the *spatial model* of jurisdiction as *effective overall control* is unconvincing, mainly for its being unable to provide effective human rights protection: It leaves a substantial gap by not covering a variety of ways in which states, *de facto*, infringe human rights abroad in situations in which no degree of spatial, territorial control is given. Among these are cases of extraterritorial acts like aerial bombings, kidnappings, or detentions abroad, but also territorial acts with effects on the enjoyment of human rights abroad, be it by introducing domestic policies, conducting surveillance operations, or sending unmanned drones targeting individuals abroad.

The *territorial* conception criticized in Chapter 7 actually constitutes a narrow variant of a spatial model, namely one in which jurisdiction coincides with territory. That is to say, the 'effective overall control' spatial model of jurisdiction merely reflects a gradual expansion of a territorial view. Statists could reconcile themselves to such a spatial model of effective overall control, maintaining their membership-based conception of protection and their understanding of jurisdiction as an essentially territorial notion, but grant

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(by way of compromise and motivated by a concern for practicability) that it may manifest itself abroad in certain exceptional circumstances, namely when a state took the sovereign decision to expand its *de facto* territories (and thereby its community of members). The ECtHR's reading of jurisdiction serves as a prominent example of such an approach: It describes jurisdiction as a paradigmatically territorial concept that is only to be applied abroad in exceptional circumstances. One of the main problems of such a spatial model is that it still implicitly leans toward a *de iure* understanding of jurisdiction and to the concept of territorial title, which is at odds with the idea behind human rights.[1] Due to states' very nature, their means to affect human rights of individuals is not restricted to the territory they exercise overall effective control over.

The second main model of jurisdiction found in IHRL case law is a *personal* one, defining *authority a state agent exercises over an individual* as decisive for triggering the applicability of human rights law. To recall, on the one hand, this model has been criticized for going too far, i.e., for collapsing into a 'cause-and-effect' notion in which *attributability* of a violation serves as a necessary and itself sufficient condition for establishing jurisdiction. According to its critics, this would place a limitless obligation upon states vis-à-vis every person whose rights they potentially violate by acts attributable to them, divesting the treaties' jurisdictional clauses of meaning and function.[2] These criticisms do not completely convince. At the very least, from a normative point of view and considering the object and purpose of human rights treaties, this assumed consequence does not *by itself* provide sufficient grounds for rejecting the personal model—as it is exactly the idea of human rights that they are owed to every human being. What is true, however, is that it fails to provide adequate practical guidance.

That said, the personal model can also be criticized for being too narrow: First, its core criterion, a state agent 'exercising authority', can hardly be fulfilled by mere *omissions*, i.e., through simply refraining from acting. Consider a fictional example: The intelligence services of state A have gathered information about the plans of government B to murder person C (who is located in state B) but failed to inform C about it. This omission cannot be described as an exercise of authority over C on behalf of a state agent of A: The latter neither monitored C's personal communication nor in any other way exercised authority over C. Yet, there are good reasons to assume that state A's jurisdiction cannot be fully denied in this situation (next to, obviously, jurisdiction of state B)—whether or not this omission amounts to a norm violation or not.[3] This and similar situations cannot be covered by the personal model because it appears to limit itself to positive *actions* of the state. But as a result, the model no longer seems unlimited and overextending but quite limited.

Similarly, it is not able to capture the manifold side effects that states' policies, measures, or activities can have on the enjoyment of human rights abroad: If intelligence services of state A surveil communication of person E in state D and thereby listen to phone calls she conducted with an individual

F also located in state D, the effects on F constitute mere side effects of A's actions. It is doubtful whether such side effects could fall under 'exercises of authority'. The same holds for situations of mere factual influence or control (without authority). If online activities abroad are secretly monitored in an undercover operation, and the acts of surveillance happen on domestic territory and through digital means, it is questionable whether this can be construed as an exercise of actual *authority,* which seems to come with the normative claim of generating reasons for obedience and not merely as one of sheer power. But even if it such actions could be covered by the model, this appears different in case of *ultra vires* actions of state agents: When the surveillance operation happened without the state agent being commanded and having the authority to do so, it is unclear how this could count as an 'exercise of authority'. This then leads to the absurd result that state responsibility may be assignable (which is typically the case for *ultra vires* actions) but no jurisdiction was given (if interpreted according to the personal model). Similarly absurd, the personal model may be applicable to killings in custody (as the preceding act of detaining the individual has amounted to an exercise of state agent authority) but not to instantaneous killings of individuals who have not been priorly detained (as no previous exercise of authority has occurred). In these and similar situations, the personal model fails to sufficiently protect people. Evaluating from the perspective of the justificatory principles behind extraterritorial human rights obligations as previously identified, both the spatial and the personal model thus risk leaving a substantial protection vacuum, and neither serves as an adequate translation of these principles into human rights law.[4]

10.2 'Jurisdiction' Reconsidered

10.2.1 The Basic Idea Behind

When it comes to situations of extraterritoriality, the applicability conditions of human rights law need theoretically substantiated reinterpretation. They must be able, on the one hand, to adequately translate the moral idea behind human rights obligations into a legal standard, and, on the other hand, to serve as a practicable legal criterion—be it within constitutional, supranational, or international law.

According to the approach developed here, human rights obligations pertain to the entirety of state acts and omissions that have effects on the enjoyment of rights of individual human beings.[5] The moral and legal human rights that states are compelled by (through domestic law, supranational law, or IHRL, based on consent or not) define and delimit the realm of states' legitimate actions. This basic idea serves as a first approximation to the concept of jurisdiction. To start with, this basic idea is not exotic, as the following examples from various legal levels illustrate. In a recent judgment, the German Constitutional Court held that

> the [Basic Law's] aim to provide comprehensive fundamental rights protection and to place the individual at its centre entails that fundamental rights as rights of the individual ought to provide protection whenever the German state acts and thus potentially creates a need for protection—irrespective of where and towards whom.[6]

In the Court's view, the state's subjugation to human rights is neither limited to state territory nor to a specific type of state conduct: Fundamental rights are inextricably linked to political responsibility, bind the state in all its functions, be it the legislative, the executive, or the judiciary, and apply to all its acts, measures, and policies.[7] In contrast, fundamental rights protection in the US Constitution is at least partly limited to 'the people'.[8] Still, some voices have long taken a different view. As early as 1901, a dissenting opinion to one of the *Insular Cases* underlined that "the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution",[9] arguably reflecting the basic idea that the exercise of state power is immanently, inevitably, and always linked to fundamental rights duties. A further illustration stems from the supranational level, where the Advocate General to the case of *X and X* (notwithstanding the overall outcome of the case) clearly alluded to the importance of foundational considerations of value in interpreting the scope of human rights obligations.[10]

With regard to the ECHR, its Preamble explicitly pronounces that the UDHR serves as its foundation and the enforcement of these universal rights as its main aim. Prior to *Banković,* it appeared as if the treaty bodies were of the general view that states are essentially bound to respect Convention rights—whenever and wherever they act.[11] This corresponds to the earlier position taken by the CCPR and its famous dictum that it would be "unconscionable" to allow State Parties to commit violations abroad that they were not allowed to commit at home.[12]

In contrast, *Banković* and some later case law displayed a more restrictive approach, arguably and at least partly as a result of the global political situation and the rise of transnational terrorism in the early 2000s. This territorial paradigm has, up until today, not been overcome, even though the Court has gradually loosened its restrictive view. Nevertheless, the insight that states cannot opt out of human rights duties appears to have stood behind at least some selected recent cases and opinions: For example, in *Gray v. Germany*, which concerned the effects of omissions on the part of Germany regarding people located in the UK, jurisdiction was affirmed without any discussion on the issue.[13] Likewise, in a concurring opinion to *Al-Skeini,* Judge Bonello argued for a broad 'functional' approach to jurisdiction, unambiguously rejecting a narrower approach by alluding to foundational ideas behind human rights:

> I am unwilling to endorse à la carte respect for human rights. I think poorly of an esteem for human rights that turns casual and approximate depending on geographical coordinates. Any State that worships fundamental rights on

> its own territory but then feels free to make a mockery of them anywhere else does not, as far as I am concerned, belong to that comity of nations for which the supremacy of human rights is both mission and clarion call.[14]

Some scholars express the hope that the above and other recent case law could be taken as suggesting a new paradigm where extraterritorial applicability is the standard.[15] However, as seen when analyzing the legal framework, the territorial paradigm has yet to be won over—and it is prone to reemerge in light of changing political landscapes and the resurgence of ideas of nationalism and particularism. Considering this, it is vital to reinforce the argument for extraterritorial human rights obligations by translating foundational normative principles into concrete legal criteria. Even though the basic idea of jurisdiction as generally arising by *state conduct that has effects on individuals*—wherever these occur—is not exotic and has repeatedly been reflected in legal opinions, it requires further specifications in order to qualify as a legal standard that is practicable, pertinent to, and useful for real-life scenarios. To serve as a viable standard in practice, it must be clarified what 'to act' means, i.e., what particular type of state conduct it refers to, and what is required for something to count as an 'effect' on an individual, i.e., what particular type of effects of state actions and omissions it refers to.

10.2.2 'Jurisdiction' Versus 'State Responsibility'

Directly pertaining to the determination of acts and effects is the distinction between *jurisdiction* (the applicability threshold for human rights norms) and *state responsibility* (the legal responsibility for a particular violation retrospectively assigned to a particular state). To an account as the one developed here, one could object that it proposes a 'cause-and-effect' notion of jurisdiction, which collapses into state responsibility,[16] pointing to the need to explicate the relation between the two concepts.

Analytically and conceptually, the distinction between the two concepts should be upheld. Law is not only about assigning responsibility *ex post* for prior breaches of norms in court rooms. An important further function of legal norms is that they allow their subjects to determine the scope of permitted conduct *ex ante* and to enjoy legal certainty, and the notion of jurisdiction is relevant to this latter function. Moreover, jurisdiction does not entail state responsibility. When a state exercises jurisdiction over a situation, this does not yet mean that every act is attributable to that state or that every state action concerns the domain of fundamental rights (let alone amounts to a violation of rights) or that interferences can never be justified.[17]

That said, it often makes sense to relate the two concepts *in practice*. Often, the separation of the two questions, which makes sense in theory, does not fit actual situations surrounding human rights violations. On the one hand, jurisdiction is highly relevant for the retrospective analysis of alleged violations and a precondition for determining responsibility in concrete cases (mirrored, e.g.,

by the ECtHR joining the question of jurisdiction to the merits).[18] On the other hand, a finding of attributability to a state (one of the two conditions of state responsibility) can be a strong indication for the exercise of jurisdiction of that particular state, which the account pursued here reflects: If jurisdiction is understood as 'state conduct with effects on individuals', the attributability test helps to identify whether a concrete act can be categorized as state conduct. Generally, this includes actions of *de facto* and nonofficial agents, *ultra vires* actions, aiding and assisting rights-violating states, and the like.[19]

Hence, from the retrospective viewpoint taken in the analysis of concrete cases, the actual *tests* for jurisdiction and attributability might turn out to be the same: The jurisdiction of state A over a situation in which alleged human rights violation X occurred was given whenever X was the effect of an action or an omission *attributable* to A. Thus, while the two notions conceptually differ, the factual test of attributability to a state can pertain to both "jurisdiction-establishing conduct" as well as "violation-establishing conduct".[20] In practice, the analysis of jurisdiction will thus typically have to be studied under the merits, as it requires a comprehensive look at the situation *in toto*.

Still, this does not mean that the question of jurisdiction collapses into that of state responsibility or, in other words, that "one can create obligations under the Convention by violating them", which would be "simply absurd".[21] Consider the case of *Banković*: The position argued for here would *not* imply that the act of bombing alone (allegedly resulting in violations of rights) established jurisdiction, but rather that jurisdiction had been exercised already prior to the act of bombing.[22] The analysis of jurisdiction requires a holistic approach that assesses the situation as a whole, considering, *inter alia*, the planning and the execution of the accused states' mission. If the same states had flown over Belgrade with their bombers but, as a last-minute decision, chosen not to drop any bombs—call this scenario (ii)—then their jurisdiction would still have been given. They clearly were under the duty, *inter alia*, to refrain from violating the right to life of any individual whose right to life they could have affected by dropping their bombs. The difference to the real scenario is *not* that they would not have exercised jurisdiction. The difference is that, in scenario (ii), while exercising jurisdiction, the states would have complied with their obligations, no violation would have occurred and, consequently, no *state responsibility* could be assigned (and probably, scenario (ii) would not have been taken to court). Accordingly, while the approach here undoubtedly comes close to a 'cause-and-effect' notion of jurisdiction, it still distinguishes it from that of state responsibility: Jurisdiction can be given independently of the occurrence of violations. However, in jurisprudential practice on concrete cases, the tests for determining them are strongly related.[23]

As scenario (ii) illustrates, whenever and wherever states have the potential to act (or to omit to act) and to thereby affect individuals, human rights obligations in principle apply. At the same time, the idea cannot be that a state exercises jurisdiction over every distant and unpredictable side effect of its actions that potentially affect any individual. In what follows, the boundaries

of this first approximation to jurisdiction, 'state conduct with effects on individuals', will be defined more precisely.

10.2.3 A Convincing Approach to 'Jurisdiction'

To do so, we will start from an account that similarly converts a universalist starting point into a specific interpretation of jurisdiction, then test its plausibility, and refine it into a legally workable solution that is entailed by and consistent with the justificatory theory developed here. *Yuval Shany*'s two-legged account, which is based on the functionalist premise that states are generally subject to human rights obligations whenever and wherever they act, provides this starting point and the terminological and conceptual toolkit for translating the justificatory approach developed earlier, adopting the universalist core moral idea and incorporating the relevant aspects of states' nature.

Shany regards human rights law as applicable for states "in those situations in which they have a *special relationship* with the individual in question that renders them *particularly well situated* to protect that said individual".[24] Yet, this 'special relationship' is not to be confounded with the 'special obligations' approach discussed earlier. Rather, he identifies two bases for the existence of such a 'special relationship':

i "*controlling relationships*—a notion captured by the tests of directness, significance and foreseeability";
ii "*special legal relationships*, which render the state in question particularly well-situated to extend its protection over certain individuals and generate strong expectations that it would do so by virtue of the special legal position of the state vis-à-vis the individual".[25]

As to criterion (i), a *controlling relationship*, is given "if and when (…) the potential impact of the act or omission in question is *direct, significant and foreseeable*".[26] Thereby, it covers situations in which states exercise *factual* power, covering a relevant dimension of their very nature: States can act as mere *de facto* powerful and resourceful agents, which does not presuppose them acting with normative legal authority. The criterion can thus perfectly apply, for example, to illegal, clandestine, or *ultra vires* conduct. When states illegally kidnap or torture people abroad or when state agents cross boundaries in monitoring people's communication, they exert power—but not thick normative authority that generates reasons for obedience and comes with a claim to legitimacy. Still, acting *without* a claim to normative authority cannot legitimize disregard for human rights. To use Shany's terms, whenever states directly and significantly have an impact on people's rights abroad in ways they could reasonably have foreseen, they cannot escape human rights obligations.

In order for them to serve as a reasonable reference point, it is important to clarify the scope and meaning of the three qualifications of directness, significance, and foreseeability. In what follows, the aim is not to outline Shany's

position (or, if this is the case, it is explicitly stated) but to suggest a way of elaborating on his criteria—that is, on the toolkit he provides—that is capable of transposing the justificatory approach developed above.

To start with, the *significance* of the potential impact on the enjoyment of an individual's right must primarily depend on the nature of the right in question. Typically, a potential violation of the right to life more readily fulfills the significance condition than potential and 'minor' circumscriptions of, e.g., the right to freedom of assembly. But there are other relevant factors for assessing the significance of an impact, including the effects' duration and dangerousness, the means employed, the number and status of individuals potentially affected, the probability of its leading to or facilitating further consequences detrimental to the enjoyment of human rights, or the overall security situation.[27]

The requirement of *foreseeability* does not require the absence of any doubt but is a standard of 'reasonable foreseeability', meaning that a state either *has* or that it *could and should have* foreseen the rights-violating consequences of its conduct. The evaluation of this criterion will require knowledge about the specific context and about the information a state actually did have and reasonably could and should have had at the relevant point in time. It is a due diligence requirement, which necessitates constant human rights impact assessments.[28]

Lastly, *directness* cannot mean that jurisdiction is only exercised with regard to effects the state has *itself brought about* by an *actual action of its agents.* Effects can 'directly' result from state conduct even when the very last element of the causal chain that led to these effects was the action of a third party or an omission—which are, in Shany's words, "potentially tantamount to active measures in their directness of causation, significant impact and foreseeability" and which he illustrates with the *Aerial Herbicide Spraying* Case (concerning, inter alia, the question of whether Colombia had positive duties to prevent private parties' use of herbicides that had detrimental effects on people in Ecuador).[29] He underlines the simple fact that states' decisions not to act can also seriously affect individuals' rights. Thus, what the requirement of *directness* must point to is, first, the existence of a nexus between the individual's enjoyment of a right and the state act/omission and, second, the state's capacity to influence the outcome of the act/omission.

Evidently, jurisdiction cannot be assigned randomly but does require some kind of nexus, i.e., some ground on which it is assigned to a particular state (or a group of particular states). In other words, it is not the case that *any* other state could just as well have had the same impact on the enjoyment of the rights concerned of the individual concerned. To adopt (and slightly adapt) another of Shany's examples, an arbitrarily chosen single state like Austria cannot be under an obligation to end hunger in North Korea on its own.[30] Absent any specific relations, there is no sufficient nexus between the Austrian omission to do so and the rights to food or to an adequate living standard of individuals in North Korea that would justify the assignment of jurisdiction to Austria with regard to these rights and these individuals.

Typically, this nexus requirement will necessitate a context-sensitive assessment of the length and strength of the causal chain between the relevant state act/omission and the alleged rights-violating effects, for which no absolute abstract standard but some approximations can be provided. Regarding *length*, it appears reasonable to assume that a causal chain with two elements (e.g., a state's failure to prohibit private parties from actively violating rights abroad) should, in most cases, be sufficient to count as a direct controlling relationship. If there are more than three elements to the chain, this plausibly means that jurisdiction is only given if the link between the state conduct and the allegedly rights-violating effect is particularly strong. Among the benchmarks for determining the *strength* of a chain are whether the specific state conduct was necessary (or merely one among many facilitating factors) for bringing about the effect at issue, the time passed between the former and the latter, and, importantly, the intentions of the state. If a state is deliberately plotting to cause harm abroad, the causal chain leading from its actions to this particular harm is of substantive strength—which might also compensate for its being rather long. For example, if a government commissions a private security company to kidnap a person abroad, the direct intention of the state to act with said effect renders the causal chain particularly strong. As a result, even if the security company in turn engages an organized criminal network, which itself employs a local street gang to carry out the kidnapping of the person targeted, the nexus would be sufficient: The strength of the chain, resulting from the state's direct intention, compensates for the many intermediate elements between the state and the effects on the alleged victim. In addition, directness also requires a second aspect, namely the capacity of a state to influence the outcome: A state can only have jurisdiction over effects it has the direct capacity to avoid or to substantially weaken with reasonable, proportionate, and legally permissible means. It cannot be required to do the impossible.[31] Thus, the criterion of directness depends on the existence of a nexus, typically provided through a sufficiently short or strong causal chain, and the capacity of the state. Like its companions foreseeability and significance, it is a gradual criterion, which will have to be assessed according to the context of concrete situations at hand. Abstract standards can approximate this determination but will never replace such a contextual analysis.

In sum, if the effects of state actions on the enjoyment of human rights are not only direct but also foreseeable and significant, this hints at the existence of a controlling relationship, which in turn triggers jurisdiction. This first leg of the approach was recently adopted (in a slightly adapted formulation) as the standard for extraterritorial applicability in the framework of the General Comment on the right to life in the ICCPR.[32]

Second, Shany's proposal can accommodate a further element of states' nature, namely their special means of legal, normative authority. Criterion (ii) defines the exercise of such means as establishing a 'special legal relationship', which puts the state in a position of being especially well-situated to consider and meet human rights claims of a specific individual, generates particularly

strong expectations of its providing protection, and thus triggers jurisdiction. However, there is nothing magic in *membership*: The relation Shany refers to it merely serves as a "rule of coordination".[33] It is not membership of the state community that triggers it but rather the state's use of distinctive means toward individuals, the position this puts the state in, and the expectations that come with it: The use of special means comes with special responsibilities. Thereby, the account accommodates the special kind of exposedness and vulnerability of outsiders, especially when they are forced into such a relationship.

At the same time, criterion (ii) is capable of explaining why the territorial state typically (though not necessarily) functions as the primary duty-bearer: Subjecting an individual to its means of normative authority by subjecting it to the coercive nature of its legal system triggers a context in which human rights obligations apply—and paradigmatically, it is the territorial state that demands this kind of subjugation. As argued earlier, it is, in practice and typically, *my* state that can most easily violate my human rights as well as most effectively protect them. Criterion (ii) thus ensures that the exposedness of *insiders* is considered, too.

That said, two points of clarification must be made in order to *refine* Shany's theory in its second leg. First, if it is a legal relation, then 'legal' cannot mean 'lawful': In using its authoritative means, states and their agents can act beyond what they are legally entitled to without this diminishing their human rights responsibilities. Related to this, next to special 'legal' relations in the narrow sense of the term, there are also special factual power relations, in which a state is particularly well-situated to extend its protection over an individual. While such factual power-based relationships could often already be covered by the account's first leg, it is still helpful to define them as separate potential bases for the ascription of jurisdiction. For example, factual power relationships could exist between a *de facto* and illegally occupying state and the individuals residing in the occupied territory; or between a hegemonic state A (on the support of which another state B for historical or other reasons thoroughly depends, putting pressure on B to act in conformance with A's political agenda at the international level) and the inhabitants of B; or as a result of the political involvement of a state in circumstances leading to or enabling the alleged violation in another state. These states are particularly well situated to extend their protection over the individuals in question by virtue of the special factual position of power they occupy.[34]

Second, some states notoriously fail to respect, protect, and fulfill human rights of those vis-à-vis whom they would be well-situated to do so. While such states are not empirically 'expected' to extend their protection over the said individuals in the narrow sense of the term, thus while it is empirically less *probable* that such a state will provide protection, this does not change its special position that, as such, comes with certain normative expectations—and can result in the exercise of jurisdiction.

Starting from the contours of Shany's approach, it appears possible to translate the idea of jurisdiction as 'state conduct with effects on individuals' into

justiciable applicability criteria for extraterritorial obligations. Whenever the potential impact of states' use of *de facto* power on human beings is direct, significant, and foreseeable, they are bound by human rights obligations. Whenever they enter or find themselves in a special (legal or factual) relation that renders them particularly well-situated to protect an individual, they are bound by human rights obligations. On the other hand, potential effects that are indirect, insignificant, or unexpected and situations where no special relation exists must be excluded from the realm over which a state can reasonably be said to exercise jurisdiction. These qualifications elaborate on the basic principle that states are under human rights obligations whenever they act with effects on the enjoyment of human rights by adding reasonable interpretations of what 'to act' means and what causal chain is required for something to count as an 'effect'. Thus, they can provide guidance for concrete cases to be evaluated—at the constitutional, supranational, or international level[35]

Consider again the example of state A that extraterritorially surveils communication of state B, retrieving information about the planned murdering of person C (who is located on the territory of B) but failing to warn C. Contrary to spatial or personal models of jurisdiction, which focus on *the way in which a state acted*, the model proposed here focuses on *the relation between a state's conduct and its respective effects.* Thereby, it can capture this situation, as the potential impacts of A's failure to warn C are direct, significant, and foreseeable enough to establish its jurisdiction over C with regard to the right in question.

The case of *El Mahi* serves as a further illustration of the proposed model, its contours, and its limits.[36] To recall, *El Mahi* concerned Denmark's alleged failure to prevent the publication of religious caricatures in private newspapers and the effects of this failure on the Moroccan-based applicants, consisting, so the latter claimed, in the violation of various Convention rights. For present purposes, this illustration will leave aside the question of state responsibility (i.e., of whether this omission is attributable to Denmark and whether it constituted a violation, which could both be contested).

The model suggested here would deny jurisdiction on the part of Denmark. First, there is no special legal or power-based relationship that renders Denmark particularly well-situated to protect the rights of the applicants, all of whom resided in Morocco. Second, the degrees of directness, foreseeability, and significance do not suffice to establish a controlling relationship. The problem lies, primarily, in the requirement of directness: The nexus between the Moroccan residents and the Danish state is insufficient. The same publications might as well have been published by newspapers in any state that grants similar levels of freedom to the press—and the number of such states is considerable. Moreover, the causal chain leading to the alleged violations is weak: The failure of Denmark to prevent the publications is but one—and rather peripheral—facilitating factor that enabled the said effects on the individuals. Plausibly, Denmark had neither the intention to bring them about nor the control over other elements of the causal chain—and possibly not even the

capacity to avoid or at least to substantially weaken these effects by proportionate and legally permissible means, given the impact a prohibition of the publications would have had on other norms.[37]

10.2.4 Dividing and Tailoring

This concept of jurisdiction is not of an all-or-nothing type: It is a gradual notion that can be *divided and tailored*, and that can be shared among various agents. A state is thus entrusted with only those duties that arise from the type and degree of jurisdiction it exercises and which it is capable of obeying in this specific context. The importance of dividing and tailoring is today recognized by international and constitutional courts.[38] As early as 1989, the CCPR declared retired members of the French army residing in Senegal to be under French jurisdiction *with regard to their pension*: In this domain and to these individuals, France has negative and positive ICCPR duties, but it would be overreaching to hold France responsible for guaranteeing all ICCPR rights of Senegalese residents, be it the freedom of assembly, the right to marry, or the right to privacy.

Such context-sensitive ascription of jurisdiction is essential. Human rights generate a variety of duties, which differ tremendously regarding the actions or services they require on the part of states. All-or-nothing approaches to jurisdiction, according to which states are either required to comply with all possible positive human rights duties (in case they exert effective overall control) or with none (in case the level of control does not amount to effective overall control), are in tension with the contemporary multifaceted dimensions of globalization, in which a spectrum of degrees of control can be exercised abroad—'boots on the ground' are no longer the only way to have an impact on situations in foreign countries. In times of easily accessible global transport routes, cyber attacks, online communication, and unmanned drones, the line between territorial and extraterritorial can be blurry, control can be exercised in virtual and non-territorial forms. Hence, a foundational applicability threshold like jurisdiction should not (or no longer) rely on the bipolar division between territory and extra-territory.[39]

Moreover, it is often the case that more than one state is involved in a situation abroad. An important practical aspect of the proposed standard is that it grants the possibility that various duty-bearers concurrently exercise jurisdiction, be it as a result of their use of *de facto* power or of authoritative means.[40] It allows for a more differentiated approach, hierarchizing various duty-bearers and allocating and distributing respective duties among them. Such a hierarchy is based on the intensity of the controlling relationship (determined via the degrees of directness, significance, and foreseeability of the impact they are in a position to bring about) and/or the special legal or power-based relationship between the state and the individual. Typically, an extraterritorially acting state would be subject to more or less the full catalogue of negative and positive duties in cases of overall and long-term occupation, based on its special

relation to the local population. In contrast, if it operates detention centers abroad, it would be under only some (but still *some*) negative and positive duties, such as the duty to provide those detained with an adequate standard of living, while other duties remain with the domestic state. All-or-nothing models could lead to significant protection gaps in situations of lower levels of control or in situations of shared control where various states (or other agents) are involved.[41]

Having said all that, it is still true that paradigmatically, most human rights obligations will rest with the domestic state. The domestic state is typically in the best position to address many human rights aspects, given its ability to rely on things like the presence, acceptance, functioning, and (*prima facie*) legitimacy of an established sanction regime or a social security system, its direct physical access to individuals on its entire territory, an existing network of institutions and decision-making processes, and a working judicial system. Typically, the degree of jurisdiction it exercises is considerable and will, very often, put it at the top of the hierarchy of duty-bearers.

A thought experiment on a recent (and previously discussed) case brought before the CCPR should help to illustrate the application of the jurisdictional model and its methods of dividing, tailoring, and hierarchizing human rights obligations. In its cases on migrants whose boat dramatically sank in the Mediterranean Sea, the CCPR applied its Shany-inspired model, and confirmed the jurisdiction of both Italy and Malta. For present purposes, we will leave the latter state aside and focus on the case against Italy to illustrate the interpretation of jurisdiction according to the model developed here—which is similar to, but in some ways also departs from, what the CCPR found.[42]

To begin with, according to our jurisdictional model, Italy exercised jurisdiction and is subject to stringent obligations. Most importantly, there is a special relationship between Italy and the migrants on board the ships: The proximity of its ships to the migrants' boat and its early knowledge of the emergency, combined with the situation the migrants found themselves in, in which their rights to life and to not being subjected to inhuman treatment were threatened, render Italy 'particularly well-situated to extend its protection' over the migrants.[43] Its special legal position is a result, on the one hand, of Italy's obligations to protect human rights as enshrined in domestic, supranational, and international law and, on the other hand, of its coastal state obligation to rescue emanating from the *Law of the Sea*, recognized in customary international law.[44] All these aspects generate strong expectations that Italy would come to their rescue.

In addition, the potential impact of Italy's failure to take action (e.g., by rescuing, granting entrance, and timely attendance to asylum applications) on the enjoyment of rights would also fulfill the threshold of a controlling relationship. The impact is direct, as the nexus to the state is apparent. Italian coastguards could themselves rescue migrants, foreseeably saving them from getting in and remaining in situations in which many of their human rights are partly or severely infringed. Italy would have the capacity to avoid or at least

to substantially weaken these infringements with legally permissible and proportionate means, especially given its short physical distance to the individuals concerned. In other words, its failure to act has a direct, reasonably foreseeable, and significant impact on the human rights situation of the individuals on board, which is—also foreseeably—going to deteriorate as time passes.

So far, so clear. But what would the jurisdictional model developed here entail for other states? Would it result in immediate obligations of all states to come to the migrants' rescue? Let us again illustrate this by way of a thought experiment. When it comes to a distant state that is not involved in the situation such as, for example, *Nicaragua*, the situation is different to that of Italy: First, Nicaragua is neither particularly well-situated nor expected to come to their rescue based on any legal considerations. Second, neither is there a controlling relationship. Of course, Nicaragua would also have some capacity to take action and rescue the migrants on board, e.g., by arranging their transport to a nearby airport or hangar, flying them to Nicaragua and providing asylum there. Yet, as only one among 195 potential rescue states, Nicaragua has no special nexus to the individuals in question. The sheer capacity to help does not suffice to establish such a nexus (and, what is more, this capacity is probably substantially smaller than that of other states: The likelihood of a significant improvement of the migrants' human rights situation is reduced as Nicaragua itself faces ongoing challenges in guaranteeing basic rights to its own population). In between these two extremes would be another European state like *Germany*. Through its cooperation with Italy in the *Common European Asylum System*, there is some sort of special relation involved, which is based on Germany's political position vis-à-vis the individuals on board the ship. While Germany is not the country that is best situated, it still seems to be, politically speaking, in a better position to extend its protection over the migrants than Nicaragua. Moreover, as a member state of the EU with its border and coast guard agency *Frontex* operating in the Mediterranean Sea, Germany is also in a special power-based position regarding the obligation to rescue.

The thought experiment illustrates how the exercise of jurisdiction is a matter of degree—and how the content and scope of obligations are proportionate to it: First, through its special position with regard to the common asylum framework, Germany exercises some—even though a minimal—degree of jurisdiction with regard to asylum claims. Given the current design of the European asylum system and especially the mechanisms pursuant to the *Dublin Regulation*, this degree of jurisdiction would not be sufficient to trigger a direct and justiciable obligation by Germany to grant entry to everyone on board and to attend to their asylum claims in Germany. Nonetheless, it will likely trigger a duty to exert pressure on or help Italy to do so—by concrete practical measures such as cooperating with or supporting the Italian government in organizing rescue missions, transports, or temporary shelters as well as in more general matters such as working toward a reliable distribution scheme within the asylum framework that decreases the risk of migrants having to endure days or

weeks in degrading situations on board overcrowded rescue ships where a variety of rights cannot be guaranteed. Second, by virtue of its EU membership, Germany exercises some jurisdiction with regard to rescuing people. This may not necessarily trigger a direct obligation to rescue, but it most likely results in an obligation to bring *Frontex* to do so—both in this concrete case as well as by generally equipping *Frontex* with the appropriate mandate and resources to fulfill such missions. Hence, Germany has human rights obligations toward the people on board but that does not mean it must respect, protect, and ensure the full range of their human rights. Rather, it is an obligation to consider and assess human rights issues that are relevant to the situation at hand and according to the degree and type of jurisdiction it exercises. Regarding many rights, its duties in this case will be limited to the political, institutional level. It is also important to be aware that jurisdiction only triggers the applicability of human rights obligations, not their absoluteness—even if a state exercised jurisdiction and was subject to obligations, it could still be the case that no violation occurred because the infringement could be justified.[45] The same is true for Italy: While Italy is clearly under the most pressing duties, the same qualifications also apply and constrain its duties.

The example also shows that, depending on the scope of extraterritorial jurisdiction exercised, it can give rise to human rights obligations in all their dimensions, i.e., *positive* and *negative* obligations to *respect, protect,* and *fulfill.*

On the former distinction—while some critics argue that extraterritorial duties should be limited to negative ones[46]—it is important to stress that the line between positive and negative duties is often not straightforward and the categories intertwined, interdependent, and morally equivalent.[47] Crucially, it is not analogous to the distinction between *omissions* and *actions*: The right to life, for example, does not only generate negative duties to refrain from killing. If refugees drown in the Mediterranean Sea, then their right to life plausibly also generates negative duties of states to take positive action to rescue them—their ships cannot simply pass by.

Regarding the latter distinction, first, extraterritorial obligations to *respect* entail clear-cut obligations like 'refraining from killing' but also include, for example, positive duties to conduct due diligence procedures and assess and mitigate potential impacts on human rights enjoyment when introducing domestic measures (e.g., agricultural policies) in order to avoid causing extraterritorial harm (e.g., on the right to an adequate standard of living of farmers abroad).[48] If it had not conducted such an assessment and the effects of its measures resulted in the violation of rights abroad, which would have been foreseeable, significant (depending on the right in question), and direct (depending on the nexus to and the capacity of the state), claims against this state should be admissible. The more direct, significant, and foreseeable these impacts are, the higher the degree of jurisdiction exercised and the more stringent the duties it is subject to. Yet not every peripheral effect of a state's domestic policy will suffice to establish its jurisdiction. Furthermore, these duties—like all extraterritorial duties—also have their limits: They are limited

by the state's capacity to alter or weaken the impacts of its actions with proportionate and legally permissive means. If the means for doing so would be disproportionate or unlawful, the capacity criterion remains unmet, and jurisdiction cannot be assigned.[49]

Second, extraterritorial states' obligations to *protect* and *fulfill* would usually be more limited, given that they rarely exercise a level of jurisdiction that comes close to the one typically exercised by the domestic state. Still, that does not mean that foreign states are never subject to such obligations. To this, one could object that complying with extraterritorial duties to protect and fulfill is prone to conflict with the sovereign domain of the domestic state. An illustrative example is the alleged (and widely debated) obligation of home states of TNCs to protect individuals abroad from human rights violations, which states should comply with by regulating the conduct of TNCs abroad. One could claim that such regulation conflicts with the sovereignty of the host state, for example, if it prohibits activities that the host state would be interested in promoting as part of its efforts to foster economic investments.[50] However, demanding TNCs to conform to human rights norms by regulating them does not illegitimately infringe the host state's sovereignty if these regulations themselves conform to the universal norms of IHRL: Sovereignty is based on human rights and thus cannot be violated by compliance with IHRL. This way of "transnationaliz[ing] the obligation to protect"[51] could even be an effective tool in reducing the negative human rights impact of TNCs acting abroad. Moreover, according to the model proposed here, there will not be, for example, an obligation on Canada to install a system of higher education on the territory of Argentina in order to realize the right to education of Argentinian residents. Given the absence of a special legal, power-based, or controlling relationship, such obligations would simply not arise. And even if Canada's conduct in the domain of, for example, intelligence activities has a direct, significant, and foreseeable impact on rights of individuals in Argentina, this would not in any way trigger the former's jurisdiction *with regard to the right to education*.

Lastly, on the level of implementation, extraterritorial duties typically, reasonably, and contextually call for *different* measures compared to those the domestic state is charged with. Depending on the type and degree of jurisdiction exercised, extraterritorial states' obligations will often be *obligations of conduct* rather than *obligations of result*, thus not require duty-bearers to bring about a particular result but to behave in a certain way, stipulating conditions on actions, decisions, and means used.[52] They include, among other things, the above-mentioned due diligence obligations to assess and mitigate the human rights impact of states' measures, mirrored in the fact that jurisdiction arises (and thus obligations apply) on condition of the *foreseeability* of effects, or as a result of special relationships that trigger certain *expectations*. Obligations of conduct are especially relevant in the extraterritorial context and for facilitating the justiciability of claims, as further fleshed out below. And, importantly, they provide ways in which states can (be required to)

contribute to the enjoyment of human rights abroad without this resulting in interventionist overkill.

10.2.5 The Gap 'Jurisdiction' Leaves: Global Obligations to Promote Human Rights

Conceptualizing jurisdiction as arising by virtue of a controlling or special legal relationship offers a promising solution for a concrete problem of positive law—the interpretation of jurisdiction—while adhering to the foundational normative principles that stand behind human rights. Still, one gap appears to remain. While the jurisdictional model developed so far reflects two of the elements of the nature of states identified above, it does not fully capture the third, namely the idea that states are institutional 'agents of humanity' set up in the service of individuals. Reconsidering the migrants example helps to clarify the point. What about Nicaragua's duties? Does its third rank really exempt it from all possible human rights responsibility vis-à-vis migrants on boats drowning in the Mediterranean Sea? Or, for the sake of argument, what about an affluent country such as the US?

Taking the moral idea behind human rights obligations seriously, such third countries, even though they do not stand in any specific relation to the individuals concerned, must also have *some* duties, namely those flowing from the general duty to contribute to the universal fulfillment of human rights. Hence, it is here where one finds the gap that jurisdiction as an applicability threshold for human rights law leaves: Such *global obligations to promote human rights* cannot be covered by it. It cannot reasonably be held that every single state exercises jurisdiction over the human rights of every individual on the globe. Rather, these obligations apply independently of and in addition to the more concrete obligations that result from the exercise of jurisdiction, i.e., independently of special controlling, legal, or power-based relationships. To employ another example, Canada does not exert jurisdiction over the freedom of movement of Argentinian residents and thus cannot have an obligation to protect the latter from restrictions on this freedom within their domestic state. Still, it has a universal duty to contribute to the universal realization of human rights—a duty it has vis-à-vis all other individuals on the globe, on its territory and beyond, including to all Argentinian residents.

Primarily, these global obligations will be focused on collective, international, and institutional levels and typically amount to obligations of conduct. At their core, they include the procedural duty to work toward a reasonable and just system of how to distribute such global human rights obligations.[53] Accordingly, global obligations will—among other things—require states to work toward genuine recognition, reinforcement, and comprehensive implementation of human rights, to promote bilateral and multilateral cooperation in that regard, to establish competent and appropriately equipped institutions, or to introduce human rights regulation in domestic legal frameworks. Regarding IHRL, states could comply with them, for example, by analyzing institutional gaps of IHRL, by enhancing its responsiveness to upcoming

challenges, by strengthening control and complaint mechanisms, or by advocating a coherent interpretation of treaties and their applicability thresholds—one that recognizes extraterritorial obligations. In the example given, third states like the US could fulfill their obligations by working toward a fair international cooperation scheme in the area of migration that is in conformity with human rights, addressing the issue in bilateral relations with Italy, raising public awareness, or lobbying for putting the issue on the agenda of international organizations.[54]

As a result, translating the justificatory theory developed here to the legal level, two conclusions follow. First, the theory calls for a *reinterpretation of jurisdiction* as the standard that positive law operates on for the applicability of human rights: Jurisdiction should be understood as arising by virtue of either controlling or special legal or power-based relationships. Such an interpretation is practicable and can be used as a guiding principle that has to be put in context by courts when they adjudicate on particular cases of alleged human rights violations. In other words, this interpretation of jurisdiction covers extraterritorial obligations *sensu stricto*.[55]

Still, jurisdiction can only bring us so far. A second conclusion relates to the third element of states' nature as institutions set up for nothing else but serving human beings: In addition to the more specific obligations of jurisdiction-exercising states, there are also *global obligations to promote the universal fulfillment of human rights*—on territory and beyond. These obligations cannot be conditional upon the exercise of jurisdiction but apply to all states.[56]

On the one hand, the latter are obligations of political morality. In the legal sphere, many systems of human rights protection cannot directly account for such obligations, not least because of the threshold of jurisdiction that conditions their applicability. On the other hand, global obligations to promote human rights are of a legal nature, too. First, some human rights regimes explicitly embrace them—such as prominently the ICESCR in its reference to "international assistance and co-operation" as one of the instruments to realize Covenant rights.[57] Second, precisely due to the applicability thresholds of human rights treaties, these global obligations will typically not lend themselves to adjudication in the form of bringing an action against a specific state for a specific breach of the global obligation to promote human rights—at least not in the current system of human rights law. Certainly, the idea is not that a Vietnamese resident can institute legal proceedings against Ghana for the latter's failure to lobby for a specific human rights issue being put on the agenda of the UN Human Rights Council. Neither will courts be able to hold a country legally accountable for its failure to support an initiative that aims at increasing the budget of Special Rapporteurs. Nonetheless, taking the foundation, the object, and the purpose of human rights law seriously, global obligations to work toward the universal realization of human rights—which bind territorially and extraterritorially—should be part of it. In other words, their limited justiciability does not fully divest them of their legal nature: They still exhibit a legally programmatic dimension, stipulating abstract standards

for law-making, as well as a dimension of indirect justiciability, setting general guidelines for the judiciary in its interpretation of law and for the executive in its political decision-making. Such global, universal obligations reflect objective principles that flow from human rights law, even though particular failures to comply with them typically cannot be proceeded against in courtrooms.[58] Yet, nothing of the above should be taken to entail that human rights *only* amount to objective legal principles. It is important to emphasize that every human right entails a subjective right that individuals have a claim to[59]—and this is why it is important to address issues of justiciability, which will be done further below. Rather, the idea is that, based on the idea behind human rights law, it should, *in toto*, also generate an obligation to promote human rights fulfillment that applies both on territory and beyond.

Accordingly, to the degree that such global obligations are not explicitly enshrined in contemporary human rights treaties, there is a moral obligation to work toward their incremental incorporation and to come up with a system of assigning and distributing them that does not have to be based on the ascription of jurisdiction. Thus, it is also here where an approach that focuses on *reinterpretation* reaches its limits or, in other words, where the proposed account may point to the need for progress in and incremental *expansion* of current human rights regimes.

10.3 The Practicability of Extraterritorial Human Rights Obligations

10.3.1 The Contingency of the Critique

Even if one accepts the universalist idea behind moral human rights obligations, one could still be skeptical about the *practical feasibility* of *legally implementing* them beyond borders. In other words, one could raise practicability-based objections against the project of transposing the justificatory theory to the legal sphere. This skepticism can target both extraterritorial obligations *sensu stricto* and global obligations to promote human rights.

As discussed in the introduction, it is often this more technical discussion which the debate on extraterritorial human rights today centers on—and this leaving a certain lacuna regarding more foundational philosophical issues provided one of the starting points for this book. Still, if normatively oriented work aims to bridge that gap and be relevant to legal practice, it is essential to address concrete practical concerns, too.

To start with, a general remark shall be made. While many of the criticisms outlined below hint at important concerns, the point is that, in general, practicability concerns are necessarily contingent: They depend on political, social, and economic circumstances and the means they provide or do not provide states with. These circumstances, however, are in constant flux and, as a result, so is the ground on which practicability rests. Thus, such concerns will not suffice for justifying a systematic and general exclusion of extraterritorial

obligations in human rights law. Nonetheless, they are highly relevant—especially if the approach developed here shall be applied to the world *as it is today*.

10.3.2 Ineffectiveness and Inefficiency

A first strand of critique asserts that dividing responsibility along territorial lines represents the most *efficient* and *effective* way of allocating duties, based on the fact that the domestic state is in the best position to ensure respect for human rights: Notwithstanding the fundamental idea behind human rights, given the way law works and the territory-based nature of the current state system, at least *legal* human rights obligations should still reasonably be limited to territory. Following this logic, a global scheme that allocates human rights duties exclusively to domestic states then serves as an instrumentally justified means of realizing universal aims.[60]

In a similar vein, it could be asserted that fully implementing IHRL extraterritorially may lead to undesired results: As the pillar of IHRL's treaty-based system lies in state consent, expanding it in such ways would entail the risk of states' withdrawing their consent to this system in general.[61] Or, even if they officially agreed, states would ultimately not feel bound by such norms when acting with effects abroad. Moreover, extraterritorial applicability would mean that states could fully rely on norms of derogation in situations abroad—the US could then simply derogate with regard to its detention facilities in Guantánamo. The claim thus is that the extraterritorial expansion would have the absurd effect of providing the US with legitimizing grounds for violating human rights in Guantánamo, as it could rely on established norms of international law in doing so.[62] Other undesired effects, so the objection continues, could include a potential decrease in states' willingness to engage in peacekeeping and peacebuilding efforts abroad, as they would be afraid of infringing human rights norms through such operations, or, in contrast, a potential increase of self-interested state interventions conducted under the guise of human rights.[63] In sum, the objection argues that just as human rights treaties in general have so far failed to make the world a better place, adding extraterritorial duties is unlikely to result in a real change but rather entails dangerous side effects.

Considerations of effectiveness and efficiency raise important points that should be considered when legally implementing and distributing extraterritorial obligations. In many cases, it indeed makes perfect sense to allocate a specific duty primarily to the domestic state, on the basis of its particularly strong special legal relation to the individual concerned and its being in the best position and strongly expected to discharge the duty. Thereby, the domestic relation, as Shany has already suggested, serves as an effective *rule of coordination*.[64]

Nonetheless, in today's globalized world, states have countless means to violate or protect rights transnationally. In this world, it is implausible that

a general limitation of duties to the domestic state would result in the most effective protection regime. It would simply leave a substantial protection gap for people affected by other states' conduct, running counter to the overall aim of universal respect of human rights. Protection regimes must aim at also effectively covering new kinds of violations, which political, economic, and social processes or technological progress bring about—as the phenomenon of extraterritorial surveillance illustrates. Moreover, many of today's most crucial human rights issues stem from global phenomena, which the domestic state cannot effectively and efficiently address by unilateral means. They must be tackled by cooperative global solutions. Thus, contemporary requirements of effectiveness and efficiency also include accepting the extraterritorial reach of human rights norms.[65]

Further, the question is whether derogations from extraterritorial duties are worse than the general denial of such duties. If they are generally denied, states are (legally) free to disregard human rights abroad. In contrast, if states needed to first derogate from norms when they intend, expect, or fear to violate rights abroad, not only would these derogations rely on established legal rules and have to be justified, but also would their legitimate scope be constrained.[66] At least, they would be based on a firm legal framework, at least partly reducing the risk of arbitrariness. By derogating, states allude to limited practical reasons why the respect of certain norms is not possible at a specific time and in a specific situation—but in doing so they importantly confirm that in general, human rights standards *do* apply universally. Moreover, the mere possibility of derogations does not undermine the argument for extraterritorial applicability but simply points to the fact that rules of derogation must be adequately specified for situations abroad, too.

Whether other undesired results will follow, such as a decreased willingness of states to contribute to peacekeeping abroad, to comply with domestic duties, or to refrain from self-interested interventions in other states, is an empirical question. What is certain is that there will always be transgressors. However, this fact should not lead to a resigned abandonment of efforts that aim at improving protection, which would be tantamount to surrendering the structural power to the rule-breakers. What is more, IHRL is only one component in the domain of international law. Other central principles—such as the principle of non-intervention—would not be undermined by the extraterritorial application of human rights law.[67] Lastly, *failing* to implement extraterritorial duties in IHRL would also result in many undesirable empirical effects, inspiring states to act in appalling ways abroad. While not everyone complies with human rights law, it still provides a normative guide—that at the same time has a hard legal core.[68]

10.3.3 Unenforceability

A second objection targets the alleged *unenforceability* of extraterritorial obligations, referencing a theoretically oriented debate on whether

enforceability and feasibility amount to necessary conditions for the existence of a right. It is often raised in the context of social and economic rights and corresponding imperfect obligations, the fulfillment of which often requires positive action and the provision of services and goods. As these are likely to describe aspirational aims, skeptics claim that they are indeterminate, do not amount to action-guiding norms, and cannot be institutionalized. In this vein, one could object that if there is no chance of an obligation being fulfilled or enforced, then it is no genuine human rights obligation.[69]

In responding to this critique, it is first important to distinguish unenforceability from nonenforcement: If a duty is not enforc*ed*, this does not entail that it is not, in principle, enforce*able* or that it *should* not be enforced.[70] If actual enforce*ment* was declared a necessary condition, it would involve an Is-Ought-fallacy: It would jump from the fact that states do not enforce human rights abroad to the conclusion that they, therefore, cannot be obliged to do so, rationalizing states' inclinations without justifying them. For many individuals across the world their concrete human rights indeed remain unfulfilled, but nonenforcement and noncompliance do not *per se* undermine the normative validity of corresponding standards.

Second, while some extraterritorial duties are not fully universally realizable at this moment in time, they still point to crucial aspirations of where human rights protection heads. This primarily applies to global obligations to promote human rights, but it also holds for extraterritorial obligations *sensu stricto* that are more difficult to assign, distribute, and comply with. All these obligations spring from the foundational equal core of human nature and its claim to dignity. If it is not possible to fulfill them *given the status quo,* then this does not undermine their normative force but rather indicates the need to *change the status quo*—and thereby to *enable or improve enforceability.* Thus, the project of legalizing so far imperfect extraterritorial obligations might come with the corresponding duty to progressively perfect them and to strengthen both their legal implementation (by establishing or restructuring enforcing institutions, specifying the content of norms and the duty-bearers involved, or campaigning for their public recognition) and their public recognition.[71] As *Adam McBeth* underlines, initially unenforceable norms are not new to international law: In some cases, enforcement mechanisms were exactly established in order to enforce preexisting duties—the Nuremberg trials provide a prominent example.[72] Moreover, the focus here is on duties on the part of the institution *state*, which can not only overcome motivational constraints but also has tremendous resources for contributing to improving norm enforceability. For this reason, the critique also overemphasizes the distinction between economic, social, and cultural rights on the one hand and civil and political rights on the other: Both categories generate demanding duties that require positive and negative actions on the part of states, and both include more and less determinate claims.[73]

Lastly, extraterritorial application could also improve enforceability. Often, a specific human rights claim generates a range of contextual

obligations—typically a combination of obligations *sensu stricto* and global obligations: The right to privacy does not only call for the absence of state surveillance but also for such things as implementing national and international regulations for domestic as well as transnational activities, supporting awareness-raising and transparency-increasing efforts, criticizing actors who transgress privacy rights, initiating international discussions on new problem areas, and the like. These duties seem most effectively realizable if they are not borne by one single agent but by various ones. Opening up on the obligation side and accepting a variety of duty-bearers, which the jurisdictional account developed here allows for, can contribute to improving the enforceability of a range of human rights obligations. While this is primarily relevant when addressing global obligations, it is also important when it comes to the distribution of obligations *sensu stricto* in situations in which various states concurrently exercise jurisdiction. In this regard, conceptualizing duties as *joint* or *collective obligations* will prove promising.[74]

10.3.4 Overburden

A third critique maintains that a territorially unrestricted application of human rights obligations would *overburden* states, as a result of which compliance with them becomes impracticable. On the one hand, the overburden can be characterized as one of *resources*: It is then portrayed as a simple fact that some states—especially nonaffluent ones—lack the *capability* of complying with duties abroad, especially if these are demanding positive duties to provide services and goods, which is why they cannot be required to do so. Affluent states would have to step in and contribute even more of their resources, which in turn unreasonably increases the burden they have to shoulder.

On the other hand, the overburden can also be described as of an *epistemic* kind: The effects of state actions abroad are nearly impossible to foresee in light of the complexity of causal chains and the manifold factors influencing them. States cannot be required to assess all potential impacts (including accidental and unintentional side effects) of all their policies on all individuals on the globe—they cannot be required to do the impossible. The expansion of human rights duties beyond borders could thus also lead to an overburden-some lack of legal certainty, leaving states in the dark about what they are allowed or not allowed to do.[75]

Extraterritorial obligations are doubtlessly stringent and demanding, entailing real constraints and burdens on states. However, the overburden argument is not an argument against the duty *per se* but rather for the fact that extraterritorial obligations must be combined with the introduction of smart and well-designed measures and institutions that precisely allow for distributing these burdens. For instrumental reasons and given the global state system, it makes sense to legally divide the moral labor human rights entail. Ultimately, such a division of labor is what instrumentally enables an effective

and efficient realization of the fundamental aim: universal respect for human rights.

The account developed here proposes such a *division of labor*. When it comes to global obligations to promote human rights *abroad*, the idea is not that every state has a duty to realize human rights fulfillment for any individual on the globe—and neither that the least developed states would have to secure rights of subsistence for the population of most affluent countries nor that the latter would have to bear the entire burden.[76] As mentioned, these duties will typically be obligations of conduct, focus on the institutional level, and foresee different measures to comply: Introducing precautionary means like due diligence standards, human rights mainstreaming in policy design and evaluation, criticizing and exerting pressure on noncomplying states, supporting capacity-building of weaker states, granting access to services or programs, influencing stakeholders through peaceful means such as human rights dialogues, introducing and supporting campaigns for strengthening the global human rights regime, promoting transnational civil society movements and NGOs, regulating activities of transnational corporations, or launching international cooperation networks. These and similar actions also cover part of the labor that human rights give rise to.[77]

The division of labor for duties *sensu stricto* in situations in which foreign and domestic states concurrently exercise jurisdiction has been described earlier. Their duties will have to be divided and tailored according and proportionate to the degree and type of jurisdiction they exercise—which, at the same time, shows why it is often still the domestic state that has to shoulder the greatest part of the human rights labor. What is crucial for all types of obligations is that a model of how to divide labor is based on an institutionalized and established procedure that ensures fairness and nondiscrimination. States are under a joint procedural obligation to establish and adequately design institutions that precisely enable to divide responsibility in a just way.[78]

Moreover, the overburden critique is mitigated in two further respects. First, human rights have limits; they do not posit unlimited and absolute norms. Given that they fulfill the conditions of having a legal basis, aiming at a legitimate goal, and being proportionate, states can justify interferences from what these norms stipulate—and these justifications define the scope and limits of a specific right.[79] Neither are human rights obligations infinite: They aim at realizing the goods necessary for a life lived in dignity, and thereby posit a *basic threshold*. Accordingly, a system of dividing the labor of human rights protection aims at reliantly upholding "full coverage",[80] not at *maximizing* living standards or the like. Beyond and apart from the basic threshold human rights posit, e.g., some areas and degrees of partiality are doubtlessly legitimate (or might even be required). The burdensome impartial principles apply to the foundational area of human rights and to the institutional level of the obligations of the state.

Second, the challenge of *epistemic overburden* raises an important point. It is certainly true that extraterritorial outcomes of acts or omissions are often indeed hard to predict. But this again precisely shows why reasonable measures must accompany the implementation of extraterritorial human rights obligations. If states are obliged to respect human rights abroad and if they are under a due diligence duty to assess the potential extraterritorial human rights impact of their conduct, they must develop the capacities to do so—and design the relevant institutions accordingly. This might include human rights education, capacity-building in human rights assessment, distributing information about fragile contexts, or providing expertise and counseling services. In today's world and with today's tools, however, this seems conquerable. On their part, states must equip institutions with the corresponding capacities and resources to fulfill their role, minimizing susceptibility to power politics and to enable an inclusive, evidence-based and scientifically sound approach—be it at domestic, supranational, or international levels.[81]

Lastly, state agents knowing that they are always and everywhere (not only partly and not only sometimes) bound by the constraints that constitutional, supranational, or international human rights law stipulate is likely to contribute to a clear delimitation of legitimate conduct, and thus to reduce epistemic overburden. If they are aware that rules that regulate their conduct domestically analogously bind them abroad, this scores much higher in terms of legal certainty and clarity compared to a situation in which they do not know whether a particular rule applies abroad or not, and if yes, to what degree.

10.3.5 Non-Justiciability

Optimally, human rights obligations come with judicial or quasi-judicial review and accountability mechanisms. This triggers a fourth kind of critique, namely skepticism about the general *justiciability* of extraterritorial duties. The fear is that such demands cannot be handled by (neither domestic nor international) judicial or quasi-judicial bodies: Not only would they be overwhelmed in terms of the quantity of cases, but also they lack the capacities to analyze alleged violations that occurred far away from the perpetrating state's territory, the complex chains of causations behind them, and the fragmented responsibilities. In addition, so the skeptic continues, they would have to enable access to outsiders: Domestic bodies, which are typically the first to be addressed, would need to make sure that outsiders can bring forward their claims by formally allowing for such procedures to be taken but also by practically enabling it, e.g., through removing barriers in terms of language, fees, physical presence, and so on. The same is true for international bodies. Eventually, there should not be greater hindrances for a resident of Burundi to bring forward her claims against Germany in Strasbourg or Geneva as it is for a German resident. Yet, according to the skeptic, it is states that decide on the power and setup of these bodies and, in order not to endanger their national interests, it is unlikely that states will equip them with sufficient and effective means to address alleged violations of

extraterritorial duties.[82] In light of all these factors, so the objection goes, not only global obligations to promote the universal fulfillment of human rights lack justiciability—even extraterritorial human rights obligations *sensu stricto* are too complex to adjudicate on.

How can we practically integrate extraterritorial application into a legal regime that not only incorporates human rights as objective legal principles but also ensures accountability when breaches of these norms occur? First, in parallel to conceptualizing *joint obligations* borne by and divided among multiple agents, allowing for *shared* or *differentiated responsibility* would enable or facilitate justiciability of extraterritorial obligations. When many actors are involved, responsibility cannot be a matter of all-or-nothing but must be assignable to various states to different degrees, depending on the obligations they were subject to at the time given and the way in which and the degree to which they contributed to the breach of these obligations. In that respect, the legal concept of *complicity* provides a relevant tool: In many cases, it is not just one state that bears full responsibility, but others might have assisted it in its violation of rights.[83] Arguably, a differentiated view on responsibility will also increase the positions of victims in demanding compensation. As a UN *Special Rapporteur* has pointed out, "[b]roadening the concept of responsibility to include more than one State not only strengthens underlying rights, it also increases the chances of victims obtaining redress when violations occur".[84] In a similar vein, recognizing *obligations of conduct*—next to obligations of result—will also prove helpful: In extraterritorial situations, where a specific result is often difficult to guarantee in light of the multitude of factors influencing the eventual outcome, it will often be more straightforward for judicial bodies to analyze whether a state complied with its obligations of conduct or not. These obligations serve as evaluative standards to assess states' actions, omissions, and usage of means, and thus complement the determination of responsibility for specific results. States are required to prove that they followed their obligations of conduct and have considered the effects on individuals that their conduct has abroad.[85]

Second, as alluded to earlier, courts undoubtedly face epistemic challenges, which is why states are obliged to equip judicial and quasi-judicial bodies at all levels with the relevant capacities for hearing and assessing extraterritorial cases. The fear that states will be unwilling to establish such strong bodies at the international level is not unfounded, and it is mirrored in some of today's international regimes. However, it is important to underline that extraterritorial duties are not only a matter of *international* human rights law and, correspondingly, of international bodies. Paradigmatically, victims first turn to domestic courts. The latter play a crucial role, often equipped with further-reaching means and *de facto* amount to more reliant or potent mechanisms. This is not to deny the significance and promising nature of the international protection system, but it highlights, on the one hand, the crucial role that the extraterritorial application of constitutional law will continue to play and, on the other hand, the importance of domestic courts' engagement with IHRL.[86]

Lastly, universal human rights duties might, at times, be imperfect ones. However, this problem is not exclusive to extraterritorial obligations. Difficulties in reconstructing concrete situations also challenge courts in cases of territorial violations. The task of clarifying the meaning and scope of broad or imperfect duties is also one that judicial bodies routinely attend to—it is a general aspect of how law functions in practice. Courts examine concrete cases, in the framework of which they prove capable of interpreting abstract criteria, applying them to a particular situation, and evaluating obedience to broadly formulated duties, such as duties of conduct, even if there is not simply one course of action available in order to conform.

In particular, unspecific duties in need of clarification are not new to human rights law, the norms of which are generally formulated in a broad way and essentially need to be conceptualized by way of interpretation. It was precisely the attempts of (quasi-)judicial bodies to develop abstract standards and apply them to concrete situations that triggered the debate on the extraterritorial application of human rights. This is what the ECtHR does when it develops its spatial and personal models, it is what the CCPR does when it proposes jurisdictional approaches in its General Comments, it is what the CJEU does when it refers to general rules about the applicability of the CFR, and it is what the US Supreme Court does when it develops formalist or functionalist approaches to extraterritorial applicability. A standard of jurisdiction will always remain, to a certain degree, an abstract standard. While it is important to make it as precise as possible, the application of the standard to a particular case and thus its ultimate concretization will always have to be conducted in practice.

Likewise, the details of how to allocate responsibilities in specific situations cannot be *fully* determined in advance and in the abstract but must leave room for context-sensitivity—and considering situations and circumstances adequately is precisely what courts are asked to do and routinely prove capable of doing. Importantly, courts can also legitimately make room for the fact that in practice, some duties (especially, but not exclusively, duties to protect and fulfill) are more difficult to obey for foreign states in extraterritorial situations, that this should have an impact on the evaluation of alleged breaches, and that states' justifications of interferences abroad must be more generously dealt with.[87] The fact that abstract fundamental rights need to be concretized by judicial bodies and methods ensures that contemporary circumstances can be considered and an effective regime be upheld, protecting individuals against threats that the world they live in holds.

Thus, on the one hand, challenges of justiciability doubtlessly exist, but they are not generally insurmountable. On the other hand, some types of obligations—above all, global obligations to universally realize human rights—need not be directly translatable into justiciable norms in the narrow sense of the term. Still, it is important to emphasize that the recognition of extraterritorial human rights obligations must also be accompanied by measures in the judicial domain (at the domestic, supranational, or international level) in order

to ensure or improve justiciability, to assign responsibility for violations of (at least) obligations *sensu stricto*, and to avoid accountability gaps.[88] Ultimately, judicial means are of outstanding importance for victims of extraterritorial violations, situations too, and "courts have an essential role to play in protecting individual rights on behalf of those without a voice in the political process".[89]

10.4 The Possibility of Legally Implementing Extraterritorial Human Rights Obligations

How to conceptualize the concrete applicability threshold of human rights law will likely remain a matter of debate. However, the above discussion has indicated that there are practically viable ways of interpreting jurisdiction (depending on the existence of a controlling, legal, or power-based relationship) that are capable of translating the normative foundation from which human rights obligations spring. Recognizing the need for a universal division of labor, allowing for dividing and tailoring jurisdiction, accepting obligations of conduct and joint obligations, establishing capacity-building measures regarding epistemic challenges, recognizing shared responsibility among multiple duty-bearers, and allowing for context-sensitivity in assessing extraterritorial violations provide some of the tools that will facilitate the practical implementation of these undoubtedly complex norms, as hard to grasp and imperfect as they might at first sight appear. Significant as institutional and practicability concerns are, they can also point to instrumental flaws of current regimes and do not, *per se*, stem from ineradicable arrangements with intrinsic normative weight.[90]

At the same time, the aim here cannot be to provide a standard of jurisdiction that exhibits such a level of concreteness that it fits all possible situations. The application of complex concepts of positive law to concrete cases is mainly the task of the judiciary—valuably supported by scholarship. Ultimately, such legal standards will always remain, to a certain extent, abstract standards that need to be contextualized in concrete situations, and this is the case for the notion of jurisdiction, too. But this is what courts are (for good reasons) here for. Lastly, there are many open questions and unresolved problems left with regard to the extraterritorial applicability of human rights—not least, and sadly so, because the world is constantly being confronted with new threats to which positive law has to be applied.

Notes

1 Raible, *Title to Territory*, 326 ff.
2 Milanović, *Extraterritorial Application*, 119, 173, 206 ff.; also Sections 4.3.3 and 4.5.1 above.
3 For a detailed discussion of such a constellation, Milanović, Marko, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life', *Human Rights Law Review*, 20/1 (2020), 1–49.
4 Kanalan, *Extraterritorial State Obligations*, 52 f. Due to the shortcomings of these two jurisdictional models, alternative jurisdictional models have been proposed

in scholarship, *inter alia*: Jurisdiction as *normative political and legal authority* (Besson, *Extraterritoriality of the ECHR*, 860 ff., 864 f., 873 f.; also Ganesh, *Distant Strangers*, 475 ff., 495 f.; Duttwiler, *Authority*, 157 ff.; Gondek, *Reach of Human Rights*, 375 ff.; cf. Raible, *The Extraterritoriality of the ECHR*); jurisdiction as *based on the distinction between negative and positive obligations*, so that the former apply universally while the latter are limited to territory (Milanović, *Extraterritorial Application*, 209 ff.; similarly Shapcott, *Cosmopolitan Extraterritoriality*, 114; earlier already, e.g., Koller, Peter, 'Der Geltungsbereich der Menschenrechte', in Gosepath, Stefan & Lohmann, Georg (eds.), *Philosophie der Menschenrechte*, 6th edn (Frankfurt a.M.: Suhrkamp, 2015), 96–123, 116; Goodin, *Fellow Countrymen*.); jurisdiction as *capability to act* (cf., e.g., Salomon, Margot E., 'Deprivation, Causation and the Law of International Cooperation', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 259–296, 282 ff.); jurisdiction as *control over territory, persons, or situations* (Altwicker, *Transnationalizing Rights*); or jurisdiction as *remedial responsibility for earlier violations of human rights* (deriving from, e.g., Pogge, Thomas, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd edn (Cambridge: Polity, 2008).

5 Again, not every state act is relevant to the enjoyment of human rights, not every jurisdiction-exercising state will commit violations, and not every circumscription of rights constitutes a violation, Section 4.3.3.

6 BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 89, translation in Press Release No. 37/2020 of 19 May 2020, www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-037.html, Section 2.1.2.

7 Ibid., para. 88 ff.

8 *U.S. Const.* Preamble; amend. I; amend. II; amend. IV; cf. also amend. IX; amend. X; Section 2.3.

9 *Downes v. Bidwell*, 386 (Harlan J., dissenting). Justice Harlan focused on application in territories subjected which were under *complete* US authority and jurisdiction, ibid., 389. Nonetheless, his choice of wording is unambiguous. Cf. Section 2.3.1.

10 CJEU, *X and X* (Opinion of AG Mengozzi), para. 89, 165; cf. Section 2.2.1.2.

11 See Section 4.5.1.

12 CCPR, *López Burgos*, para. 12.3.

13 ECtHR, *Gray*; cf. Milanović, *Gray v. Germany*.

14 ECtHR, *Al-Skeini v. UK*, Concurring Opinion Judge Bonello, para. 18.

15 Cf. on IHRL, den Heijer & Lawson, *Extraterritorial Human Rights*, 191.

16 The ECtHR dismisses such a notion, e.g., ECtHR, *Al-Skeini*, para. 130; ECtHR, *Banković*, para. 75.

17 In more detail Section 4.3.3; also Shany, *Taking Universality Seriously*, 65 ff.

18 Vandenhole, *Obligations and Responsibility*, 117. For example, ECtHR, *Al-Skeini*, para. 102.

19 Cf. Art. 4–Art. 11; Art 16–Art. 19 *Draft Articles on State Responsibility*.

20 Milanović, *Jurisdiction and Responsibility*, 106, emphases removed.

21 Raible, *Game Changers*, 166.

22 Similarly Shany, *Taking Universality Seriously*, 65 ff.

23 On the distribution of duties to various duty-bearers, also Sections 10.2.4 and 10.3.

24 Shany, *Taking Universality Seriously*, 69, emphasis added, also 50, 65 ff.
25 Ibid., 69, emphasis added.
26 Ibid., 69, emphasis added; based on Ben-Naftali & Shany, *Living in Denial*, 64 f.; see also CCPR, *GC 36 ICCPR*, 2018, para. 63.
27 Many of these factors are inspired by Altwicker, *Transnationalizing Rights*, 591. However, Altwicker lists them as necessary conditions for establishing a "sufficient 'jurisdictional link'", which departs from what is proposed here.
28 The qualification of 'reasonable' foreseeability was also introduced in CCPR, *GC 36 ICCPR*, 2018, para. 63. Similarly, ECtHR, *Osman v. the United Kingdom [GC]*, 23452/94, 28 October 1998, Reports 1998-VIII, para. 116; IACtHR, *Medio ambiente (Opinión Consultiva)*, para. 120. Also *Maastricht Principles*, e.g., Principle 8; cf. Vandenhole, *Obligations and Responsibility*, 119 f.; Milanović, *Khashoggi*, 13 f.
29 Shany, *Taking Universality Seriously*, 69; ICJ, *Aerial Herbicide Spraying*. Cf. IACtHR, *Medio ambiente (Opinión Consultiva)*, para. 120. While this could be objected to by arguing that by including omissions it deviates from the usage of the term 'direct' in other legal contexts, this is a merely terminological objection: If another term turned out more appropriately to capture the criterion described earlier, then its name might as well be changed.
30 Shany, *Taking Universality Seriously*, 68 ff. In Shany's example, the randomly chosen state is the US (not Austria) but its complex relation to North Korea potentially clouds the point of the argument, which is why the example has been adapted.
31 Künzli, *Unrechtsregimes*, 453 ff.
32 CCPR, *GC 36 ICCPR*, 2018, para. 63; cf. Section 4.5.2. In his role as CCPR member and Co-Rapporteur for the General Comment, Shany facilitated the procedures leading to its adoption.
33 Shany, *Taking Universality Seriously*, 69.
34 This point is acknowledged by Shany himself in Shany, Yuval, 'Bad Cases Make Bad Law, But Good Law Books!', *EJIL: Talk!*, 1 December 2011, www.ejiltalk.org/bad-cases-make-bad-law-but-good-law-books/.
35 For a related model, ECtHR, *Al-Skeini*, Concurring Opinion Judge Bonello, para. 10 ff.; cf. Shany, *Taking Universality Seriously*, 68.
36 ECtHR, *El Mahi*. Section 4.5.1.
37 This illustrates how jurisdiction often cannot be evaluated separately but is closely linked to the merits.
38 For example, ECtHR, *Al-Skeini*, para. 137 f.; BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 104.
39 Cf. also BVerfG, Urteil des Ersten Senats vom 19. Mai 2020—1 BvR 2835/17, para. 105. On virtual control, e.g., Bignami & Resta, *Human Rights Extraterritoriality*, 361 ff.; Watt, Eliza, 'The Role of International Human Rights Law in the Protection of Online Privacy in the Age of Surveillance', in Rõigas, Henry et al. (eds.), *9th International Conference on Cyber Conflict: Defending the Core* (Tallinn: NATO Cooperative Cyber Defence Centre of Excellence, 2017); Taylor, *EU's Human Rights Obligations*, 250 f.
40 Shany, *Taking Universality Seriously*, 70.
41 Ibid., 63 ff.
42 CCPR, *A.S. and Others v. Italy*, CCPR/C/128/D/3042/2017. See Section 4.5.2.
43 Cf. Shany, *Taking Universality Seriously*, 69. However, cf. CCPR, *A.S. v. Italy*, Annex I, Joint Opinion by Shany, Heyns, Pazartzis (dissenting).

44 For an overview, Papanicolopulu, Irini, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview', *International Review of the Red Cross*, 98/2 (2016), 491–514. Cf. also *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (UNCLOS), Art. 98
45 Shany, *Taking Universality Seriously*, 70.
46 For example, Milanović, *Extraterritorial Application*, 209 ff.; Goodin, *Fellow Countrymen*, 663, 678 ff.
47 Shany, *Taking Universality Seriously*, 61 f.
48 McBeth, *Global Economy*, 157.
49 Cf. Milanović, *Khashoggi*, 17; ECtHR, *Osman*, para. 116.
50 Ryngaert, Cedric, 'Jurisdiction. Towards a Reasonableness Test', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 192–211, 207 ff.
51 Altwicker, *Transnationalizing Rights*, 602.
52 Ben-Naftali & Shany, *Living in Denial*, 72; Skogly & Gibney, *Transnational Human Rights Obligations*, 785 f.; Salomon, *Global Responsibility*, 132 ff.; cf. Langford; Coomans & Gómez Isa, *Extraterritorial Duties*, 82 ff. See also CESCR, *GC 3 ICESCR*, 1990, para. 1, referring to its origin in the work of the International Law Commission.
53 Vandenhole, *Obligations and Responsibility*; *Maastricht Principles*, Principle 30. Cf. van der Have, Nienke, 'The Maastricht Principles on Extraterritorial Obligations in the Area of ESC Rights: Comments to a Commentary', *SHARES—Research Project on Shared Responsibility in International Law*, 25 February 2013, www.sharesproject.nl/the-maastricht-principles-on-extraterritorial-obligations-in-the-area-of-esc-rights-comments-to-a-commentary/. Similarly Shue, *Mediating Duties*, 702 f.; Gibney, *International Human Rights Law*, 121 f., 154.
54 Of course, such universal obligations would also apply to Italy and Germany, in addition to the obligations *sensu stricto* they have as a result of exercising some degree of jurisdiction, see below.
55 The terminology follows Vandenhole, Wouter, 'Emerging Normative Frameworks on Transnational Human Rights Obligations', *EUI Working Papers*, RSCAS 2012/17 (2012), http://cadmus.eui.eu/handle/1814/21874, 5.
56 Müller, *Justifying*, 62. For other authors who argue for the existence of such global obligations (the terminology varies) that exist in addition to extraterritorial obligations *sensu stricto,* e.g., Skogly, Sigrun, 'Global Human Rights Obligations', in Gibney, Mark et al. (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Abingdon/New York: Routledge, 2022), 25–39; Salomon, *Global Responsibility*, 194; Skogly, *Global Responsibility*, 836 ff.; Künnemann, Rolf, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Coomans, Fons & Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004), 201–231, 216 f.; Vandenhole, Wouter & Benedek, Wolfgang, 'Extraterritorial Human Rights Obligations and the North-South Divide', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 332–364, 340 ff.; CommHR, *Report of SR on Right to Food*, 2005; cf. the discussion in Langford et al., *Introduction*, 26 f. Cf. also the *Maastricht Principles*,

Principles 8b, 28 ff., which however subsume these obligations under the threshold of jurisdiction. For a critique, van der Have, *Comments to a Commentary*.

57 Art. 2(1), 11(1), 11(2), 15(4), 22, 23 *ICESCR*. Cf. also *Maastricht Principles*, Principle 8b.

58 Cf., e.g., example of Switzerland, Müller, *Art. 35 BV*, 90 ff., 95 ff. 101 ff. See also Skogly, *Global Human Rights Obligations*.

59 For example, *BVerfG, Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 92.

60 For example, Goodin, *Fellow Countrymen*, 663, 678 ff.

61 On this ground, *Sarah Miller* argues for the importance of the *espace juridique* idea, Miller, *Revisiting*, 1236.

62 Wilde, *Civil and Political Rights*, 657 f.

63 On the former, Wenzel, Nicola, 'Human Rights, Treaties, Extraterritorial Application and Effects', in Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, 2008, para. 23; den Heijer & Lawson, *Extraterritorial Human Rights*, 180. On the latter (on IHRL in general), Posner, *Twilight*, 127 ff.; cf. Peters, *Humanity*, 531 ff.

64 Shany, *Taking Universality Seriously*, 69.

65 BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 105. For the same empirical reasons, the 'principle of subsidiarity', assigning obligations to the smallest and most local unit, is not (or no longer) adequate for the distribution of human rights duties. Cf. Moore, *Cosmopolitanism*, 654 f.

66 Wilde, *Legal 'Black Hole'?*, 776 f., 781 f.

67 Peters, *Humanity*, 532 ff., 544.

68 Mahlmann, *Elemente*, 487 ff.

69 For the general theoretical critique, e.g., Raz, Joseph, 'Human Rights in an Emerging World Order', in Cruft, Rowan; Liao, S. Matthew & Renzo, Massimo (eds.), *Philosophical Foundations of Human Rights* (New York: Oxford University Press, 2015), 217–231, 227 f.; O'Neill, Onora, 'The Dark Side of Human Rights', *International Affairs*, 81/2 (2005), 427–439, 428 ff.

70 Cruft, Rowan; Liao, S. Matthew & Renzo, Massimo, 'The Philosophical Foundations of Human Rights: An Overview', in Cruft, Rowan; Liao, S. Matthew & Renzo, Massimo (eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015), 1–44, 34.

71 Sen, *Elements*, 320 ff., 346 ff.; Tan, *Justice*, 51 f.; Buchanan, Allen, 'Moral Progress and Human Rights', in Holder, Cindy & Reidy, David (eds.), *Human Rights: The Hard Questions* (New York: Cambridge University Press, 2013), 399–417, 408 f. Cf. Benhabib, *Kosmopolitismus ohne Illusionen*, 139 ff., 275 ff.

72 McBeth, *Global Economy*, 167.

73 Buchanan, *Why International Legal Human Rights?*, 260.

74 Cruft, Rowan, 'Human Rights as Rights', in Ernst, Gerhard & Heilinger, Jan-Christoph (eds.), *The Philosophy of Human Rights: Contemporary Controversies* (Berlin/Boston: De Gruyter, 2011), 129–158, 139 f.; Vandenhole, *Taking Stock*, 829 ff.

75 *US v. Verdugo-Urquidez*, 274 (1990); Duttwiler, *Authority*, 153. Cf. Skogly, *Global Responsibility*, 836.

76 Khalfan, Ashfaq, 'Division of Responsibility amongst States', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University

Press, 2013), 299–331, 321 ff. Khalfan importantly highlights that the situation is different if a state A is the only state that has the capacity to assist another state B.

77 Interestingly, references to measures like mutually supporting capacity-building already appeared in early scholars such as De Vattel, *Law of Nations*, II, 1.6.

78 van der Have, *Comments to a Commentary*. On concurrent responsibilities, cf. Besson, Samantha, 'Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities', in Aaken, Anne van & Motoc, Iulia (eds.), *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018), 155–177, 157.

79 Milanović, *Extraterritoriality and Human Rights*, 63.

80 Shue, *Mediating Duties*, 690, also 691 ff.

81 Rivlin, *Constitutions*, 187; Buchanan, *Legitimacy of the International Order*, 60, original emphasis.

82 Posner, *Twilight*, 39 ff., 102 ff.

83 Salomon, *Global Responsibility*; Skogly, *Global Responsibility*; Gibney, Mark & Skogly, Sigrun I., 'Introduction', in Gibney, Mark & Skogly, Sigrun (eds.), *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010), 1–9; Skogly, Sigrun I., 'Causality and Extraterritorial Human Rights Obligations', in Langford, Malcolm et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), 233–258, 244 ff.; Pavlakos, *Transnational Legal Responsibility*, 154 ff.; Vandenhole, *Obligations and Responsibility*, 133.

84 HRC, *Report of SR on Rights to Freedom of Peaceful Assembly and of Association*, 2015, para. 25; see also Salomon, *Deprivation*, 287.

85 Skogly & Gibney, *Transnational Human Rights Obligations*, 785 f. Similarly Benvenisti, *Trustees of Humanity*, 314.

86 Besson, *Transnational Constitutional Law*, 244.

87 Milanović, *Foreign Surveillance*, 130 ff.; see also ECtHR, *Jaloud*, para. 226; Liao, S. Matthew, 'Human Rights as Fundamental Conditions for a Good Life', in Cruft, Rowan; Liao, S. Matthew & Renzo, Massimo (eds.), *Philosophical Foundations of Human Rights* (New York: Oxford University Press, 2015), 79–100, 95 ff.; den Heijer & Lawson, *Extraterritorial Human Rights*, 180 f.; Wellman, Carl, *The Moral Dimensions of Human Rights* (New York: Oxford University Press, 2011).

88 Which, today, is still far from being realized, Vandenhole, *Taking Stock*, 807.

89 Cole, *Rights over Borders*, 60.

90 Lafont, *International Protection of Human Rights*, 441 f.

11 Concluding Remarks

11.1 Summary

At its beginning, this book outlined the thesis that a territorial conception of human rights obligations of states stands in tension with the fact that states can and do have an impact on people beyond their territories. This is particularly salient considering the multitude of tools contemporary states have access to to affect the human rights situation of individuals abroad: Failing to address this aspect of states' obligations potentially leads to a significant protection vacuum. This chapter will briefly summarize and reflect upon the main conclusions of the arguments put forward to support this thesis.

To begin with, studying the approaches to extraterritorial applicability of several regimes of human rights law in Part I revealed a substantial degree of complexity, manifested at various legal levels. This first legal part of the analysis came to two main conclusions. First, the strong territorial underpinnings of the legal protection of human rights, traditionally conceptualized as rights of individuals against the state on the territory of which they reside, continue to be felt. Even though, especially at the supranational and the international level, there is a tendency to expand human rights obligations beyond states' own borders, other jurisprudential approaches at various levels indicate that the territorial paradigm has not yet been overcome. The fact that relevant duty-bearers (i.e., states) continuously oppose attempts to expand the reach of human rights law supports this perception—an opposition that is unlikely to wane anytime soon in light of the current political climate. Accordingly, addressing extraterritoriality requires a comprehensive approach, and it must include tackling the theoretical foundation on which this territorial paradigm rests. Second, the first part concluded that the extraterritorial applicability of human rights law constitutes a pressing, real, and concrete legal problem and an unresolved jurisprudential matter: The provision of coherent approaches to the issue continues to challenge judicial bodies, epitomized by the controversies on the interpretation of the concept of jurisdiction, the main applicability threshold of IHRL. What these ongoing controversies again point to is the need for further foundational normative work on the background of this

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clearly very complex problem. And this should eventually help to reinforce the cogency of interpretative approaches at the level of jurisprudence.

On this basis, Part II identified six theoretical clusters—broadly belonging to the tradition of statism—that could provide the normative foundation of this territorial paradigm, i.e., six frameworks in which potential arguments *against* extraterritorial human rights obligations can be developed. Through a reconstruction and a critical discussion of these arguments, it found that they would need to rely on extreme and ultimately untenable premises. Most centrally, it concluded that there is no rationale for the position that the relation between the territorial state and its residents is of such monumental moral significance that it justifies the systematic disregard for the basic claims outsiders raise. While the political community, its cooperative network, its self-determination, its institutions, its instrumental advantages, its pluralistic nature, and its opportunity for participation are all (morally) relevant in some respect or another, they are not the grounds from which human rights obligations arise. These obligations do not arise from membership but from the individual itself.

Accordingly, in the final chapter of Part II, proceeding to the positive formulation of elements of a justificatory theory of extraterritorial human rights obligations, it has been argued that territorial conceptions are fundamentally at odds with the core moral idea behind human rights: These are rights assigned to human beings by virtue of the morally relevant core of human nature, which bestows dignity on them. Dignity comes with a normative claim, and human rights translate the goods human beings need to live a dignified life to the level of norms. Now, according to the idea of justice, a normative principle should apply equally to everyone who is equal with respect to the relevant basis on which the principle is assigned. For human rights, the relevant basis for their assignment is the morally relevant core of human nature, which is universally shared. Hence, human rights apply universally and to everyone equally, and legal human rights protection at various levels reflects this core moral idea. Moreover, as the concept of human rights refers both to rights as claims as well as to obligations, and absent proof to the contrary, the universality of the former entails the universality of the latter. This again emphasizes that human rights set essential restrictions to the duty-bearers' room for maneuver.

For an analysis of its obligations, it is essential to consider the nature of the spotlighted duty-bearer: the state. When it comes to human rights protection, states play a double-edged role, functioning as the agents that can best protect these rights as well as, at the same time, that can most easily violate them. A triad of aspects of states' nature helps to explain this ambiguity: States are carriers of legal, normative authority, by virtue of which they dispose over categorically distinctive means; they have enormous *de facto* power and resources; and they are, in their essence, collective projects of justice set up for nothing but to cater to human beings' good. This multifaceted nature of states is mirrored in the multidimensionality of their human rights obligations. By virtue of their nature and their double-edged role in human rights protection,

statehood amounts to a *sufficient condition* for being a human rights duty-bearer. Accordingly, these duties apply to *all* state conduct, regardless of where its effects materialize. Next to the essential role that human rights protection plays for insiders, it also responds to the special kind of exposedness to which outsiders are subject, underlining the importance and urgency of applying human rights law extraterritorially, too. In these diagonal relations in which individuals' means are typically limited, human rights provide a minimally protective instrument.

Lastly, states are institutions, and it is the very essence of legal systems that they enable a sensible distribution of duties, in which demanding, universal, and impartial principles are assigned to the institutional level and to institutional agents, while leaving more leeway to individuals to act on personal concerns. Crucially, such an argumentation would not place extraterritorial human rights obligations in tension with the concept of state sovereignty, which is fundamentally based on and inherently and substantively constrained by human rights—constraints that not only pertain to its internal but also its external exercise.

Finally, Part III applied this justificatory theory of extraterritorial human rights obligations to the legal level. It is based on the background assumption that normative reasoning is particularly pertinent to the conceptualization of human rights law and should substantially inform it. Accordingly, it should also substantially inform the interpretation of central concepts that regulate the applicability of human rights law, such as 'jurisdiction' in IHRL. Still, the first approximation to this standard of applicability—the basic idea that human rights essentially constrain state conduct whenever it affects individuals—must be qualified in order to serve as a legally viable, practicable criterion. It does so, if it is understood as arising either through special legal or power-based relationships between the state and the effects on an individual's right or through controlling relationships, where the effects of the state conduct are direct, significant, and reasonably foreseeable. This interpretation of jurisdiction is suitable for governing the applicability of *extraterritorial obligations sensu stricto* and allows for dividing and tailoring obligations in a context-sensitive way. The latter is especially important for allocating and hierarchizing duties in situations where various states are involved—which is often the case in extraterritorial settings. Due to the type and degree of jurisdiction it exercises, the domestic state will often remain the primary duty-bearer, but territorial and extraterritorial duties importantly complement each other. That said, there is a gap that 'jurisdiction' (and similar applicability thresholds at other legal levels) leaves: It is not able to capture *global obligations to contribute to the universal fulfillment of human rights.* These obligations, which apply independently of the exercise of jurisdiction, bind all states, at home and abroad.

In this process of applying extraterritorial obligations to the legal level and implementing them, practicability concerns on the efficiency, enforceability, burdensomeness, or justiciability of such obligations are doubtlessly relevant.

Yet, first, these concerns are contingent, and, second, they do not appear entirely insurmountable, even though they do crucially point to the need for a range of accompanying measures when implementing extraterritorial duties. That said, one has to be aware that a standard that generally guides the applicability of human rights law—at whatever legal level—will always, at least to a certain extent, remain an abstract standard that ultimately has to be put into practice by juridical means. This, however, is a characteristic of legal concepts in general, which routinely need to be contextualized in concrete cases and by judicial bodies.

11.2 Evaluation and Outlook

Several considerations help to further evaluate these findings and their implications for the bigger picture of human rights theory, global justice theory, and human rights law. To begin with, human rights do not exhaust global justice, and neither are extraterritorial obligations a one-size-fits-all solution that would eliminate all current and future forms of transnational injustices. Other important kinds of moral and legal duties, such as humanitarian duties to aid or equality-based duties of distributive justice, are equally needed. Still, working toward universal human rights enjoyment, *inter alia* (but not only) by implementing extraterritorial obligations, is one of the key paths we need to take in the pursuit of global justice. Thus, the account developed has also aimed at applying foundational background reasoning on global justice demands to a specific legal problem, outlining a concrete way of implementing universalist concerns. It hopes to thereby contribute to substantiating the sometimes vague references to the universal nature of human rights and the international community's responsibility in the field,[1] by suggesting how such duties could be allocated and distributed in the framework of existing legal systems.

The topicality of this proposal is underlined by the multitude of ways states today can and do affect individuals abroad. Therefore, restricting human rights obligations to territory is not justified for foundational reasons, but neither for practical and contemporary reasons, as it can no longer be said to be the most effective or efficient way to reach the overall aim of universal respect for human rights. Stepping on the next level in deterritorializing human rights law thus amounts to a contemporary requirement, too. At the level of legal implementation, human rights obligations—and the bodies that assign responsibility for their breaches—must take contemporary challenges into account if they are to serve as an instrument against present-day means of suppression, discrimination, and humiliation. Enlarging the circle of those protected may thus also constitute a path of moral and legal progress, as legal obligations are empirically expanded in order to conform to the universal moral idea behind them.[2]

Normatively oriented work on the significance of the political community and of the distinction between insiders and outsiders has a long tradition in political and legal philosophy. And yet, it continues to be a timely topic. The

global political climate, the significance unceasingly ascribed to state sovereignty, and the persistent—or even increasing—influence of ideologies like nationalism and supremacism indicate that the debate has not and will not soon become obsolete. Even if the idea of universal human rights is normatively justified, there is no guarantee that it will continuously advance—eventually, in the contemporary global system, it requires the political will of the duty-bearers at stake, namely states. In a similar vein, the rising academic critique of the idea of universal human rights that we can today observe offers little grounds for optimism that this political climate will be reliantly countered at a more theoretical level. On the contrary, the success of political movements and the attention paid to underlying ideologies are likely to feed off one another. Accordingly, statist positions, even those that include premises that to many seem extreme, should not be overlooked but systematically addressed. Cosmopolitanism should not naïvely underestimate its competitors—and the most valuable currency in countering both one's academic opponents as well as their political disciples is, as it has been for a long time, good arguments.

What the quality of these arguments benefits from, and what is of particular significance for the current discussion, is the broadness of the perspectives in approaching the issue. When it comes to human rights, which are, essentially, prelegal principles enshrined into law at different levels, it is critical to combine legal analyses with foundational normatively oriented work. Concrete legal problems, like that of finding coherent approaches to the extraterritorial applicability of human rights law, are often a symptom of the need to address the basic normative issues that stand behind them—especially in fields of law that are inherently and explicitly informed by their moral counterparts. Ultimately, whether human rights law is extraterritorially applied or not "is, and has always been, a moral choice."[3]

To conclude, this normatively oriented study, situated in the academic tradition of the philosophy of law, hopes to have contributed to furthering holistic approaches of addressing a topical and concrete legal question. It has suggested that, when it comes to affecting individuals in a particular way, states simply cannot evade human rights obligations. Eventually, by contributing to the theoretical debate, the above reflections hope to have an effect in practice, too—because it is there where improvements in protection are most urgently needed.

Notes

1 Cf. the critique by Besson, *Extraterritoriality of the ECHR*, 858.
2 Buchanan, *Moral Progress*, 400 ff.; BVerfG, *Urteil des Ersten Senats vom 19. Mai 2020*—1 BvR 2835/17, para. 105. Cf. Habermas, *Zur Verfassung Europas*, 37.
3 Milanović, *Foreign Surveillance*, 93.

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Biography

Angela Müller wrote this PhD thesis on extraterritorial human rights obligations at the University of Zurich, funded by the Swiss National Science Foundation. It was accepted as a doctoral dissertation by the Faculty of Law in March, 2021, and awarded the distinction *summa cum laude*. Before, Angela Müller obtained a Master of Arts in Political and Economic Philosophy from the University of Berne. During her academic career, she was a visiting researcher at Columbia University, New York, and Hebrew University, Jerusalem. For her dissertation, Angela Müller received the University of Zurich FAN Award as well as the Award of the Swiss Association for Legal and Social Philosophy.

Today, Angela Müller is Head of AlgorithmWatch CH and Head of Policy and Advocacy at AlgorithmWatch, a civil society organization that unpacks the impact of algorithmic and AI-based systems on human rights, democracy, and the rule of law. In this position, she has testified as an expert before various national and international bodies. Prior to her current role, she held positions at the University of Zurich, Lucerne University of Applied Sciences and Arts, the University of Berne, a civil society think tank on foreign policy, and the Swiss Federal Department of Foreign Affairs.

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