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Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations

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ARTICLES

Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations

*John Cerone**

ABSTRACT

One of the most controversial and politically charged issues in current human rights discourse is whether and to what extent states are bound by human rights obligations with respect to the conduct of their armed forces abroad in armed conflict, occupation, and peace operations. Underlying the controversy are a number of complex legal questions, several of which have eluded definitive resolution. Chief among these questions is whether individuals affected by the conflict are among those whose rights states are obliged to secure. Answering these questions is further complicated in situations of collective action, giving rise to such questions as whether national contingents of multilateral operations retain their status as organs of their respective sending states. The purpose of this Article is to outline the issues underlying these questions and to provide a framework for answering them.

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Despite continuing objections on the part of a handful of states, a consensus is evolving in favor of the view that human rights law applies in full alongside humanitarian law during times of armed conflict and occupation. While it is easy to see how human rights law would apply to a state's regular forces in a situation of internal armed conflict, the situation becomes more complex when states operate abroad, especially when acting through the context of collective action or with the assistance of private actors.

Human rights law, embedded in the inter-state structure of the international legal system, generally binds states and states alone. At the same time, states are abstract entities, incapable of acting as such. The conduct of states is the conduct of individuals whose acts or omissions are attributable to the state. Thus, the question of attribution not infrequently arises in disputes before human rights bodies.

The legal standards for attribution of the conduct of non-state actors to the state require a fairly high level of state involvement or, alternatively, de facto state action by non-state actors accompanied by state authorization or disengagement. However, special rules may be evolving through the practice of universal and regional human rights mechanisms. These institutions have increasingly found degrees of state involvement not rising to the level established for attribution under the Articles on State Responsibility to be sufficient to render the state responsible for the acts of non-state actors.

The question of attribution is separate in principle from the content of international obligations. However, this distinction may become difficult to discern in the context of a failure of a state to fulfill positive obligations in relation to the acts of non-state actors. The state is essentially in a constant state of omission. However, in order for an omission to constitute a basis of responsibility, there must be a duty to act. The question of establishing a duty to act will turn on the content of the relevant primary rule. Thus, in these circumstances, the issue of attribution collapses into the content of the primary rule.

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

Most of the jurisprudence of human rights bodies, which have greatly elaborated on the content of states' obligations under the various human rights treaties, has been developed in the context of alleged violations committed on the territory of the respective state party. Can these same standards be transposed onto the state's conduct abroad? In an effort to bring order to an otherwise chaotic array of judicial (and quasi-judicial) decisions, the Article provides a framework for delineating the scope of human rights obligations by examining three different parameters: the scope of beneficiaries, the range of rights applicable, and the level of obligation. Structuring an analysis of current jurisprudence around these three parameters reveals a trend toward recognizing varying levels of obligation. In particular, it may be that negative obligations apply whenever a state acts extraterritorially (at least with respect to intentional human rights violations, as opposed to indirect consequences), but that the degree of positive obligations will be dependent upon the type and degree of control (or power or authority) exercised by the state. This approach would preserve the integrity of the respective treaties and would vindicate the universal nature of human rights, which is proclaimed in the preambles of all of the human rights treaties considered in this analysis.

International judicial and quasi-judicial bodies have provided answers to many of the important legal questions described in the Introduction. Nonetheless, there remain significant gaps that provide ample opportunity for these institutions to further elaborate on what is required of states in situations of armed conflict and occupation.

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I. INTRODUCTION

In a February 2006 report, five U.N.-appointed human rights experts denounced the U.S. government for human rights violations committed against individuals detained at Guantánamo Bay.¹ These experts found that the nature and conditions of this detention regime gave rise to numerous violations of the International Covenant on

1. United Nations, Economic and Social Council, Commission on Human Rights, Situation of detainees at Guantánamo Bay, Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt, U.N. Doc. E/CN.4/2006/120 (2006).

Civil and Political Rights (ICCPR), as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²

In its reply, the U.S. government “profoundly object[ed] to the Report both in terms of process and of substance,” citing “numerous glaring legal errors.”³ In its opinion, “[t]he Report’s improper conflation of the law of war (also known as international humanitarian law) and international human rights law is a fundamental flaw that undercuts virtually all of the Report’s conclusions.”⁴ In particular, the United States expressly rejected the application of the ICCPR to the detainees at Guantánamo Bay, asserting that their treatment was governed instead by humanitarian law and relevant provisions of domestic U.S. law.⁵

Whether and to what extent states are bound by human rights obligations with respect to the conduct of their armed forces abroad in armed conflict, occupation, and peace operations is one of the most controversial and politically charged issues in current human rights discourse. In the modern world, states are capable of mobilizing massive destructive power across the globe with increasing speed and efficiency. A crucial consequence of this enhanced military power is the increasing breadth of states’ impact on the enjoyment of human rights in territories far beyond their physical frontiers.

In addition to traditional situations of armed conflict, individuals today may find themselves in the power of states in fairly complex configurations. States are increasingly operating through multilateral frameworks, e.g., through coalitions or under the auspices of United Nations (U.N.) or regional peace-keeping operations with increasingly expansive mandates. Further, states are now purporting to create zones beyond the reach of their human rights obligations. Detention facilities at Guantanamo Bay, on the high seas, and in secret locations raise controversial questions as to the nature and purpose of human rights norms. Indeed, efforts by powerful states to withdraw their military conduct from the purview of international law threaten to undermine hard-won victories achieved by the international human rights movement during the past sixty years.

2. *Id.* at pp. 36–38.

3. Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantánamo Bay, Cuba, March 10, 2006, at 1, 10.

4. *Id.* at p. 11.

5. “[T]he law of armed conflict provides the rules governing detention and treatment of enemy combatants in armed conflict, and the ICCPR by its terms applies only within the territory of the State Party.” *Id.* At 16.

Whether such conduct is beyond the reach of the relevant states' obligations under international human rights law⁶ is a question very much alive before international courts and human rights mechanisms. Increasing numbers of cases involving alleged human rights violations committed in conflict situations outside the physical territory of the state are being adjudicated in various international fora. These institutions have already developed a varied jurisprudence, accepting extraterritorial application of human rights norms to the different scenarios to differing degrees.

Underlying the controversy are a number of complex legal questions, several of which have eluded definitive resolution. Chief among these questions is whether individuals affected by the conflict are among those whose rights states are obliged to secure. A common feature of human rights treaties is that the scope of beneficiaries⁷ (i.e., those whose rights the state is obliged to respect and ensure) is typically limited to those within a state's territory or subject to its jurisdiction.⁸ Based purely on an ordinary meaning interpretation of the text, it is unclear how this would apply with respect to individuals outside of a state's territory. Even if a juridical basis for extraterritorial application is established, the question of positive obligations must still be resolved.

Answering these questions is further complicated in situations of collective action, giving rise to such questions as whether national contingents of multilateral operations retain their status as organs of their respective sending states. The purpose of this Article is to outline the issues underlying these questions and to provide a

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

7. Use of the term "beneficiaries" is not intended to imply that individual human beings are not rights-holders under human rights law.

8. American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 1, Nov. 22, 1969, O.A.S. T.S. No. 36, entered into force July 18, 1978 [hereinafter ACHR], available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], available at <http://www.ohchr.org/english/law/ccpr.htm>; Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, art. 1, Nov. 4, 1950, Europ. T.S. No. 005 [hereinafter European Convention], available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. While Article 2 of the ICCPR refers to all individuals within a state's territory and subject to its jurisdiction, the Human Rights Committee has interpreted these to be independent grounds for application of the Covenant. See, e.g., Human Rights Committee, *Views of the Human Rights Committee Under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights*, Communication No. 52/1979, ¶ 12.1, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981).

framework for answering them. Part II examines the relationship between human rights law and international humanitarian law. Part III explores the nature of human rights obligations and the various modes of state responsibility in relation to human rights violative conduct. Part IV delineates a framework for understanding the application of human rights law in relation to individuals outside of a state's territory. Part V concludes the analysis by discussing implications of the present legal framework and suggesting principles to guide future jurisprudential development.

II. THE RELATIONSHIP BETWEEN HUMAN RIGHTS LAW AND HUMANITARIAN LAW IN TIMES OF ARMED CONFLICT AND OCCUPATION

Human rights law and humanitarian law (i.e., the law of armed conflict) are separate bodies of international law with distinct modes of application. While human rights law is primarily concerned with the way a state treats those within its domain, "[h]umanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities."⁹ For much of the twentieth century, it remained unclear whether human rights law would apply to a state's conduct during armed conflict or occupation, with some states having taken the position that these situations were governed by the *lex specialis* of humanitarian law, to the exclusion of human rights law. Others took the position that human rights law applied in full alongside humanitarian law. In support of their position, they noted that the ICCPR and regional human rights treaties contain provisions permitting derogation from certain obligations in times "of public emergency which threatens the life of the nation," the inclusion of which implicitly recognizes that human rights law applies to all situations, subject to possible derogation with respect to certain obligations.¹⁰

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

9. Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, Trial Chamber Judgment, ¶ 470 (Feb. 22, 2001). Other distinctions between human rights and humanitarian law include the subjects of obligations, the institutions competent to determine violations, the period of application, the scope of beneficiaries, the locus of application, the range of rights protected, and the sources of obligations.

10. ICCPR, *supra* note 8, at art. 4. While states may derogate from certain human rights obligations when faced with a public emergency, strict limitations apply.

and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”¹¹ This position is shared by the Inter-American Commission on Human Rights (IACHR)¹² and the Human Rights Committee¹³ and has been echoed in political fora as well.¹⁴ As the ICJ clarified in a subsequent opinion, “there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”¹⁵

In situations where these branches of international law overlap, the ICJ,¹⁶ the IACHR,¹⁷ and the Human Rights Committee¹⁸ have all concluded that the application of human rights law in times of armed conflict or occupation must be informed by the standards of humanitarian law. Thus, after noting that the “right not arbitrarily to be deprived of one’s life” is non-derogable, the ICJ explained:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁹

Once it is settled that human rights law does not cease to apply by reason of the inception of a state of armed conflict, it is easy to see how this body of law would apply to a state’s regular forces in a

11. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1995 I.C.J. 95, ¶ 25 (July 8) [hereinafter *Legality of the Threat*].

12. See *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, ¶ 39 (1999) [hereinafter *Coard*] (explaining that “[c]ertain core guarantees apply in all circumstances, including situations of conflict”). Given the pervasive phenomenon of cross-fertilization among international fora, particularly among human rights fora, it is not uncommon to cite jurisprudence from regional fora as precedent for universal regimes. Regional practice is also particularly useful since the regional institutions, the combined membership of which comprises a large proportion of U.N. member states, tend to be more active and thus have broader bases of experience within their spheres of competence.

13. Human Rights Committee, *General Comment 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *Nature of the General Legal Obligations*]; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, ¶ 11, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998).

14. See S.C. Res. 1265, ¶ 4, U.N. Doc. S/RES/1265 (Sept. 17, 1999).

15. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 106 (July 9) [hereinafter *Legal Consequences*].

16. *Id.*

17. See *Coard*, *supra* note 12, ¶ 39.

18. *Nature of the General Legal Obligations*, *supra* note 13, ¶ 11.

19. *Legality of the Threat*, *supra* note 11, ¶ 25.

situation of internal armed conflict. The situation becomes more complex, however, when states operate abroad, especially when acting through the context of collective action or with the assistance of private actors. The next two Parts provide the necessary legal framework for understanding how human rights law applies in these circumstances.

III. THE NATURE OF HUMAN RIGHTS LAW: STATE RESPONSIBILITY, ATTRIBUTION, AND THE OBLIGATION TO ENSURE

Human rights law, embedded in the inter-state structure of the international legal system, generally binds states and states alone. Human rights treaties, such as the ICCPR, place responsibility for “respect[ing] and . . . ensur[ing]” human rights squarely upon states parties.²⁰ Thus, only conduct²¹ attributable to the state can constitute an internationally wrongful act under these treaties, and only the state can be held responsible on the international plane for such violations.

At the same time, states are abstract entities, incapable of acting as such. The conduct of states is the conduct of individuals whose acts or omissions are attributable to the state. Thus, the question of attribution not infrequently arises in disputes before human rights bodies.

As an initial matter, it is important to bear in mind that the question of whether an actor’s conduct is attributable to a state is analytically distinct from the question of whether that conduct is internationally wrongful.²² The rules of attribution form part of the

20. ICCPR, *supra* note 8, at art. 2. While the preambles of the ICCPR and ICESCR both speak of duties of individuals, no normative content for this language has been determined. The idea of duties under human rights law is generally employed in the context of permissible restrictions on rights made through, for example, claw-back clauses. *See id.* at art. 19(3). Finally, although the African Charter on Human and Peoples Rights (ACHPR) sets forth duties in its operative text, these provisions have never been used by the African Commission to find individuals responsible for breaches of the Charter. Indeed, there are no procedures for alleging a breach of these duties. African (Banjul) Charter on Human and Peoples’ Rights, art. 3(2), June 27, 1981, 21 I.L.M. 58, OAU Doc. CAB/LEG/67/3 [hereinafter ACHPR].

21. Such conduct may consist of an action or omission. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 2, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) [hereinafter Responsibility of States]. The rules of attribution set forth in the Articles are declaratory of existing customary international law. *Id.* at arts. 4–11.

22. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says

law of state responsibility, which is codified in the International Law Commission's Articles on State Responsibility.²³ They are secondary rules of international law, as opposed to the primary rules of international law that place obligations upon states. As such, these rules are of a framework nature, generally applicable across the full spectrum of substantive international law and unconcerned with the separate question of whether the conduct at issue conforms to what is required by those substantive norms.

The first rule of attribution is that the conduct of an organ of a state, including that of any individual who is an official part of the machinery of the state²⁴ or of an entity legally empowered by a state to exercise elements of governmental authority,²⁵ is considered to be an act of that state. This would also include situations in which an "organ [is] placed at the disposal of a State by another State," and the "organ is acting in the exercise of elements of the governmental authority" of the former state.²⁶ The conduct of such actors is attributable to the state even where an actor's conduct is *ultra vires*, or beyond the scope of his or her authority, so long as he or she was acting in an official capacity.²⁷

A. Attribution in the Context of Collective Action

While the lines of responsibility are relatively clear when states act in an individual capacity in the course of a conflict, the issue of attribution becomes more complex in the context of collective action, particularly in light of the range of circumstances in which states

nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise.

Report of the International Law Commission on the Work of its 53rd Session, at 81, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Report of the International Law Commission]. This distinction can be particularly difficult to discern in analyzing the extraterritorial application of human rights law. The European Court of Human Rights (ECtHR), as will be discussed below, has at times found the extraterritorial application of a primary rule to be triggered in part by a finding of attribution and has also linked the issue of attribution to the scope of this primary rule.

23. Responsibility of States, *supra* note 21. The Articles, adopted by the International Law Commission in 2001, represent the codification and progressive development of this area of international law. *Id.*

24. *Id.* at art. 4.

25. *Id.* at art. 5.

26. *Id.* at art. 6. This rule is limited to situations in which "the organ, originally that of one State, acts *exclusively* for the purposes of and on behalf of another State and its conduct is attributed to *the latter State alone.*" Report of the International Law Commission, *supra* note 22, at 95 (emphasis added).

27. Responsibility of States, *supra* note 21, at art. 7. See also Velasquez-Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 169-70 (July 29, 1988) [hereinafter *Velasquez-Rodriguez Case*].

may conduct collective operations. States may simply deploy military forces jointly or through coalitions of the willing, which may or may not have separate legal personality. They may also contribute troops to U.N. or North Atlantic Treaty Organization (NATO) forces. Alternatively, they may deploy forces together with other states acting pursuant to a U.N. mandate, while retaining command and control. In these situations, chains of command may or may not be unified, states may or may not retain control over their contributed troops, and the lines of responsibility may be muddled as a result.

Given this complex array of possibilities, the issue of attribution must be assessed in light of the particular features of each operation. In general, the conduct of a state's military forces will be attributable to that state while those forces are acting in their national capacity.²⁸ However, if troops are seconded to an intergovernmental organization or another entity with separate international legal personality, such that they are acting on behalf of that organization or entity²⁹ and are no longer acting on behalf of their state of nationality, then their conduct may no longer be attributable to their state of nationality.³⁰

In reality, the sending states of troops contributed to U.N. or regional peace-keeping operations retain a significant degree of control over their troops. In such situations, the precise scope of the troops' national capacity versus their intergovernmental peace-keeping capacity may be difficult to delineate. Indeed, it may be possible that the troops are operating in both capacities simultaneously, in which case their conduct may be attributable to their sending state as well as to the intergovernmental organization through which they have been deployed.

28. Responsibility of States, *supra* note 21, at art. 7.

29. While the Law of State Responsibility does not address the responsibility of intergovernmental organizations as such, *see id.* at art. 57, the rules discussed in this Part may apply by analogy. At a minimum, intergovernmental organizations are responsible for the conduct of their own organs or officials. *See* Report of the International Law Commission, *supra* note 22, at 361 (“[A]n [intergovernmental] organization possesses separate legal personality under international law, and is responsible for its own acts, i.e., for acts which are carried out by the organization through its own organs or officials.”). Regarding the responsibility of entities other than States in a peace-keeping context, see John Cerone, *Reasonable Measures in Unreasonable Circumstances: a Legal Responsibility Framework for Human Rights Violations in Post-Conflict Territories under UN Administration*, in *THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS* 42 (Nigel White & Dirk Klaasen eds., 2005).

30. This is analogous to the situation referred to in Article 6 of the Articles where the organ of one state is placed “at the disposal of” another state. Report of the International Law Commission, *supra* note 22, at 361. However, this says nothing about the issue of member State responsibility for the conduct of intergovernmental organizations, which is a separate issue.

B. Attribution of the Conduct of Non-State Actors³¹

The conduct of non-state actors may also be attributed to a state under certain circumstances. The conduct of a non-state actor may be imputed to a state when: the actor is in fact acting on the instructions of, or under the direction or control of, a state in carrying out the conduct;³² the actor is exercising elements of governmental authority in the absence or default of official authorities;³³ the conduct is subsequently adopted by a state;³⁴ or the conduct is that of an insurrectional movement that becomes the new government of a state.³⁵

These standards establish a fairly high threshold of state involvement or, alternatively, de facto state action by non-state actors accompanied by state authorization or disengagement. Instances of simple complicity of state organs in the conduct of non-state actors are not sufficient to render such conduct attributable to the state under the traditional rules of attribution.³⁶

C. The Use of Private Contractors

The use of private contractors in the recent conflicts in Iraq and Afghanistan has drawn increased attention to the relationship between the conduct of non-state actors and state responsibility. The rules of attribution contemplate two situations in which the conduct of private contractors may be attributable to the state.

The first is where the contractor is de jure acting on behalf of the state.³⁷ This situation is covered by Article 5 of the Articles on State Responsibility, which applies to entities that are empowered by the

31. The phrase "non-state actor" is here used in a relative sense. It is meant to refer to any individual or entity that is not a de jure organ of the state whose obligations are under consideration. Thus, it may include de jure organs of other states or of intergovernmental organizations.

32. Responsibility of States, *supra* note 21, at art. 8. In the absence of specific instructions, a fairly high degree of control has been required to attribute the conduct to the state. According to the Commentary on the Articles,

Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

Report of the International Law Commission, *supra* note 22, at 104.

33. Responsibility of States, *supra* note 21, at art. 9.

34. *Id.* at art. 11; *see also infra* notes 51–55 and accompanying text.

35. Responsibility of States, *supra* note 21, at art. 10.

36. *See, e.g.,* Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14 (June 27) (holding that provision of training, resources, and logistical support was insufficient for the conduct of the contras to be attributable to the United States).

37. Responsibility of States, *supra* note 21, at art. 5.

law of the state to exercise elements of governmental authority. Thus, the conduct of private contractors that are legally authorized to carry out public functions on behalf of the state will be attributable to the state. These entities essentially become assimilated to organs of the state when they are acting in their public capacity. Thus, their *ultra vires* conduct remains attributable to the state so long as they are acting in that capacity.

The second situation where the conduct of private contractors may be attributable to the state is where the contractor is in fact authorized to act on behalf of the state without the official imprimatur of legal empowerment.³⁸ In such situations, it does not matter whether the contractor is carrying out a public function. However, this situation would be governed by Article 8 of the Articles on State Responsibility, which, as noted above, sets a fairly high threshold for attribution.³⁹ In addition, as there is not necessarily any "official" capacity in such situations, the entity's conduct will not be attributable to the state if such conduct was contrary to the state's instructions.⁴⁰

Thus, as noted above, the law of state responsibility sets a relatively high bar for attribution in these circumstances. However, the law of state responsibility admits the possibility of *lex specialis* where "special rules of international law" may govern.⁴¹

D. Attribution in the Context of Human Rights Law

Special rules may be evolving through the practice of universal and regional human rights mechanisms. These institutions have increasingly found degrees of state involvement not rising to the level established for attribution under the Articles on State Responsibility to be sufficient to render the state responsible for the acts of non-state actors. In the *Loizidou* case, for example, the European Court of Human Rights (ECtHR) found that the Turkish army's "effective overall control" of northern Cyprus was sufficient to impute⁴² the

38. *Id.* at art. 9.

39. *Id.* at art. 8.

40. *But see* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 120 (July 15, 1999) [hereinafter *Tadic*]. In *Tadic*, the ICTY Appeals Chamber took the position that overall control of a hierarchically organized non-state entity may be sufficient to assimilate that entity to a state organ, rendering all of its conduct attributable to the state. *See infra* note 41.

41. Responsibility of States, *supra* note 21, at art. 55.

42. *Loizidou v. Turkey* (merits), 1996-VI Eur. Ct. H.R. 2216, ¶ 49 (1996) [hereinafter *Loizidou* (merits)]. Note, however, that the *Loizidou* court essentially collapsed the issue of imputability with the question of the scope of Turkey's jurisdiction within the meaning of Article 1 of the European Convention. *Id.* ¶ 57.

conduct of the local administration to Turkey.⁴³ In adopting the effective overall control test and finding that it was therefore not necessary to determine whether Turkey actually exercised detailed control over the policies and actions of the authorities of the Turkish Republic of Northern Cyprus (TRNC),⁴⁴ the ECtHR seemed to adopt a lower standard for attribution than that employed by the ICJ in the Nicaragua case⁴⁵ and set forth in Article 8 of the Articles on State Responsibility.⁴⁶

However, an even lower standard for attribution in the context of human rights law may be evolving. A growing corpus of international

It follows from the above considerations that the continuous denial of the applicant's access to her property in northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) and is thus imputable to Turkey.

This of course becomes problematic in the context of peace operations involving collective action. The distinction between these questions was illustrated in *Banković*, in which the court found that it was unnecessary to consider the "alleged several liability of the respondent States for an act carried out by an international organisation of which they are members" because the court had already concluded that it was "not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question." *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶¶ 82, 83 [hereinafter *Banković*].

43. *Loizidou* (merits), *supra* note 42, at ¶ 56.

It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC." It is obvious from the large number of troops engaged in active duties in northern Cyprus . . . that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC."

44. *Id.*

45. Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14 (June 27).

46. This was expressly recognized by the ICTY Appeals Chamber in *Tadic*, in which it departed from the rule formulated by the ICJ for attribution of the conduct of organized, hierarchical groups. While the ICJ had held that the proper standard for attribution was "effective control" over the group, including direction and participation in the particular act to be attributed, *id.* ¶ 115, the ICTY found "overall control" to be sufficient and has not required direction or participation by the state in the specific conduct, *Tadic*, *supra* note 40, ¶ 120. In finding further that the state could be held responsible even for acts contrary to specific instructions, the ICTY Appeals Chamber noted that, generally speaking, "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives." *Id.* ¶ 121. The Appeals Chamber also made clear that it was applying its interpretation of the rules of attribution under the Law of State Responsibility and was thus not relying on a *lex specialis* theory for its departure from the *Nicaragua* judgment. *Id.* ¶¶ 115, 122.

human rights jurisprudence and practice supports the proposition that the conduct of non-state actors may be attributable to the state where state actors are *complicit* in such conduct.⁴⁷ An example of the application of this principle in human rights jurisprudence can be found in the Massacre at Riofrío case of the IACHR. In that case, petitioners alleged that members of the Colombian army collaborated with a group of paramilitaries in the execution of a number of individuals in the municipality of Riofrío, Colombia.⁴⁸ Before analyzing the alleged violations of the standards of the American Convention on Human Rights, the IACHR addressed the question of whether the acts of paramilitaries, otherwise regarded as non-state actors,⁴⁹ could be attributed to the State of Colombia, thus “call[ing] into question its responsibility in accordance with international law.”⁵⁰

The IACHR recalled that the Inter-American Court of Human Rights has noted that “[i]t is sufficient to show that the infringement of the rights recognized in the Convention has been supported or tolerated by the government.”⁵¹ Having found evidence that “agents of the State helped to coordinate the massacre, to carry it out, and, as

47. See, e.g., *Velasquez-Rodriguez Case*, *supra* note 27, ¶ 172; African Commission on Human and Peoples’ Rights, Decision Regarding Communication No. 155/96, ¶ 61 (May 27, 2002) [hereinafter *Decision*]; U.N. Econ. & Soc. Council [ECOSOC], *Report on Questions of Human Rights, Mass Exoduses, and Displaced Persons*, ¶ 30, U.N. Doc. E/CN.4/1998/53/Add.1 (Feb. 11, 1998) (*submitted by the Representative of the Secretary-General, Francis Deng*); see also *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 331, ¶ 81 (2001) [hereinafter *Cyprus*] (noting that “the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State’s responsibility under the Convention.”). However, it should be noted that the ECtHR at times fails to distinguish clearly between human rights violative conduct that is attributable to the state and conduct of non-state actors that the State has failed to prevent or respond to. The lack of distinction may result in part from the formulation of Article 1, containing the single obligation to secure rights, which would encompass both types of conduct, rather than being expressed as two distinct obligations (i.e., to respect and to ensure). There has been a parallel development in refugee law. See e.g., *Islam v. Sec’y of State for the Home Dep’t* [1999] 2 A.C. 629, 631–32 (H.L.) (U.K.).

48. Riofrío Massacre Colombia, Inter-Am. C.H.R., Report No. 62/01, ¶¶ 9–10 (2001) [hereinafter *Riofrío*], available at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Colombia11.654.htm>.

49. Although Colombia has been found responsible for creating and supporting such paramilitary groups as part of its counterinsurgency efforts, the subsequent withdrawal of lawful support from, and even criminalization of, such groups rendered untenable the argument that they were *de jure* state agents or otherwise authorized to exercise elements of governmental authority. See generally Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L.V/II.102, doc. 9 rev. 1 (1999).

50. *Riofrío*, *supra* note 48, ¶ 48.

51. *Id.* It should be noted, however, that the actual conduct of state actors in this case would have met a higher standard than that adopted by the Commission.

discovered by domestic courts, to cover it up," the Commission concluded that the "State is liable for the violations of the American Convention resulting from the acts of commission or omission by its own agents and by private individuals involved in the execution of the victims."⁵²

In analyzing whether the conduct at issue amounted to a violation of the right to life under the American Convention, the IACHR found Colombia to be

responsible for the acts of its agents as well as for those perpetrated by individuals who acted with their complicity to make it possible to carry out and cover up the execution of the victims in violation of their right not to be arbitrarily deprived of their lives, as established in Article 4 of the American Convention.⁵³

It therefore found that the arbitrary deprivation of life perpetrated by paramilitaries acting in complicity with agents of the State constituted a breach of the American Convention by Colombia.⁵⁴

In the context of human rights law, therefore, there appears to be a trend toward recognizing complicity as sufficient for attribution giving rise to a breach of a state's obligation to respect rights. It should be noted, however, that cases in which human rights mechanisms have found complicity sufficient for attribution have generally involved state complicity in the conduct of non-state actors operating *within that state*. It is unclear whether the same standard would apply with respect to non-state actors operating abroad.⁵⁵

E. *Caveat: Positive Obligations and the Attribution of Omission*

As noted above, the question of attribution is separate in principle from the content of international obligations. However, this distinction may become difficult to discern in the context of a failure of a state to fulfill positive obligations in relation to the acts of non-state actors. In such situations, it is essential to distinguish between the issue of whether the conduct of non-state actors is attributable to a state and the separate question of whether a state has failed to fulfill an affirmative obligation, should one be imposed by a primary rule of international law, in relation to the conduct of non-state actors.

For example, in *United States v. Iran*, the ICJ considered three grounds for finding Iran responsible in relation to the embassy takeover and seizure of hostages carried out by a group of militants. First,

52. *Id.* ¶ 52.

53. *Id.* ¶ 57.

54. *Id.* ¶ 83.

55. See *infra* Part IV.C (discussion regarding the level of obligation under human rights law).

it considered whether alleged incitement by Iranian officials accompanied by a failure to protect the embassy was sufficient to render the subsequent take-over of the embassy attributable to Iran. The court found that this was not a sufficient basis for attribution.⁵⁶

The ICJ then considered whether the Iranian government's failure to protect the embassy violated Iran's affirmative obligation to do so under the Vienna Conventions on Diplomatic and Consular Relations. The court found that the failure of the Iranian authorities to take steps to protect the embassy violated this obligation.⁵⁷ It is important to note that the court did not find that the failure to protect the embassy made the conduct of the militants attributable to Iran. The conduct at issue was an omission of the Iranian authorities, i.e., the failure to take steps to protect the embassy. It was this conduct, this failure to act, that was not in conformity with what international law required, and Iran was therefore found to be in violation of its affirmative duty to protect the embassy.

Finally, the court considered whether the subsequent praise of the militants by Iranian officials, together with a request by the Iranian government that the occupation of the embassy be maintained, was sufficient to attribute the continuing occupation of the embassy and detention of the hostages to Iran. Here, the court found that Iran adopted the conduct of the militants as its own, thereby translating the acts of the militants into acts of Iran.⁵⁸ The court explained, "The militants, authors of the invasions and jailors of the hostages, had now become agents of the Iranian State for whose acts the state itself was internationally responsible."⁵⁹

Thus, the ICJ found attributable to Iran the conduct of two groups: the conduct of Iranian officials in failing to protect the embassy and the conduct of the militants in taking over the embassy and detaining the hostages. The ICJ made clear the importance of the distinction between these two findings:

The Iranian authorities' decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.⁶⁰

56. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 4 (May 24).

57. *Id.* at 95.

58. *Id.* at 62-63.

59. *Id.* at 74.

60. *Id.* at 76.

Notwithstanding the distinction drawn by the court, some scholars have conflated these modes of responsibility. In the aftermath of the September 11, 2001 attacks against targets in the United States, some scholars argued that *United States v. Iran* stood for the proposition that acquiescence by a state in the conduct of non-state actors was sufficient to find that conduct attributable to the state. That is clearly not the case under the rules of attribution as elaborated by the International Law Commission (ILC). While a state's responsibility may be engaged in relation to its own conduct—i.e. its own failure to take steps to prevent or respond to the acts of non-state actors—this is quite distinct from finding the conduct of the non-state actors to be attributable to the state. In the context of the 9/11 attacks, a finding that Afghanistan had breached its affirmative duty to take steps to prevent and respond to terrorist activity would give rise to an obligation on the part of Afghanistan to bring its conduct into conformity with its obligations and to make reparations. In contrast, to find that the attacks were attributable to Afghanistan could give rise to the right of self-defense, justifying the use of armed force against Afghanistan.

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

F. *The Obligation to Respect Versus the Obligation to Ensure*

The distinction between attribution of the conduct of non-state actors and a state's responsibility for its omissions in relation to the conduct of non-state actors has special significance in the context of human rights law. Where human rights violative conduct⁶¹ is attributable to a state, the state will have breached an obligation of result, and responsibility will arise immediately. Where such conduct is not attributable to a state, the question of whether human rights law has been violated will be determined by the quality of the state's

61. In this Article, the terms "human rights violative conduct" or "human right violation," do not refer to conduct that necessarily constitutes a violation of human rights law. Instead, they refer to conduct that would constitute an impermissible interference with one or more human rights if such conduct were attributed to the state. Thus, a human rights violation committed by a non-state actor whose conduct is not otherwise attributable to the state would not necessarily constitute a violation of human rights law. See generally *id.* at 8.

response to this conduct, generally governed by a “best efforts” standard.⁶²

As noted above, Article 2(1) of the ICCPR states, “Each State Party to the present Covenant undertakes *to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”⁶³ In its General Comments, the Human Rights Committee has construed this provision to oblige states to protect the rights contained in the Covenant against non-state interference.⁶⁴ In General Comment 31, the Committee stated:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights,⁶⁵ as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish,

62. *Nature of the General Legal Obligations*, *supra* note 13, ¶ 8; *Velasquez-Rodriguez Case*, *supra* note 27, ¶ 172.

63. ICCPR, *supra* note 8 (emphasis added). Customary law may entail a more limited level of obligation. It is unclear, for example, whether customary law requires states to “ensure” rights, as that term has been interpreted by human rights mechanisms. For example, the U.S. Restatement provides that a

state violates international law when, as a matter of policy, it practices, encourages, or condones any of the following:

- (a.) Genocide,
- (b.) Slavery or slave trade,
- (c.) Murder or causing the disappearance of individuals,
- (d.) Torture or other cruel, inhumane, or degrading treatment or punishment,
- (e.) Prolonged arbitrary detention,
- (f.) Systematic racial discrimination, or
- (g.) A consistent pattern of gross violations of internationally recognized human rights.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

By limiting this obligation to situations when the State, “as a matter of policy, . . . practices, encourages, or condones” the violations, this passage may be read to exclude an obligation to take affirmative steps to prevent or respond to violations by non-state actors, an obligation which clearly exists under the major human rights treaties. *Id.*

64. *Id.* § 702 cmts. 6, 10, 16–18, 20–21, 27–28, 31.

65. *Id.* However, note that the Committee here risks conflating the distinction just drawn. The Committee would have been better advised to characterize such conduct as a failure to ensure rights as opposed to a violation of rights.

investigate or redress the harm caused by such acts by private persons or entities.⁶⁶

The regional human rights institutions have similarly interpreted comparable provisions⁶⁷ in their respective treaties.⁶⁸ In the Velásquez-Rodríguez case, the Inter-American Court of Human Rights found that agents who acted under cover of public authority carried out the disappearance of Manfredo Velásquez.⁶⁹ The court stated, however, that

even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.⁷⁰

Earlier in its opinion, the court had surmised, “what is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”⁷¹ This statement reflects the twin obligations to respect and ensure human rights. In either case, the government would be held responsible. In the former case, where the violation has occurred with the support or the acquiescence of the government, the state would be directly responsible for the violative act itself. In the latter case, the state would be responsible for failing to ensure the right through the exercise of due diligence. Thus, human rights violations committed by non-state actors may give rise to state responsibility even when there is no connection between the perpetrators and the state. The obligation to ensure rights under the major human rights treaties requires states to take reasonable, effective steps to prevent and to respond to human rights violations committed by non-state actors.

66. *Id.* at cmt. 31.

67. *See* ACHR, *supra* note 8, at art. 1; European Convention, *supra* note 8, at art. 1. Article 1 of the European Convention requires the High Contracting Parties to “secure” the rights contained in the Convention. European Convention, *supra* note 8. The European Convention has interpreted Article 1 to entail a scope of obligation similar to that encompassed by the phrase “to respect and to ensure” as interpreted by the Human Rights Committee. *Ilaşcu v. Moldova*, 2004 Eur. Ct. H.R. 318, ¶ 313 (2004) [hereinafter *Ilaşcu*]. The ACHPR has gone farther, interpreting Article 1 of the African Charter, which obliges states to “recognize” rights and to “adopt . . . measures to give effect to them,” to entail the obligations to respect, protect, promote, and fulfil the rights contained in the Charter. *Decision, supra* note 47, ¶ 18.

68. *See Velasquez-Rodriguez Case, supra* note 27, ¶ 172; *A v. United Kingdom*, 1998-VI Eur. Ct. H.R. 2692, ¶ 22; *Kiliç v. Turkey*, 2000-III Eur. Ct. H.R. 128, ¶ 110; Human Rights Committee, *Jiménez v. Colombia*, Communication No. 859/1999, ¶¶ 7.2, 9, U.N. Doc. CCPR/C/74/D/859/1999 (Mar. 25, 2002).

69. *Velasquez-Rodriguez Case, supra* note 27, ¶ 172.

70. *Id.* ¶ 182.

71. *Id.* ¶ 173.

As stated by the Inter-American Court in *Velásquez-Rodríguez*:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁷²

The court reasoned that the Article 1(1) obligation to ensure the free and full exercise of the rights recognized by the Convention implied the duty of the state parties to “organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”⁷³ The court elaborated on the states’ duties to “prevent the violation or respond to it,” stating, “the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”⁷⁴ The “due diligence” standard “has been generally accepted as a measure of evaluating a State’s responsibility for violation of human rights by private actors.”⁷⁵

In most cases, due diligence to prevent violations would require legislative prohibition of the violative behavior and enforcement. Legislative prohibition and enforcement alone, however, are not generally successful in preventing violations and are thus insufficient to meet a state’s obligation. States must take effective measures to meet their obligations in this context. This follows from the principle of good faith and has been echoed by various human rights bodies.⁷⁶

72. *Id.* ¶ 172.

73. *Id.* ¶ 166; see also U.N. Econ. & Soc. Council [ECOSOC], *Final Report on the Situation of Human Rights in Afghanistan*, ¶ 20, U.N. Doc. E/CN.4/1995/64 (Jan. 20, 1995) (submitted by the Special Rapporteur, Felix Ermacora).

74. *Velásquez-Rodríguez Case*, *supra* note 27, ¶ 167.

75. U.N. Econ. & Soc. Council [ECOSOC], *Preliminary Report on Violence Against Women, Its Causes and Consequences*, ¶ 103, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994) (submitted by the Special Rapporteur, Radhika Coomaraswamy); see generally John Cerone, *The Human Rights Framework Applicable to Trafficking in Persons and its Incorporation into UNMIK Regulation 2001/4*, 7 Y.B. INT’L PEACE OPERATIONS 43 (2001).

76. See *Velásquez-Rodríguez Case*, *supra* note 27, ¶ 172; *Artico v. Italy*, App. 6694/74, 3 Eur. H.R. Rep. 1, ¶36 (1980); Office of the High Commissioner for Human Rights, Sept. 12, 1994, *CESCR General Comment 5: Persons With Disabilities*, ¶ 11; Human Rights Committee, *General Comment 16: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 11, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

It is for this reason that the Inter-American Court of Human Rights emphasized that states are under a duty to employ

all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.⁷⁷

The court recognized that “[i]t is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.”⁷⁸ In addition, they will vary with the nature of the right violated. However, a list of general measures can be extracted from international practice,⁷⁹ bearing in mind the principles of effectiveness and reasonableness.⁸⁰

Such measures are particularly important in situations where the rule of law has not been firmly established. In such cases, the government may be unable to effectively punish perpetrators,⁸¹ and consequently, must more diligently act to prevent violations by addressing the underlying conditions that lead to them and to respond to them through the provision of reparations.⁸² Thus, the scope of obligation under human rights law clearly reaches the conduct of non-state actors, even when there is no link between the non-state actors and the state. However, it must be recalled that the obligation does not itself extend to the non-state actors such that they become responsible under international law for the violations they perpetrate.

It should be noted that the line between complicity sufficient for attribution and failure to exercise due diligence is highly fact-

77. *Velasquez-Rodriguez Case*, *supra* note 27, ¶ 175.

78. *Id.*

79. Recent practice has included measures such as education and awareness-raising, government condemnation of violations, rehabilitation and support services for victims, training for law enforcement personnel, ratification and implementation of other international human rights instruments, improving access to legal remedies on both the domestic and international planes, implementation of the recommendations of international human rights bodies and mechanisms, protection of complainants and witnesses to violations, promoting research and compiling statistics on violations, publishing reports on the state's responses to violations, providing financial support to organizations that combat discrimination, and changing patterns of socialization that perpetuate discrimination. *See generally* Cerone, *supra* note 75.

80. *See* Dinah Shelton, *Private Violence, Public Wrongs and the Responsibilities of States*, 13 *FORDHAM INT'L L.J.* 1, 23 (1989) (asserting that due diligence requires “reasonable measures of prevention that a well administered government could be expected to exercise under similar circumstances”).

81. *See* Commission on Human Rights, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, ¶ 58, U.N. Doc. E/CN.4/1999/101 (Feb. 26, 1999).

82. *See* U.N. Econ. & Soc. Council [ECOSOC], *Report on Violence Against Women, Its Causes and Consequences*, ¶¶ 37, 141, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (*submitted by* the Special Rapporteur, Radhika Coomaraswamy).

sensitive, and that these two modes of responsibility often blur into each other.⁸³ In addition, state responsibility may be engaged by the state's failure to provide an effective remedy in accordance with its treaty obligations.⁸⁴ It is important to remember that although the same acts may implicate all three types of responsibility, these are separate modes of state responsibility and breaches of independent legal obligations. The application of various related modes of state responsibility is illustrated in the Riofrío case described above. In that case, the IACHR found Colombia responsible for violations of the rights to life and humane treatment perpetrated by paramilitaries acting in complicity with state agents, violation of the right to judicial protection, and failure to ensure the rights protected under the American Convention.⁸⁵

Lastly, as with the evolving jurisprudence finding complicity sufficient for attribution, much of the jurisprudence on responsibility for preventing and responding to violations committed by non-state actors has developed in the context of non-state actors operating within the relevant state's territory. It is unclear to what extent this interpretation of the obligation to ensure rights can be transposed to an extraterritorial context.

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

The great innovation of human rights law was that it regulated the way a state treated those within its jurisdiction. No longer could a state invoke the principle of non-intervention as an impermeable barrier to international scrutiny of its conduct vis-à-vis its own populace. Conversely, the notion that international law took cognizance of and regulated a state's conduct on the territory of other states and toward foreign nationals was established long before the Universal Declaration of Human Rights was adopted.⁸⁶ It is

83. See *Velasquez-Rodriguez Case*, *supra* note 27, ¶ 177 (“[W]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”).

84. Under Article 2(3)(a) of the ICCPR, each state party undertakes “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” ICCPR, *supra* note 8; see also European Convention, *supra* note 8, at art. 13.

85. *Riofrío*, *supra* note 48, ¶19.

86. This included violations perpetrated against foreign nationals in third states. See generally MARJORIE M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* (1937).

therefore somewhat ironic that a great controversy has erupted in recent years as to whether the norms of human rights law may be applied to a state's extraterritorial conduct.⁸⁷

Prior to the development of human rights law, international law was concerned almost exclusively with states' external conduct. Abuses committed within a state's territory were virtually invisible to international law unless the victim was a foreign national and the state of nationality was willing to espouse the claim on the inter-state level. Thus, human rights law filled a serious gap by regulating the way a state treated its own people. Human rights law has developed tremendously over the past few decades, and individuals are receiving increasing levels of protection against abuses committed by their own governments—levels of protection exceeding those afforded under the traditional law of state responsibility for injury to aliens. But is this protection to be afforded only vis-à-vis the state's own citizenry?

Relatively early on, international and regional human rights institutions made clear that human rights law applied to all those within the state's territory, even to those who were not nationals of that state, underscoring the universality of the concept of human rights.⁸⁸ Thus, the heightened protection of human rights law applies irrespective of the nationality of the victim. A separate question is whether this protection applies irrespective of the physical location of the victim vis-à-vis the state. Most of the jurisprudence of human rights bodies, which have greatly elaborated on the content of states' obligations under the various human rights treaties, has been developed in the context of alleged violations committed on the territory of the respective state party. Can these same standards be transposed onto the state's conduct abroad?

To answer this question, it is essential to closely examine the scope of human rights obligations.

A. *The Scope of Human Rights Obligations*

In an effort to bring order to an otherwise chaotic array of judicial (and quasi-judicial) decisions, this Part will provide a framework for delineating the scope of human rights obligations by

87. Although the present analysis at times refers to "extraterritorial conduct," the focus of the analysis is on a state's conduct in relation to individuals outside the state's territory. It may be that a state's conduct occurring on its own territory is alleged to infringe the rights of those situated outside of that territory. See *infra* notes 86–90 and accompanying text.

88. The treaties refer to "all individuals" (ICCPR), "all persons" (ACHR), or "everyone" (European Convention) within the States Parties' jurisdiction. The plain language of the treaties makes clear that they apply to foreign nationals within their territory. This interpretation is bolstered by the fact that certain rights are limited to "citizens." See *e.g.* ICCPR, art. 25.

examining three different parameters: the scope of beneficiaries, the range of rights applicable, and the level of obligation. The scope of beneficiaries refers to those individuals whose rights must be respected and ensured by the relevant state (or other subject of obligation under human rights law).⁸⁹ The range of rights applicable refers to the question of which rights apply in situations where the state may not be bound to recognize the full range of rights provided under treaty or customary law. The level of obligation refers to the degree of positive action a state must undertake to meet its obligations under human rights law. It should be noted that the scope of obligation may vary depending upon whether the relevant source of law is treaty or custom as well as the context in which the state is operating.

B. *Scope of Beneficiaries*

States Parties to the ICCPR are not bound to respect and ensure the rights of all individuals everywhere. For example, it is clear that, absent special circumstances, States Parties are not required to protect the rights of individuals living in other countries from violations perpetrated by the governments of those countries or by non-state actors operating there. As noted above, a common feature of the major human rights treaties is that the scope of beneficiaries is typically limited to those within a state's territory or subject to its jurisdiction. While it was initially unclear whether this language could encompass a state's conduct abroad, the extraterritorial application of human rights treaties has now been clearly established in the jurisprudence of several international judicial and quasi-judicial bodies.

1. The Approach of U.N. and U.N.-Related Institutions

The Human Rights Committee has consistently held that the ICCPR can have extraterritorial application,⁹⁰ clearly demonstrating

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

90. See, e.g., Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) [hereinafter *Concluding Observations: Israel*]; Human Rights Committee, *Comments on United States of America*, ¶ 19, U.N. Doc. CCPR/C/79/Add.50 (Apr. 7, 1995); Human Rights Committee, *Summary record of the 1253rd meeting : Iran*, ¶ 63, U.N. Doc. CCPR/C/SR/1253 (July 30, 1993).

its understanding that a state's jurisdiction extends beyond its territorial boundaries. In particular, it has found that the expressed scope of Article 2(1) "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."⁹¹ In *Delia Saldias de Lopez v. Uruguay*, the Committee held that Uruguay violated its obligations under the Covenant when its security forces abducted and tortured a Uruguayan citizen then living in Argentina.⁹² In line with Article 5(1),⁹³ the Committee reasoned that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."⁹⁴ Initially, it was unclear whether the Committee's holding in *Lopez* was strictly limited to extraterritorial violations committed against a state's own national, that factor providing a solid basis for finding that the victim was subject to the perpetrating state's jurisdiction. However, the Committee's recent practice makes clear that the Covenant applies to a state's conduct abroad, even with respect to its treatment of foreign nationals.

In its General Comment 31, the Human Rights Committee asserted that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."⁹⁵ Similarly, after affirming that the "enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party,"⁹⁶ the Committee noted,

[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a

91. Communication No. 52/1979, at 88, ¶ 12.3, U.N. Doc. CCPR/C/OP/1 (1984) [hereinafter *Lopez*]; see generally John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUR. J. INT'L L. 469 (2001).

92. *Lopez*, *supra* note 91, ¶ 13.

93. Article 5(1) of the ICCPR states, "[n]othing in the present Covenant may be interpreted as implying . . . any right to engage in any activity . . . aimed at the destruction of any of the rights and freedoms recognized herein." ICCPR, *supra* note 8, at art. 5.

94. *Lopez*, *supra* note 91, ¶ 12.3.

95. *Nature of the General Legal Obligations*, *supra* note 13, ¶ 10.

96. *Id.*

State Party assigned to an international peace-keeping or peace-enforcement operation.⁹⁷

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

Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.⁹⁸

The Committee's position was endorsed in part by the ICJ in its 2004 Advisory Opinion on Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory (Israeli Wall Opinion).⁹⁹ In that case, the ICJ opined that the ICCPR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) applied to Israel's conduct in the occupied territories.¹⁰⁰

In particular, after citing the position of the Human Rights Committee, the ICJ found "that the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."¹⁰¹ However, in contrast to the Human Rights Committee's broad reference to conduct by authorities "that affect the enjoyment of rights," the court employed the more specific, and arguably circular, formulation "acts done . . . in the exercise of its jurisdiction."¹⁰² It seems that the ICJ may have intended to establish a narrower standard in this respect. The court did not cite General Comment 31 or its "power or effective control standard," even though that Comment was adopted by the Human Rights Committee several months before the ICJ rendered its opinion.¹⁰³

The ICJ did not provide specific guidance as to what constitutes acts done by a state in the exercise of its jurisdiction. While the court clearly regarded this standard as having been met in the situation of

97. *Id.*

98. *Concluding Observations: Israel, supra* note 90, ¶ 11.

99. *Legal Consequences, supra* note 15, ¶ 109.

100. *Id.* ¶¶ 111–13.

101. *Id.* ¶ 111.

102. *Id.*; *Concluding Observations: Israel, supra* note 90, ¶ 11.

103. *Nature of the General Legal Obligations, supra* note 13 (adopted on May 26, 2004).

occupation, the court did not reject the Committee's broader interpretation. Indeed the court cited *Lopez*, referring to the arrests in those cases as exercises of jurisdiction.¹⁰⁴ Thus, it would appear that an exercise of jurisdiction for the purpose of applying the ICCPR does not require as a pre-condition territorial control.

In contrast, the ICJ seemed to require territorial control to trigger application of the ICESCR. After noting that Article 2 of the ICESCR does not contain a provision circumscribing the scope of States Parties' obligations,¹⁰⁵ the ICJ acknowledged that the rights enumerated therein are "essentially territorial."¹⁰⁶ Nonetheless, the court found that "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction."¹⁰⁷ Here the court appears to limit more narrowly the circumstances in which the ICESCR would apply extraterritorially. Rather than referring simply to the exercise of jurisdiction, the court seems to require the exercise of territorial jurisdiction, which implies control over territory and not just over individuals.

As for the CRC, the court simply noted Article 2 of the CRC, which provides that "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .," and found that the "Convention is therefore applicable within the Occupied Palestinian Territory."¹⁰⁸ Given the absence of any separate analysis of the CRC, it is unclear what standard the court applied in finding that Convention applicable.¹⁰⁹

The ICJ again addressed the issue of extraterritorial application of human rights law in its 2005 judgment in *Democratic Republic of*

104. *Legal Consequences*, *supra* note 15, ¶ 109.

105. It should be noted, however, that the ICESCR imposes an obligation upon State Parties to take steps, "individually and through international assistance and cooperation," toward the progressive realization of the rights contained in the Covenant. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), art. 2, ¶ 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Jan. 3, 1976). To the extent this implies an obligation on state parties to work jointly toward realization of the Covenant rights for all people (or at least all those individuals within State Parties to the Covenant), the ICESCR may incorporate an element of extraterritoriality.

106. *Legal Consequences*, *supra* note 15, ¶ 112.

107. *Id.* The court cited with approval the finding of the Committee on Economic, Social, and Cultural Rights that the "State party's obligations under the Covenant apply to all territories and populations under its effective control." *Id.* While this may be interpreted to apply to effective control over either territories or populations, it is difficult to conceive of effective control of a population, as opposed to certain individuals, without territorial control.

108. *Id.* ¶ 113.

109. Given the similarity between Article 2 of the CRC and Article 2 of the ICCPR, it may be surmised that the court applied the same standard to both. It should be noted, however, that the CRC contains economic and social rights as well as civil and political rights. *See infra* note 121 and accompanying text.

Congo (DRC) v. Uganda.¹¹⁰ This is the first time the issue has been addressed by the court in a contentious case. In *Congo v. Uganda*, the court found that the conduct of Ugandan forces on Congolese territory gave rise to numerous violations of Uganda's obligations under several human rights treaties, including the ICCPR, the African Charter on Human and Peoples' Rights (ACHPR), and the CRC.¹¹¹

To address the DRC's allegations that Uganda had violated international humanitarian law and human rights law, the ICJ found it "essential" to first "consider the question as to whether or not Uganda was an occupying Power in the parts of Congolese territory where its troops were present at the relevant time."¹¹² After concluding that Uganda was an occupying power in Ituri (a district within the DRC), the court found that Article 43 of the 1907 Hague Regulations required Uganda "to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC."¹¹³ The court found that this obligation "comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party."¹¹⁴

The court then proceeded to examine the DRC's submissions concerning alleged violations by Uganda. After noting that "it is not necessary for the Court to make findings of fact with regard to each individual incident alleged," the court considered a number of U.N. and NGO reports documenting abuses committed by or with the acquiescence of Ugandan forces.¹¹⁵ The court considered that

it ha[d] credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian

110. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. No. 116 (Dec. 19), available at <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm> [hereinafter *Armed Activities*].

111. *Id.* ¶ 219.

112. *Id.* ¶ 166.

113. *Id.* ¶ 178.

114. *Id.* Article 43 of the 1907 Hague Regulations states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Convention respecting the laws and customs of war on land art. 43, Oct. 18, 1907, 36 Stat. 2277. It thus appears that the court found international human rights law incorporated into the law of occupation through Article 43's reference to "the laws in force in the country."

115. *Armed Activities*, *supra* note 110, ¶ 205.

buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.¹¹⁶

While it is unclear whether the phrase “in the occupied territories” modifies all of the enumerated abuses, it seems likely that it refers only to the final clause, “did not take measures to ensure.” The documentation referred to by the court included massive numbers of abuses committed in various parts of the DRC, including areas beyond the territory in which the court had found Uganda to be an occupying power.

The court then considered which rules and principles of human rights and humanitarian law were relevant in the instant case. In doing so, it recalled that in its Israeli Wall Opinion, the court had “concluded that international human rights instruments are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,’ particularly in occupied territories.”¹¹⁷ It then found that the ICCPR, the ACHPR, the CRC, and the CRC’s Optional Protocol on Involvement of Children in Armed Conflict, as well as a number of international humanitarian law instruments were “applicable, as relevant, in the present case.”¹¹⁸ In view of its generalized factual findings, the court found that Uganda had breached each of these treaties.¹¹⁹ The court thus concluded:

Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.¹²⁰

Although the characteristically imprecise language employed by the ICJ makes it difficult to draw clear conclusions, there appear to have been three significant developments in the court’s jurisprudence. First, the court seemed to find two separate bases for the application of human rights law to the conduct of Ugandan forces operating in the DRC. In addition to reiterating the rule that human rights treaties are applicable “in respect of acts done by a state in the exercise of its jurisdiction outside its own territory,” the court also

116. *Id.* ¶ 211.

117. *Id.* ¶ 216.

118. *Id.* ¶ 217.

119. *Id.* ¶ 219.

120. *Id.* ¶ 220.

found human rights law to be incorporated into the humanitarian law of occupation.¹²¹

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

The third significant development is that the court seems to indicate that there may be a single standard for all human rights treaties.¹²² In the Israeli Wall Opinion, the court had found that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."¹²³ While it also found the ICESCR and CRC applicable in that opinion, it seemed to adopt a slightly higher standard for the ICESCR, and possibly also for the CRC, as noted above. However, in restating this rule in *Congo v. Uganda*, the court did not refer specifically to the ICCPR and stated instead that "*international human rights instruments* are applicable 'in respect of acts done by a State in the exercise of its jurisdiction.'"¹²⁴ It then appears to employ this standard in finding applicable the ICCPR, the CRC and its Optional Protocol, and the

121. *Id.* ¶ 217. This of course begs the question of whether it would matter if Uganda was not a party to the relevant human rights treaties. If "laws in force in the country" includes human rights treaty obligations of the occupied state, then it would seem that it would not matter if the occupying power was itself a party to the those treaties as long as the occupier was bound by the rule contained in Article 43 (which the court found to be binding on the Parties as customary law). In such a case, the occupier would be bound to observe those human rights obligations only within the occupied territory. One could perhaps argue that this interpretation would be limited to monist countries, where there would be a closer relationship between treaties binding *upon* and "laws in force *in*" the state. However, this would seem an inappropriate distinction to make as a matter of international law (i.e., to find that the content of the state's obligation turned upon the relationship between that state's municipal law and its international obligations).

122. This would not likely apply to suppression treaties such as the Convention Against Torture (CAT) to the extent such treaties could fall within the category of "international human rights instruments," due to the different nature and mode of operation of such treaties. The scope limitation in CAT serves a different function and different parts of that treaty are subject to different scope limitations.

123. *Legal Consequences*, *supra* note 15, ¶ 111.

124. *Armed Activities*, *supra* note 110, ¶ 216.

ACHPR. Both the ACHPR and CRC provide for economic and social rights as well as civil and political rights.¹²⁵

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

2. The Approach of Regional Human Rights Systems

Regional human rights institutions¹²⁶ have generated more extensive jurisprudence on this issue. Both the Inter-American and European human rights bodies have found that regional human rights treaties apply to extraterritorial conduct.

a. The Inter-American Commission on Human Rights

The IACHR has applied a relatively low threshold for extraterritorial application of Inter-American human rights law, simply requiring control over the individuals whose rights have been violated. In *Coard et al. v. the United States*, the Commission examined allegations that the military action led by U.S. armed forces in Grenada in October 1983 violated a series of norms of international human rights and humanitarian law. In the course of its analysis, the Commission found that the phrase "subject to its jurisdiction"¹²⁷ "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."¹²⁸ The

125. The court did not include the ICESCR in the list of applicable treaties, despite the fact that both the DRC and Uganda are parties. The DRC did not expressly allege violations of the ICESCR by Uganda. See *Armed Activities*, *supra* note 110.

126. The ACHPR does not contain language limiting the scope of application of the Charter to the territory or jurisdiction of State Parties. Article 1 of the ACHPR simply states that "parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them." ACHPR, *supra* note 20, at art. 1.

127. *Coard*, *supra* note 12, ¶ 37. While the Declaration does not contain language expressly narrowing the scope of its application to individuals "subject to the jurisdiction" of the State Party, the Commission read in this requirement. *Id.* "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." *Id.*

128. *Id.* This standard was recently reaffirmed in a letter from the Inter-American Commission to the U.S. government indicating precautionary measures in respect of detainees at Guantanamo Bay, Cuba. JUAN E. MÉNDEZ, DETAINEES IN

Commission further stated, "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."¹²⁹

The IACHR made clear that neither the victim's nationality nor geographic location were decisive and set forth the criteria of authority and control over the victim.¹³⁰ The petitioners in this case, having been taken into custody by U.S. forces, were clearly under the authority and control of the United States.

Notwithstanding the broad language employed by the Commission, it could be argued that certain facts in this case limit the reach of its holding. Since the petitioners were placed in detention on U.S. military vessels, a finding of jurisdiction could be grounded on this fact alone.¹³¹ Similarly, petitioners had alleged that at the time they were arrested, the United States had already consolidated its control over Grenada. It could thus be argued that it was this territorial control that enabled the Commission to find that the petitioners were under the authority and control of the United States. However, the Commission made no mention of either of these facts in its analysis. A contemporaneous case confirms that this was not an oversight.

In *Alejandro v. Cuba*, petitioners alleged that a military aircraft belonging to the Cuban Air Force shot down two unarmed civilian light airplanes resulting in the deaths of the four occupants of those airplanes.¹³² The IACHR examined the evidence and found that the victims died as a consequence of direct actions taken "by agents of the Cuban State in international airspace."¹³³

In determining whether the victims were within the jurisdiction of Cuba, the Commission again cited the standard of authority and control.¹³⁴ In this case, the victims were clearly not on Cuban territory nor on any territory over which Cuba had any control, they were not in a Cuban vessel, and their bodies were not subsequently

GUANTANAMO BAY, CUBA; REQUEST FOR PRECAUTIONARY MEASURES (2002), available at <http://www.umn.edu/humanrts/cases/guantanamo-2003.html> (citing string of cases).

129. *Coard, supra* note 12, ¶ 37.

130. *Id.* ¶¶ 38–44.

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

132. *Alejandro v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L.V/II.106, doc. 3 rev. ¶ 1 (1999) [hereinafter *Alejandro*].

133. *Id.* ¶ 25.

134. *Id.* ¶ 23. The Commission's language was almost identical to that used in *Coard, supra* note 12, ¶ 37.

brought within Cuban territory.¹³⁵ Further, while two of the victims were Cuban-born, the other two were born in the United States.¹³⁶ Thus, nationality could not serve as the jurisdictional link between the victims and Cuba. Authority and control in this case had to be found solely in the relationship between the agents of Cuba and the victims in the circumstances at the time of the incident.

The Commission found no evidence of any dialogue between Cuban armed forces and the victims, stating, “[a]t no time did [they] notify or warn the civilian airplanes, try to use other interception methods, or give them an opportunity to land.”¹³⁷ Nor were there any indicia of control other than the simple fact that the Cuban military aircraft had the victims in their cross-hairs. As noted by the Commission, their “first and only response was the intentional destruction of the civilian airplanes and their four occupants.”¹³⁸ Nonetheless, the Commission found this to constitute “conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots . . . under their authority,”¹³⁹ and the Commission therefore held that the victims were within the jurisdiction of Cuba for the purpose of applying Cuba’s human rights obligations.¹⁴⁰

135. Their airplanes were U.S.-registered.

136. *Alejandre*, *supra* note 132, ¶¶ 9–11.

137. *Id.* ¶ 8.

138. *Id.*

139. *Id.* ¶ 25. It may be worth noting that the Commission used only the term “authority” in this context and did not expressly find the victims to be under the “control” of Cuba. This may be interpreted to permit extraterritorial application in situations where individuals are subject to a state’s authority but are not necessarily within its control. Further, in the immediately preceding sentence, when restating the standard for extraterritorial application, the Commission stated: “The fact that the events took place outside Cuban jurisdiction does not limit the Commission’s competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise *power and authority* over persons outside national territory, the state’s obligation to respect human rights continues.” *Id.* (emphasis added). Again, the Commission makes no mention of control. This leaves open the question of what constitutes placing individuals “under their authority.” It seems in this case that the agents of the Cuban State placed the victims under their authority by intentionally shooting down their plane. In other words, the human rights violative act itself constituted the relationship necessary to establish that the victims were within Cuban jurisdiction for the purposes of applying Cuba’s human rights obligations. Following this line of reasoning, any intentional infringement by a state of the rights of individuals anywhere would be sufficient to bring those individuals within the jurisdiction of that state for the purpose of applying its human rights obligations. As noted below, the ECtHR has considered such a conclusion to render “superfluous and devoid of any purpose” the requirement that individuals be “within the jurisdiction” of State Parties. *Banković*, *supra* note 42, ¶ 75. The flaw in the court’s reasoning is its failure to distinguish between negative and positive obligations. See discussion *infra* Part IV.A.2.b.

140. *Alejandre*, *supra* note 132, ¶ 25.

Thus, the IACHR has established a relatively low threshold for the extraterritorial application of Inter-American human rights law. Indeed, it is hard to imagine a situation where human rights violations perpetrated by a state agent would fail to meet this test.¹⁴¹

b. The European Commission and Court of Human Rights

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

The ECtHR has set forth various standards for determining whether individuals are within the jurisdiction of Contracting States (i.e., States Parties) for the purpose of applying the European Convention on Human Rights to their conduct abroad. It has found the Convention to apply where a Contracting State exercises effective overall control of territory beyond its borders,¹⁴² as well as in certain other limited circumstances where agents of that state carry out a governmental function on the territory of another state.¹⁴³

The early jurisprudence of the European Commission of Human Rights seemed to correspond more closely to the approach of the Human Rights Committee. In the case of *W.M. v. Denmark*, in which a German citizen alleged human rights violative conduct on the part of the Danish ambassador in Berlin, the European Commission found it clear that

authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.¹⁴⁴

While it ultimately did not find a violation in that case, the breadth of the European Commission's language closely paralleled that employed by the Human Rights Committee in *Lopez*.

The ECtHR initially appeared to employ a similarly broad understanding of jurisdiction. In the case of *Drozd v. France*, the court noted that "[t]he term 'jurisdiction' is not limited to the national

141. However, the IACHR recently rejected a petition that conduct of U.S. forces in Iraq violated Inter-American human rights law. The Commission did not provide reasons for rejecting the petition, but it may have been due to the fact that the alleged violations occurred outside of the region. See *infra* Part IV.A.2.c.

142. See *Cyprus*, *supra* note 47, ¶¶ 80–81.

143. See generally *Banković*, *supra* note 42. As noted below, the jurisprudence of the ECtHR is presently in flux with regard to this issue. Recent cases seem to establish a lower standard.

144. App. No. 17392/90, 15 Eur. H.R. Rep. CD28, ¶ 1 (1993) [hereinafter *W.M.*].

territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.”¹⁴⁵ In that case, the applicant contended that French and Spanish judges who had been seconded to Andorran courts violated their rights under the Convention.¹⁴⁶ The court began its analysis of whether the applicants came within the jurisdiction of France or Spain by restating the question as one of attribution:¹⁴⁷ “The question to be decided here is whether the acts complained of by Mr. Drozd and Mr. Janousek can be attributed to France or Spain or both, even though they were not performed on the territory of those States.”¹⁴⁸ Although it ultimately found that the conduct of the judges was not attributable to France or Spain, the ECtHR implied that had it been attributable, individuals over whom the judges exercised authority would have been within the jurisdiction of those countries.

However, in later cases, the ECtHR seemed to take a somewhat different approach. In a series of cases relating to the Turkish occupation of northern Cyprus, the court began to place greater emphasis on territorial control. In *Loizidou v. Turkey* (preliminary objections), the court began its analysis by recalling “that, although Article 1 . . . sets limits on the reach of the Convention, the concept of ‘jurisdiction’ under this provision is not restricted to the national territory of the High Contracting Parties.”¹⁴⁹ It then proceeded to identify situations in which those outside of a state’s territory could still be deemed within the jurisdiction of that state.

The ECtHR first mentioned cases, such as *Soering*, in which the extradition or expulsion of a person by a Contracting State could give rise to a human rights violation “and hence engage the responsibility of that State under the Convention.”¹⁵⁰ It should be noted, however, that this is not an example of extraterritorial application as the individual alleging a violation was actually within the territory of the

145. 240 Eur. Ct. H.R. (ser. A), ¶ 91 (1992) [hereinafter *Drozd*].

146. *Id.*

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

148. *Id.*

149. 310 Eur. Ct. H.R. (ser. A), ¶ 62 (1995) [hereinafter *Loizidou* (preliminary objections)].

150. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), ¶ 91 (1989).

state, as the court subsequently recognized in the *Banković* case discussed *infra*.¹⁵¹

The court then identified a second category, recalling that the “responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.”¹⁵² The court then set forth a third situation in which the Convention could be found to apply extraterritorially:

[T]he responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.¹⁵³

The court then noted that “the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops” and that “it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.”¹⁵⁴ The court found that “such acts are capable of falling within Turkish ‘jurisdiction’ within the meaning of Article 1 . . . of the Convention.”¹⁵⁵ In its judgment on the merits, the court found that this extraterritorial jurisdiction had an extremely broad scope. The court first found that the conduct of the TRNC was attributable to Turkey. This finding enabled the court to view Turkish jurisdiction as encompassing all “[t]hose affected by [the] policies or actions” of the TRNC.¹⁵⁶

As noted above, in finding the conduct of the TRNC attributable to Turkey, the court employed a somewhat lower standard than that set forth in the ILC Articles. It was unclear at first whether this lower standard was being employed solely to determine attribution for the purpose of establishing Turkish jurisdiction over the territory of northern Cyprus or whether attribution was being found in the strict sense to hold that the conduct of the TRNC was conduct of Turkey.

The subsequent case of *Cyprus v. Turkey* confirmed that the ECtHR was referring to attribution in the strict sense. In that case, the court noted that the responsibility of Turkey, “[h]aving effective

151. See *infra* notes 156–63 and accompanying text.

152. *Loizidou* (preliminary objections), *supra* note 149, ¶ 62 (citing *Drozd, supra* note 145).

153. *Id.*

154. *Id.* ¶ 63.

155. *Id.* ¶ 64.

156. *Loizidou* (merits), *supra* note 42, ¶ 56.

overall control over northern Cyprus, . . . cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.”¹⁵⁷ This approach enabled the court to find that “Turkey’s ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.”¹⁵⁸ In adopting this approach, the court essentially assimilated the TRNC to an organ of the Turkish State and the territory of northern Cyprus to Turkish territory for the purpose of applying the Convention.

Although the ECtHR in the northern Cyprus cases focused its attention on the issue of territorial control, this did not seem to narrow in any way the other situations in which the European human rights institutions had found the European Convention to apply extraterritorially, in particular the exercise of authority standard set forth in *W.M. v. Denmark*. However, a subsequent, highly politically-charged case seemed to diminish the scope of the rule set forth by the European Commission in *W.M. v. Denmark*. In *Banković*, the court found that the applicants, relatives of individuals killed in the course of the NATO bombing of Serbia, were not within the jurisdiction of the respondent states.¹⁵⁹ In rejecting the applicants’ claims as being beyond the jurisdiction of Contracting States, the court synthesized its prior holdings and set forth the various situations in which it found the European Convention to apply extraterritorially.

The court noted that the European Convention would apply to a state’s conduct abroad

when the . . . state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercise[s] all or some of the public powers normally to be exercised by that government.¹⁶⁰

157. *Cyprus*, *supra* note 47, ¶ 77.

158. *Id.*

159. *See generally Banković*, *supra* note 42.

160. *Id.* ¶ 71. The court here seems to refer to two standards. The first—effective control of territory—seems to be a reiteration of the rule expressed in the northern Cyprus cases. The second seems intended to encompass a standard implicit in *Drozd*. Had the conduct of the judges in that case been attributable to France or Spain, it is likely that the court would have found the Convention to apply. Note however, that the court in that case simply stated that the “responsibility [of Contracting States] can be involved because of acts of their authorities producing effects outside their own territory.” *Drozd*, *supra* note 145, ¶ 91. Similarly, in *Loizidou*, the court reiterated that the “responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside

To these two situations—the exercise of public powers either through effective control of territory or with consent—the court added “other recognised instances of the extra-territorial exercise of jurisdiction by a state includ[ing] cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state.”¹⁶¹

The court did not restate the broad exercise of authority standard of *W.M. v. Denmark*. Presumably, the court intended *W.M.* to be encompassed as a case “involving the activities of its diplomatic or consular agents abroad.”¹⁶² However, this would seem to be a narrower interpretation of the standard applied in that case. In *W.M.*, the European Commission found it clear that “that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property.”¹⁶³ This seems to imply that it was not limited to acts of diplomatic or consular agents.

The ECtHR expressly rejected the possibility, implicit in the IACHR’s *Alejandro* decision, that a Contracting State’s jurisdiction would follow the state’s conduct, such that an infringement of rights committed against anyone anywhere in the world (or at least within the respective region) would be sufficient to bring that individual within the state’s jurisdiction for the purposes of applying its human rights obligations.¹⁶⁴ The court noted that such an approach would render “superfluous and devoid of any purpose” the Article 1 language “within their jurisdiction.”¹⁶⁵

Thus, the court seemed to significantly narrow the scope of extraterritorial application of the European Convention. The exercise of power and authority over persons would not be sufficient. The court seemed to require territorial control (through military occupation), the performance of a public function with the permission¹⁶⁶ of the territorial state, or that the particular type of

national boundaries, which produce effects outside their own territory.” *Loizidou* (preliminary objections), *supra* note 149, ¶ 62 (citing *Drozdz*, *supra* note 145). In *Banković*, the court recasts this principle in narrower terms.

161. *Banković*, *supra* note 42, ¶ 73.

162. *Id.*

163. *W.M.*, *supra* note 144, ¶ 1 (emphasis added).

164. *Banković*, *supra* note 42, ¶ 75.

165. *Id.*

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

jurisdiction exercised be recognized in international law (i.e., cases involving diplomats or acts on vessels of the Contracting State).

Ultimately, the court found that none of the recognized standards for extraterritorial application were applicable in *Banković*.¹⁶⁷ The NATO states were not in effective control of the territory. Nor were they exercising a public power normally exercised by the Federal Republic of Yugoslavia with its permission. Finally, their conduct was not recognized as an exercise of jurisdiction by any other rule of international law.

However, the court's recent judgments show a more fluid approach to extraterritorial application of the European Convention, projecting a trend toward convergence (or re-convergence) with the approach of the Human Rights Committee and IACHR. In *Ilaşcu v. Moldova*, the ECtHR was faced with an Application alleging breaches of the Convention by both Moldova and Russia arising out of human rights violations occurring in Transdniestria, a territory located within the internationally recognized borders of Moldova but over which Moldova had no effective control.¹⁶⁸ Russia, however, was alleged to have indirect control over the events occurring within the territory.¹⁶⁹ Most of the alleged human rights violations stemmed from acts of authorities of the Moldavian Republic of Transdniestria (MRT), a self-proclaimed government that is not recognized by the international community.

In analyzing the responsibility of Moldova and Russia in relation to the alleged violations, the court first had to determine whether the victims came within their respective jurisdictions. In determining the scope of Moldova's jurisdiction, the court began by recalling its earlier jurisprudence on the concept of jurisdiction. It noted that "jurisdiction is presumed to be exercised normally throughout the State's territory."¹⁷⁰ It then found:

This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned, to acts of war or rebellion, or to the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.¹⁷¹

To determine whether this was the case, the court would have to "examine on the one hand all the objective facts capable of limiting

Communication No. R.12/52, at 176, ¶ 12.3, U.N. Doc. Supp. No. 40 (A/36/40) (1981) (emphasis added).

167. *Banković*, *supra* note 42, ¶ 75.

168. *Ilaşcu*, *supra* note 67, ¶ 3.

169. *Id.*

170. *Id.* ¶ 312.

171. *Id.* (citations omitted).

the effective exercise of a State's authority over its territory, and on the other the State's own conduct."¹⁷² After recalling that the "undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with enjoyment of the rights and freedoms guaranteed, positive obligations,"¹⁷³ the court noted that these positive obligations "remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take."¹⁷⁴

The court next summarized its earlier jurisprudence recognizing that "in exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention."¹⁷⁵ It began with discussion of the northern Cyprus cases, recalling the effective control of an area standard, as well as the rules of attribution developed in those cases. The court then referred to "acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction," citing the example of extradition to a state "where there are substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment."¹⁷⁶ At the same time, the court recalled established rules of state responsibility, including the principles relating to *ultra vires* conduct by state agents and the continuity of internationally wrongful acts.

The court then, in a discussion that seems to blur the issue of jurisdiction with the merits of the case, sought to determine "whether Moldova's responsibility is engaged on account of either its duty to

172. *Id.* ¶ 313.

173. *Id.*

174. *Id.*

175. *Id.* ¶ 314.

176. *Id.* ¶ 317. Interestingly, while the *Banković* court tried to place the extradition cases outside the realm of extraterritorial application (by noting that the individual being extradited was physically present within the territory of the relevant Contracting State at the time of extradition), the court in *Ilaşcu* placed them in the context of "acts of Contracting States performed outside their territory or which produce effects there" amounting to exercises of "jurisdiction." *Id.* ¶ 314. The court also formulated more broadly the rule applicable to extradition cases, stating, "A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction." *Id.* ¶ 317. This broad formulation of the rule does not rely on the physical presence of the victim within the state's territory, and extradition is cited as just one example of application of this rule. This is one of many signals in *Ilaşcu* that the court was attempting to back away from the rigidity of its *Banković* decision.

refrain from wrongful conduct or its positive obligations under the Convention.”¹⁷⁷ The court noted that

even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.¹⁷⁸

After discussion of the concept of positive obligations, the court

conclude[d] that the applicants [were] within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention but that its responsibility for the acts complained of, committed in the territory of the “MRT,” over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention.¹⁷⁹

The ECtHR then analyzed the relevant conduct of the Moldovan government and further concluded that “Moldova’s responsibility is capable of being engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001.”¹⁸⁰ The court then considered whether the applicants “come within the jurisdiction of the Russian Federation.”¹⁸¹ It began by examining the events in Transdniestria prior to Russia’s ratification of the ECtHR. After analyzing the link between the Russian Federation and the MRT, the court found that the “Russian Federation’s responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting.”¹⁸²

Noting that Russian soldiers participated in the initial arrest and detention of the applicants within Transdniestria,¹⁸³ the court found that “on account of the above events the applicants came within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention, although at the time when they occurred

177. *Id.* ¶ 322.

178. *Id.* ¶ 331.

179. *Id.* ¶ 335. This, of course, is not an example of extraterritorial application since the victims were within the territory of Moldova; however, it is relevant to the court’s jurisprudence on extraterritoriality.

180. *Id.* ¶ 352.

181. *Id.* ¶ 376. Interestingly, the court then rephrased its inquiry, stating that “the Court’s task is to determine whether . . . the Russian Federation can be held responsible for the alleged violations.” *Id.* ¶ 377. The court here blurs the issue of responsibility with the issues of attribution as well as the scope of the state’s jurisdiction. See *infra* note 246 and accompanying text.

182. *Ilaşcu, supra* note 67, ¶ 382.

183. *Id.* ¶ 383.

the Convention was not in force with regard to the Russian Federation.”¹⁸⁴ The court continued, explaining:

This is because the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transdnestrian police and regime, and the subsequent ill-treatment inflicted on them by those police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime.¹⁸⁵

In a somewhat circular analysis, the court here referred to the responsibility of the Russian Federation, and implied that it is this responsibility¹⁸⁶ that brings the applicants within the jurisdiction of the Russian Federation. The court then stated, “In addition, regard being had to the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them.”¹⁸⁷ Thus, the court seems to supplement its finding of responsibility with a *Soering*-type analysis, even though unlike *Soering*, the applicants were not on Russian territory.¹⁸⁸

The court seems to indicate that the complicity of Russian agents in acts of the MRT authorities rendered the conduct of those authorities attributable to Russia, opining that “all of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities' collaboration with that illegal regime, are capable of engaging responsibility for the acts of that regime.”¹⁸⁹ Since this conduct was all pre-ratification, the court then queried “whether that responsibility remained engaged and whether

184. *Id.* ¶ 384.

185. *Id.*

186. It is unclear whether in using the term responsibility the court is referring to responsibility under the Convention or to the analytically distinct issue of attribution of conduct. See *infra* note 246 and accompanying text. If the former, then the court's formulation is truly circular. If the latter, then the court seems to imply that attribution to the state of human rights violative conduct is sufficient to bring the victims within the jurisdiction of that state for purposes of applying the Convention. This would be in direct contradiction with *Banković*. However, the court may implicitly be relying on the control over Transdnestrian territory exercised by the MRT, the conduct of which is attributable to the Russian Federation. This would align the present case more closely with the northern Cyprus line of cases. However, in that case, it was the control of the territory by Turkish forces that rendered the conduct of the TRNC attributable to Turkey.

187. *Ilaşcu*, *supra* note 67, ¶ 384.

188. See *Soering*, *supra* note 150.

189. *Id.* ¶ 385. Again, the phrase “capable of engaging responsibility for the acts of that regime” seems to indicate that the conduct of that regime is attributable to the Russian Federation. However, the court's formulation makes this unclear.

it was still engaged at the time of the ratification of the Convention by the Russian Federation.”¹⁹⁰

The court examined the continuing links between Russia and the MRT, and concluded,

All of the above proves that the “MRT,” set up in 1991–1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.¹⁹¹

In referring to the MRT, the court appears to refer to the regime, as opposed to the territory.¹⁹² Thus, the court seems to have found that the MRT, as an administration, was under the effective authority of the Russian Federation.

That being the case, the court found that there was

a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants’ fate, as the Russian Federation’s policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation made no attempt to put an end to the applicants’ situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.¹⁹³

In light of this continuous link of responsibility, the court concluded that “the applicants therefore come within the ‘jurisdiction’ of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of.”¹⁹⁴

Significantly, nowhere did the ECtHR find that the Russian Federation was in overall control of the territory of Transdniestria.

190. *Id.*

191. *Id.* ¶ 392. Here the court seems to employ an even lower standard—“decisive influence” or dependence (“survives by virtue of”)—for attribution. Given the court’s reference earlier in its judgment to the continuity of internationally wrongful acts, the court may believe that applying a lower standard for attribution in this context is warranted. However, the rules referred to by the court in its discussion of the continuity of internationally wrongful acts pre-suppose an initial breach. In this instance, the pre-ratification conduct of the Russian Federation cannot constitute a breach of the Convention. Thus, the standard for continuity of an existing violation is inapplicable. Also, use of the phrase “survives by virtue of” Russian support parallels language used by the court in *Cyprus* in finding the conduct of the TRNC attributable to Turkey. However, in that case, the finding of attribution was based primarily on Turkey’s overall control of the territory of northern Cyprus. *Cyprus*, *supra* note 42, ¶ 77.

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

193. *Ilaşcu*, *supra* note 67, ¶ 393.

194. *Id.* ¶ 394.

However, using rules of attribution of its own design,¹⁹⁵ it seems to have attributed the conduct of the MRT authorities to the Russian Federation. Once it had assimilated the MRT regime to an organ of the Russian Federation, it could then be argued that the Russian Federation was in fact in overall control of Transdniestria via the MRT authorities. However, this is not explicitly mentioned by the court. Further, this is the inverse of its findings in the northern Cyprus cases. While the *Ilaşcu* court cited its earlier jurisprudence relating to Turkey's responsibility in northern Cyprus, it neglected to point out that in that case, the conduct of the TRNC was initially found attributable to Turkey because of Turkey's effective overall control of the territory. All of the subsequent findings of attribution stemmed from this original finding. Absent reliance on a territorial control argument, the *Ilaşcu* court seems to reduce its jurisdiction inquiry to the simple question of whether alleged infringements were attributable to the Russian Federation. In so doing, the court seems to have adopted a much lower standard than those set forth in *Banković*.

This trend in favor of more relaxed standards for extraterritorial application is also seen in the more recent case of *Issa v. Turkey*. In this case concerning the conduct of Turkish forces in northern Iraq, the ECtHR again listed situations in which the European Convention would apply extraterritorially.¹⁹⁶ In addition to the effective overall control standard of the northern Cyprus cases, the court seemed to resurrect the power and authority standard. Citing the Commission's decision in *W.M. v. Denmark*, it stated, "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating—whether lawfully or unlawfully—in the latter State."¹⁹⁷ The court implied that this rule had been a consistent part of its jurisprudence, but that would seem not to be the case.¹⁹⁸ Of the

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

196. *Issa v. Turkey*, 2004 Eur. Ct. H.R. 629, ¶ 68–71 [hereinafter *Issa*].

197. *Id.* ¶ 71.

198. One of the reasons for the apparent inconsistencies in the court's jurisprudence may be the different ways in which the court has formulated the question of whether extraterritorial conduct of the state has fallen within the scope of Article 1. While the text of Article 1 requires Contracting States to secure rights "to everyone within their jurisdiction," the court has framed the question in a variety of ways. European Convention, *supra* note 8. The court variably refers to individuals, acts, matters, or property being within the jurisdiction of the particular state. At other times, the court frames the question exclusively as one of attribution without clearly explaining the relationship between attribution and the separate question of whether individuals fall within the jurisdiction of the state.

various cases cited for this standard, none are the court's own cases.¹⁹⁹ Indeed, the *Issa* court cited cases of the IACHR and Human Rights Committee from which the court had distanced itself in *Banković*, and the court even adopted the reasoning of the Human Rights Committee in *Lopez*, stating, "[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."²⁰⁰

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

c. Regionality

One element in particular of the ECtHR's jurisprudence warrants closer inspection. In the *Banković* case, the court noted that "the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."²⁰¹ It found that "the Convention is a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States."²⁰² As the Federal Republic of Yugoslavia was not a party to the Convention, it did not comprise part of this legal space.

Essentially, the court found that the European human rights system was designed within and for a particular region and was not intended to make Council of Europe States responsible for securing

199. It does, however, cite Commission cases, including *W.M.*, *supra* note 144, ¶ 1.

200. *Issa*, *supra* note 196, ¶ 71. This formulation is almost identical to that used by the Human Rights Committee in *Lopez*, which the Court had criticized in *Banković*.

201. *Banković*, *supra* note 42, ¶ 80.

202. *Id.*

the rights of individuals throughout the world.²⁰³ This reasoning would of course only apply to regional human rights obligations and would not be relevant to obligations arising under treaties open for universal participation, such as the ICCPR and ICESCR. However, even within the context of regional obligations, the continuing vitality of the legal space argument is questionable.

A number of considerations support a finding that regional human rights obligations do apply to a state's conduct beyond regional frontiers. Chief among these is the notion of universality. The very idea of human rights supports a finding that they would apply vis-à-vis all human beings. Although regional human rights norms are generated and formulated within a regional framework, they purport to be universally applicable.²⁰⁴ As such, the focus of human rights law generally is on how states ought to behave with respect to any human being under their control. Thus, it is clearly established in the jurisprudence of all regional human rights bodies that human rights obligations apply irrespective of the nationality of the victim. As the Inter-American Commission has noted in a case involving extraterritorial conduct, "[g]iven 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."²⁰⁵

The regional nature of the treaty speaks not to the scope of beneficiaries but to the willingness of states within the region to agree to a particular treaty regime and system of collective enforcement. As expressed in the preamble of the European Convention, "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, [were resolved] to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."²⁰⁶

Finally, the ECtHR's jurisprudence is itself in flux with respect to this issue. The court has diminished the force of its legal space

203. *Id.*

204. The Preamble to the European Convention makes clear that the standards enunciated in that treaty are derived from the Universal Declaration and reaffirms the "profound belief [of the Contracting States] in those fundamental freedoms which are the foundation of justice and peace in the world," not just the region. European Convention, *supra* note 8. (emphasis added). The Preamble of the American Declaration of the Rights and Duties of Man similarly employs the language of universality, asserting that "[a]ll men are born free and equal, in dignity and in rights." Ninth Int'l Conference of American States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, (Bogotá, Colombia, 1948), available at <http://www.cidh.org/Basicos/basic2.htm>.

205. *Coard, supra* note 12, ¶ 37; see also *Alejandro, supra* note 132, ¶ 23.

206. European Convention, *supra* note 8, at pmb1.

argument. In *Issa*, the court found that Turkish troops had been carrying out cross-border military operations “aimed at pursuing and eliminating terrorists who were seeking shelter in northern Iraq.”²⁰⁷ The court noted that if Turkey “could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq” and if it could be shown that “at the relevant time, the victims were within that specific area,” then “it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States.”²⁰⁸ The court essentially equated being within the jurisdiction of Turkey with being within the legal space of the Contracting States for the purpose of applying the Convention. This could be interpreted as relegating the legal space argument to circularity, at least in situations where Contracting States exercise a degree of territorial control.

3. Customary Human Rights Law

Finally, this limitation of scope may not apply with respect to those human rights norms that have evolved into customary international law. Thus, all states may be bound by these norms in their dealings with anyone anywhere. The U.S. JAG Operational Law Handbook, for example, provides that the customary law of human rights applies to U.S. armed forces wherever they may act.²⁰⁹

C. Range of Rights Applicable

Under human rights treaties, the range of rights applicable within a state’s territory will normally be the full range of rights set forth in each treaty. However, this may not be the case when the state is operating abroad. In such situations, the range of applicable rights may be limited by the scope of the state’s authority or control in the circumstances. In general, it may be reasoned that as human rights law is generally predicated on a state’s authority and

207. *Issa*, *supra* note 196, ¶ 73.

208. *Id.* ¶ 74.

209. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 45 (2005) [hereinafter HANDBOOK] (“Human rights law established by treaty generally only binds the state in relation to persons under its jurisdiction; human rights law based on customary international law binds all states, in all circumstances.”). It should be noted, however, that the United States rejects extraterritorial application of the ICCPR. John Cerone, *Out of Bounds? Considering the Reach of International Human Rights Law* 4 (Center for Human Rights and Global Justice Working Paper No. 5, 2006), available at http://www.nyuhr.org/docs/WPS_NYU_CHRGJ_Cerone_Final.pdf.

presumed capacity to control individuals and territories,²¹⁰ a state's human rights obligations while acting abroad would not be as extensive as when it acts on its own territory. Similarly, it may be the case that the application of certain rights requires a higher threshold of control.

As noted above, the ICJ in its Israeli Wall Opinion appeared to establish different thresholds of application for the International Covenants. While the exercise of jurisdiction was sufficient for application of the ICCPR, the ICJ explicitly required *territorial* control to trigger application of the ICESCR.²¹¹ After noting that Article 2 of the ICESCR does not contain a provision circumscribing the scope of States Parties' obligations, the ICJ acknowledged that the rights enumerated therein are "essentially territorial."²¹² Nonetheless, the court found that "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction."²¹³ Here the court appears to limit more narrowly the circumstances in which the ICESCR would apply extraterritorially. Rather than referring simply to the exercise of jurisdiction, the court seems to require the exercise of territorial jurisdiction, which implies control over territory and not just over individuals.

It may be that this approach is linked to the nature of economic and social rights. In general, these rights are thought to require an expansive and more highly defined conception of the state. In situations of extraterritorial conduct, this conception is not necessarily applicable—the full apparatus of the state is not readily available, nor is the level of control as great as that exercised by a state within its own territory. However, in *Congo v. Uganda*, the court seemed to indicate a single standard for the extraterritorial application of human rights treaties generally. It stated that "*international human rights instruments* are applicable 'in respect of acts done by a State in the exercise of its jurisdiction.'²¹⁴ It then appeared to employ this standard in finding applicable the ICCPR, the CRC and its Optional Protocol, and the ACHPR. While both the ACHPR and CRC contain economic and social rights, there was no separate analysis of the scope of application of these instruments.

At the same time, however, the court found these instruments applicable "as relevant."²¹⁵ This might simply mean that only those provisions setting forth rights actually infringed by acts of the

210. *Banković*, *supra* note 42, ¶ 80.

211. *Legal Consequences*, *supra* note 15, ¶¶ 108–12.

212. *Id.* ¶ 112.

213. *Id.*

214. *Armed Activities*, *supra* note 110, ¶ 216.

215. *Id.* ¶ 217.

Ugandan forces would be applicable. However, such an approach would fail to take account of positive obligations, particularly in the economic and social spheres as will be discussed below. Alternatively, "as relevant" might indicate that some provisions of these treaties require a greater finding of control or more expansive exercise of jurisdiction than others. Ultimately, the court made no mention of the economic and social rights enumerated in the ACHPR or CRC²¹⁶ and only found violations of provisions concerning the right to life, liberty, and security of person and the protection of children in times of armed conflict.²¹⁷

Although the regional institutions provide little express guidance on this issue, the European institutions have indicated that the exercise of certain rights may be linked to territorial control and have implied that such rights may not apply in situations falling short of territorial control. Thus, in *W.M. v. Denmark*, in response to the applicant's allegations that he was deprived of his right to move freely on Danish territory and that he was expelled without a decision being taken in accordance with law, the European Commission observed that

[A]lthough . . . a State party to the Convention may be held responsible either directly or indirectly for acts committed by its diplomatic agents, the provisions invoked by the applicant must be interpreted in the light of the special circumstances which prevail in situations as the one which is at issue in the present case.²¹⁸

Noting that "the applicant, while the incident took place, was not on Danish territory," the Commission held that "the provisions invoked by him are not applicable to his case."²¹⁹

In *Cyprus v. Turkey*, where the ECtHR found that Turkey had territorial control over northern Cyprus, the court found the full range of European Convention rights to be applicable. After finding that Turkey, by virtue of its effective overall control of northern Cyprus, was responsible for the conduct of the local authorities there (i.e., the TRNC), the court held: "It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified."²²⁰ This seems to imply that in situations falling short of effective overall control, Contracting States may be bound to observe a narrower range of rights.

216. The court did not include the ICESCR in its list of applicable treaties.

217. *Id.*

218. *W.M.*, *supra* note 144, ¶ 2.

219. *Id.*

220. *Cyprus*, *supra* note 47, ¶ 77.

More generally, the jurisprudence of regional institutions seems to indicate that the scope of a state's obligations vary with the scope of the authority and control exercised. In *W.M. v. Denmark*, the European Commission found it clear from the constant jurisprudence of the Commission that authorized agents of a state, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that state *to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the state is engaged.*²²¹

This seems to imply that a state's exercise of extraterritorial jurisdiction has a variable scope. Similarly, the ECtHR, in formulating the question of whether extraterritorial conduct of the state has fallen within the scope of Article 1, has variously referred to individuals, acts, matters, or property being within the jurisdiction of the particular state.²²² It seems then that individuals may come within a state's jurisdiction to various degrees. For example, where a state brings an individual into its jurisdiction through a particular act, without having control generally over that individual or over the territory within which that individual may be found, it would seem that the individual is within the jurisdiction of that state only for the purpose of that act.

As these institutions have linked their findings of jurisdiction to the scope of a state's authority and control over people or territory, it may thus be argued that the range of rights states are bound to respect is dependent upon the level of that state's control.²²³

221. *W.M.*, *supra* note 144, ¶ 1.

222. *See supra* Part IV.A.2.b.

223. This also seems to be the case with respect to customary human rights law. In general, customary law recognizes a narrower range of rights than that provided under treaty law. Further, the extraterritorial application of customary human rights law may be subject to limitations analogous to those applicable to human rights treaties. For example, the U.S. Judge Advocate General's Handbook noted that when the United States carried out detention operations in Haiti as part of Operation Uphold Democracy, U.S. forces complied with the customary human rights norms implicated by that operation, including freedom from arbitrary detention. HANDBOOK, *supra* note 209, at 49.

Along this line, the Joint Task Force (JTF) lawyers first noted that the Universal Declaration of Human Rights does not prohibit detention or arrest, but simply protects civilians from the arbitrary application of these forms of liberty denial. The JTF could detain civilians who posed a legitimate threat to the force, its mission, or other Haitian civilians.

The Handbook notes that detainees were also "entitled to a baseline of humanitarian and due process protections," including "the provision of a clean and safe holding area; rules and conduct that would prevent any form of physical maltreatment, degrading treatment, or intimidation; and rapid judicial review of their individual detention." *Id.* at 50. The United States did not, however, "step into the shoes of the Haitian

Nonetheless, the ECtHR appeared to dismiss this possibility in *Banković*, flatly rejecting the applicants' "claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation."²²⁴ The court stated its view that

the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question. . . .²²⁵

This position seems difficult to reconcile with the notion that a state's exercise of jurisdiction may be limited to a narrow scope. Indeed, in the court's later jurisprudence, it seems to back away from the rigidity of this statement.²²⁶ However, another approach is to focus the inquiry not on the question of which rights the state is obliged to secure, but instead on the level of obligation upon states with respect to those rights, as discussed below.

D. *Level of Obligation*

As noted above, the obligation to respect and ensure rights, or in the words of the European Convention, to secure rights, entails a substantial degree of positive obligation.²²⁷ As with the range of rights, the level of obligation may also be limited where the state operates abroad. The level of obligation may similarly be tied to the scope of a state's extraterritorial activities or authority to act. In particular, it is arguable that human rights obligations requiring the adoption of affirmative measures may be more limited in an extraterritorial context. This position finds support in the international jurisprudence cited above. In the Israeli Wall Opinion, the ICJ found that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."²²⁸ While the Human Rights Committee had referred to "conduct by the State party's authorities," the ICJ used the phrase "acts done by a State."²²⁹ This difference in terminology may have some significance.

government, and did not become a guarantor of all the rights that international law requires a government to provide its own nationals." *Id.* at 49. As the United States rejects extraterritorial application of human rights treaties, the Handbook refers here solely to customary law.

224. *Banković*, *supra* note 42, ¶ 75.

225. *Id.* ¶ 76.

226. *See, e.g., Ilaşcu*, *supra* note 67.

227. *See supra* Part III (indicating that customary international law may entail a lower level of obligation).

228. *Legal Consequences*, *supra* note 15, ¶ 111.

229. *Id.*

While the term conduct encompasses both actions and omissions,²³⁰ the term acts may be read to preclude the latter. Under this interpretation, only negative obligations would be applicable to Israel's conduct.

As to the scope of obligation imposed on Israel by the ICESCR in the occupied territories, the court found "[i]n the exercise of the powers available to it [as the occupying Power], Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights."²³¹ Thus, the scope of its obligation under the ICESCR may be co-extensive with the scope of its authority as an occupying power. The court noted further that Israel "is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities."²³² Thus, with respect to matters within the scope of Palestinian authority, the court implied that Israel is bound only by negative obligations. This would seem to imply, *a contrario*, that the scope of Israel's obligation in matters within its authority, and beyond the authority of the Palestinians, encompasses positive obligations. This would seem to indicate that as Israel cedes control, the scope of its obligation is decreased from one encompassing positive and negative obligations to one entailing only negative obligations. Ultimately, however, the court analyzed Israel's conduct exclusively in the context of negative obligations, finding that "the construction of the wall and its associated régime impede" the exercise of a number of rights under both Covenants.²³³ Nonetheless, the ICJ's language setting forth the applicable law was broad enough to accommodate positive obligations in principle, at least in the context of occupation.

In *Congo v. Uganda*, the ICJ seemed to take a different approach, and this shift in approach is related to the two bases upon which the court found human rights law applicable to Uganda's conduct in the DRC. In restating the "exercise of its jurisdiction" rule from the Israeli Wall Opinion, the court again referred to acts as opposed to conduct. However, in finding human rights law incorporated into the law of occupation, the court clearly contemplated the possibility of culpable omission. In particular, the court found that "Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the

230. Responsibility of States, *supra* note 21, at art. 2.

231. *Legal Consequences*, *supra* note 15, ¶ 112.

232. *Id.*

233. *Id.* ¶ 134.

occupied territory, including rebel groups acting on their own account.”²³⁴ This language clearly asserts the existence of a positive obligation on Uganda to act with vigilance to prevent human rights violations committed by third parties.²³⁵ However, what is unclear is whether this positive obligation is entailed by norms of human rights law themselves or by the application of Article 43 of the Hague Regulations, through which the norms of human rights law are applicable. In any event, as the court found Article 43 to have acquired the status of customary law,²³⁶ it will make little difference in situations of occupation whether the positive obligation results directly from the norms of human rights law or whether it arises by operation of the rule contained in Article 43. However, in extraterritorial situations falling short of occupation, the degree of positive obligation entailed by human rights law, if any, remains unclear.

Again, the court’s finding that the ICCPR, CRC, and ACHPR are applicable “as relevant” compounds this ambiguity. Ultimately, the court simply concluded, without any significant analysis, that certain provisions of these instruments had been violated.²³⁷ Thus, it remains unclear whether certain rights provided for in these treaties were simply not relevant to the facts of this case or whether the positive dimension of the obligation to ensure those rights was inapplicable in this particular context.

A similar analysis may be applied to the jurisprudence of regional institutions. In *Alejandro*, the IACHR recalled that “when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state’s obligation to respect human rights continues. . . .”²³⁸ Again, it is worth noting that the Commission referred only to the obligation to respect rights; it did not mention the obligation to ensure rights. It may be that this was not intended to imply that Cuba would be limited to negative obligations. However, to date the Commission’s finding of extraterritorial application of human rights obligations has been limited to finding violations of negative obligations. It is unclear whether the same analysis would apply to positive obligations.

The ECtHR seems to admit the possibility that a state’s obligations may encompass positive obligations in an extraterritorial

234. *Armed Activities*, *supra* note 110, ¶ 179.

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

236. *Id.* ¶ 217.

237. *Id.* ¶ 219.

238. *Alejandro*, *supra* note 132, ¶ 25.

context, at least in situations of territorial control. In *Cyprus v. Turkey*, the ECtHR noted that since Turkey had effective control over the territory of northern Cyprus,

its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support. Turkey's "jurisdiction" under Article 1 was therefore considered to extend to securing the entire range of substantive Convention rights in northern Cyprus.²³⁹

In using the term securing instead of respecting, the court may have implied that positive obligations were entailed. While the European Convention does not use the term respect in Article 1, it could have employed this term as it is used by other human rights bodies if it wished to limit the scope of obligation to negative duties. The court then addressed the question of whether Turkey was required to protect rights from private interference in northern Cyprus. It determined that it would address this issue on a case by case basis in light of the violation alleged.²⁴⁰ In analyzing alleged violations by third parties, the court found that Turkey's responsibility would be engaged if the applicant could establish a "policy of acquiescing" on the part of the TRNC.²⁴¹ It would thus appear that a mere failure to respond to perpetration of violations by non-state actors would be insufficient to trigger responsibility. The omission would be culpable only if it were pursuant to a policy of acquiescence. This approach blurs the distinction between negative and positive obligations.

In *W.M. v. Denmark*, as noted above, the European Commission seemed to admit the possibility of a variable scope of obligation, and this could be interpreted to apply to the degree of positive obligation entailed. In that case, the applicant contended that Denmark bore responsibility for human rights violations perpetrated by DDR police because the Danish Ambassador had summoned the police who arrested the applicant.²⁴² In analyzing the responsibility of Denmark in relation to human rights violations perpetrated by the DDR authorities, the court recalled "that an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention,"²⁴³ citing the *Soering* case. The Commission found, however, "that what happened to the applicant at the hands of the DDR authorities cannot

239. *Banković*, *supra* note 42, ¶ 70 (interpreting the court's findings in *Cyprus*).

240. *Cyprus*, *supra* note 47, ¶ 98.

241. *Id.* ¶ 346.

242. *W.M.*, *supra* note 144, ¶ 1.

243. *Id.*

in the circumstances be considered to be so exceptional as to engage the responsibility of Denmark.”²⁴⁴ Clearly, the Commission was of the view that the Danish Ambassador was under no positive obligation in these circumstances to protect the applicant from the DDR authorities. Indeed, it seems Denmark was similarly free of any negative obligation to refrain from handing him over to the police.

However, in *Banković*, the ECtHR seemed to reject the possibility of varying levels of obligation. Again, the court rejected the applicants’ claim that the scope of a Contracting State’s obligation was proportionate to its degree of control, asserting that “the applicants’ submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.”²⁴⁵ The court dismissed this possibility.

Essentially, the *Banković* court seemed to take an all-or-nothing view of application of the Convention. In particular, the court expressed the view that “the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties’ positive obligations and, as such, of the scope and reach of the entire Convention system of human rights’ protection. . . .”²⁴⁶ It emphasized that

the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure “the rights and freedoms defined in Section I of this Convention” can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question. . . .²⁴⁷

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

As noted above, the ECtHR’s subsequent jurisprudence seems to indicate that *Banković* was anomalous. In *Ilaşcu*, for example, the ECtHR found that Moldova’s jurisdiction had a more limited scope by virtue of the fact that it did not have effective control over part of its territory. Here, the court expressly tied the scope of Moldova’s

244. *Id.*

245. *Banković*, *supra* note 42, ¶ 75.

246. *Id.* ¶ 65.

247. *Id.* ¶ 75.

jurisdiction to the level of Moldova's control over the situation facing the applicants. Where a Contracting State is prevented from exercising its authority over its territory "by a constraining *de facto* situation," the court held that "such a factual situation *reduces the scope of that jurisdiction* in that the undertaking given by the State under Article 1 must be considered only in the light of the Contracting State's positive obligations towards persons within its territory."²⁴⁸ Before concluding that "Moldova's responsibility is capable of being engaged under the Convention,"²⁴⁹ the court had satisfied itself that "it was within the power of the Moldovan Government to take measures to secure to the applicants their rights under the Convention."²⁵⁰ The court thus appears to link the scope of Moldova's jurisdiction and responsibility, which it blurs together,²⁵¹

248. *Ilaşcu, supra* note 67, ¶ 333 (emphasis added). The court seems to find that only positive obligations are applicable to Moldova in this context. However, it may be that the court has implicitly determined that negative obligations may be applicable but are simply not implicated by Moldova's conduct.

249. *Id.* ¶ 352.

250. *Id.* ¶ 351. Note, however, that this blurs the question of jurisdiction with that of responsibility.

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

In determining whether applicants were within the jurisdiction of the Russian Federation, the court phrased the question as: "In the present case the Court's task is to determine whether . . . the Russian Federation can be held responsible for the alleged violations," again conflating responsibility and jurisdiction. *Id.* ¶ 277. The court proceeded to find the conduct of the MRT attributable to the Russian Federation and then used this finding to expand Russia's jurisdiction. *Id.* ¶¶ 464, 494. By relying on its prior blurring of the distinction between attribution and responsibility, the court was able to employ a lower standard for attribution. In the northern Cyprus cases, the court based attribution of the conduct of the TRNC to Turkey on the fact that Turkey exercised effective overall control of that part of the island. *Cyprus, supra* note 47, ¶ 56. While the court in that case referred to the fact that the TRNC depended on Turkey for its survival, this alone was not sufficient for its conduct to be attributed to Turkey. In recalling the standards developed in those cases, the court noted: "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its

to the scope of Moldova's control over the territory and the situation. While this would not be an example of extraterritorial application, as Transnistria is part of Moldovan territory, the ECtHR's approach in *Ilașcu* is in tension with the finding in *Banković* that the Article 1 obligation of Contracting States cannot be subdivided and tailored to particular circumstances.

Also noteworthy is the repeated reference of the *Ilașcu* court to Moldova's positive obligation(s)²⁵² under Article 1 toward persons "within its territory." In other cases, the court has not been so careful to include the latter phrase. It may be that the court here was indicating that positive obligations are generally not applicable extraterritorially, except perhaps in those cases where an area can be assimilated to the territory of another state, such as in northern Cyprus, where the court suggested that Turkey's obligations under the Convention may entail a positive dimension.²⁵³

In the *Issa* case, in support of its inclusion of the power and authority standard, the ECtHR stated, "[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."²⁵⁴ As with the Israeli Wall Opinion and the *Alejandre* case, the word employed by the court implies a context of violation of a negative obligation. Here, the court referred to perpetration, which could be read as encompassing only affirmative interference with rights, as opposed to a failure to adopt positive measures of protection. While this use of language may not have been intentional, it fits a pattern among human rights bodies of employing the language of negative obligations when finding extraterritorial application based on a standard of power, authority, or control over individuals (and not over territory).

jurisdiction may engage the State's responsibility under the Convention." *Id.* ¶ 81. The court continued, "[t]hat is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognized by the international community." *Ilașcu*, *supra* note 67, ¶ 318. It should be recalled, however, that the "acquiescence or connivance" standard was employed by the *Cyprus* court not in finding the TRNC's conduct attributable to Turkey, but rather in determining whether Turkey bore responsibility in relation to the human rights violations committed by private individuals in northern Cyprus. The *Ilașcu* court appeared to base its finding of attribution on the complicity of Russian soldiers, the military and political support provided by the Russian Federation, and the dependence of the MRT regime on this Russian support. *Id.* ¶ 63. Thus, the court in *Ilașcu*, while purporting to rely on established jurisprudence, in fact adopted a lower standard for attribution.

252. The court appears to alternate between the single and plural forms of "obligation." *Ilașcu*, *supra* note 67, ¶¶ 304, 306, 309, 311, 313, 322, 333, 335–39, 352, 441, 448, 453, 464.

253. To the extent that acquiescence would constitute a breach of its obligations.

254. *Issa*, *supra* note 196, ¶ 71.

Thus, it would seem that there may be an identifiable trend toward recognizing varying levels of obligation. In particular, it may be that negative obligations apply whenever a state acts extraterritorially²⁵⁵ (at least with respect to intentional human rights violations, as opposed to indirect consequences), but that the degree of positive obligations will be dependent upon the type and degree of control (or power or authority) exercised by the state. This is not inconsistent with these institutions' general jurisprudence on positive obligations. Such obligations are limited by a scope of reasonableness even when applied to a state's conduct within its territory; there is no reason why application to a state's extraterritorial conduct would not be bounded similarly by a scope of reasonableness,²⁵⁶ such that the adoption of affirmative measures is only required when and to the extent that the relevant party *de jure* or *de facto* enjoys a position of control that would make the adoption of such measures reasonable. Ultimately, any such inquiry would be highly fact-sensitive.

This approach would preserve the integrity of the respective treaties²⁵⁷ and would vindicate the universal nature of human rights, which is proclaimed in the preambles of all of the human rights treaties considered in this analysis. At the same time, it would not place unreasonable burdens on state parties. Due to the very nature of negative obligations, states would be bound by those obligations only to the extent they affirmatively acted within the relevant sphere. Similarly, positive obligations would apply only in circumstances in which it would be reasonable for the state to take affirmative steps in light of its level of authority, control, and resources. Thus, where there is only a limited connection between a state and an individual, the state would not be required to undertake the same degree of positive action, if any, to protect that individual's rights as it would if the individual were subject to a broader degree of control by the state, such as in situations of territorial occupation.

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

256. Similar reasoning is implicit in the jurisprudence of human rights mechanisms finding that the obligation to ensure rights against violations by private actors is bounded by a scope of reasonableness. For example, in the *Velazquez-Rodriguez* case, the Inter-American Court of Human Rights noted that this obligation was not absolute; the standard is one of "due diligence." *Velazquez-Rodriguez Case*, *supra* note 27, ¶¶ 79, 172. The court also recognized that "[i]t is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party." *Id.* ¶ 175. In essence, the inquiry under the American Convention is whether the State Party acting in good faith undertook steps that were reasonable in the circumstances.

257. By not "divid[ing] and tailor[ing]" obligations "in accordance with the particular circumstances of the extra-territorial act in question." *Banković*, *supra* note 42, ¶ 75.

Such an approach also preserves a clear differentiation among such concepts as attribution, responsibility, jurisdiction, and positive obligations—the recognition of which is essential to the development of a coherent jurisprudence. This approach does of course contemplate that the scope of application of these human rights treaties is potentially worldwide, or in the words of the ECtHR, “wherever in the world [an] act may have been committed or its consequences felt.”²⁵⁸ Yet, by expressly recognizing a variable scope of jurisdiction, with an attendant variable level of obligation, this approach would not render “superfluous and devoid of any purpose” the words “within their jurisdiction,” as the court had warned. Thus, for example, all state parties would be obliged to refrain from summarily executing individuals anywhere in the world. A state agent’s extraterritorial act of summary execution would be sufficient to bring the victim within the jurisdiction of the state party to the extent necessary to apply that state’s negative obligation to respect the right to life. However, the mere extraterritorial presence of a state agent in the same physical location as an individual would not be sufficient to bring that individual within the jurisdiction of that state party for the purpose of applying positive obligations, e.g., the duty to protect that individual’s right to life from violation by a third party.²⁵⁹

Finally, such an approach is supported by the text of the ICCPR. Specifically, the structure of Article 2(1) of the ICCPR supports the notion that negative obligations apply vis-à-vis all individuals everywhere, whereas positive obligations may have a more limited scope. As noted above, Article 2 of the ICCPR reads, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.”²⁶⁰ It does no violence to this language to read “to all individuals within its territory and subject to its jurisdiction” to modify only the obligation to ensure rights and not the obligation to respect them. Indeed, the absence of transitive language between “to respect” and “all individuals” would seem to support this interpretation.²⁶¹ Thus, the provision may reasonably be read to oblige states to respect all of the rights in the Covenant vis-à-vis all persons but to ensure them only to those within the state’s territory

258. *Id.* ¶ 75.

259. This would certainly be more logically consistent than the ECtHR’s approach of variously referring to matters, persons, property, and acts being “within their jurisdiction,” the express language of Article 1 notwithstanding, and of conflating attribution, responsibility, and jurisdiction in an effort to achieve the same result. *Id.*

260. ICCPR, *supra* note 8.

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

and subject to its jurisdiction, with both of these obligations subject to the proviso “without distinction of any kind.”²⁶²

E. Application in the Context of Armed Conflict, Occupation, and Peace Operations

It thus appears that states remain bound by human rights law even when engaged in hostilities far from their home territories. Even during the invasion phase of an armed conflict, it would seem that a state would exercise sufficient control over any individuals with whom its forces come in contact for those individuals to fall within the scope of beneficiaries of that state’s human rights obligations. This, however, does not mean that the content of those obligations would be the same as if the individuals in question were within the home territory of that state. The scope of the obligation, at least in terms of the level of obligation as explained above, will vary with the degree of control exercised in the circumstances. Once an individual is taken into detention by the state, the degree of control over the individual will clearly have increased. Similarly, if a state’s armed forces effectively occupy a territory, it is likely that the state’s obligations will entail a substantial positive dimension.

262. The structure of the American Convention on Human Rights even more readily lends itself to this interpretation. Article 1 of the American Convention provides that State Parties undertake “to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination. . . .” ACHR, *supra* note 8, at art. 1. It would appear from the structure of the text that “all persons subject to their jurisdiction” modifies only the obligation to ensure rights. *Id.* The text of the CRC, which provides “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination” does not readily lend itself to this interpretation. G.A. Res. 44/25, art. 2(1), U.N. Doc. A/RES/44/25 (Nov. 20, 1989). Placing the scope language after the reference to the rights in the Covenant makes it more difficult to find that the limitation of scope applies only to the obligation to ensure. At the same time, this language differs from the ICCPR in two respects. First, as with the ACHR and ECtHR, there is no mention of territory. Second, the CRC refers to “their” jurisdiction, making it easier to argue that the Convention is applicable to all children within any State Party’s jurisdiction. Of course, the counter argument would be that since jurisdiction is singular, this refers to each State’s respective jurisdiction. Alternatively, one could argue that this is merely a reference to jurisdiction in the collective sense (i.e., within their collective jurisdiction). Finally, the establishment of different scopes of application for negative and positive obligations does not derive support from Article 1 of the European Convention as that treaty uses only the term “secure,” as opposed to subdividing into “respect” and “ensure.” Nonetheless, as indicated above, the court has consistently recognized a distinction between positive obligations and negative obligations, employing a different analysis to these different types of obligation.

F. *Collective Action*

This issue becomes further complicated in the context of collective action. In such cases, while the collective entity may exercise control over the individual alleging a human rights violation, it is unclear whether such an individual may be deemed within the jurisdiction of any of the individual states contributing personnel or otherwise participating in the collective entity. In applying a control-based standard to determine the scope of beneficiaries of states' obligations under human rights treaties, it is arguable that the analysis should start from the position of the individual to determine whether his or her relationship to the relevant authority meets the control-based standard and then to address separately the question of attribution of the entity's conduct to a subject of obligations under human rights law.²⁶³

The Human Rights Committee has determined that obligations under the ICCPR continue to apply in full in the context of collective action. In General Comment 31 it stated:

This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.²⁶⁴

Note, however, that this statement may go too far. As noted above in Part III, the issue of attribution must be considered whenever organs of a state are assigned to peace operations. If armed forces are placed entirely and exclusively at the disposal of an intergovernmental organization, their conduct may no longer be attributable to the sending state.²⁶⁵ However, it is arguable that in such circumstances the troops would no longer be forces of a State Party.

Nonetheless, if it is determined that the contingent is placed at the disposal of an intergovernmental organization such that the sending state is not deemed responsible for the contingent's conduct, this does not mean that there is no subject of international law that

263. In this context, it is particularly important to distinguish the question of the scope of beneficiaries from the issue of attribution. It would seem most appropriate to determine whether the collective entity exercises the necessary degree of control and then to focus only on the issue of attribution.

264. *Nature of the General Legal Obligations*, *supra* note 13, ¶ 10.

265. The distinction between these questions was recognized in *Banković*, in which the ECHR found that it was unnecessary to consider the "alleged several liability of the respondent States for an act carried out by an international organization of which they are members" because the court had already concluded that it was "not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question." *Banković*, *supra* note 42, ¶¶ 82–83.

may be held responsible for violations that may be committed. The U.N., for example, has a large measure of international legal personality²⁶⁶ and can bear responsibility on the international level for the conduct of its agents.²⁶⁷ In addition, where serious violations of human rights law overlap with international criminal law, the individual perpetrators themselves may be held directly responsible under international law.

V. CONCLUSION

International judicial and quasi-judicial bodies have provided answers to many of the important legal questions described in the Introduction to this Article. Nonetheless, there remain significant gaps that provide ample opportunity for these institutions to further elaborate on what is required of states in situations of armed conflict and occupation. It is now clearly established that both human rights law and humanitarian law are simultaneously applicable in situations of armed conflict and occupation and that their relationship is that of a *lex generalis* to a *lex specialis*. However, there is little detailed guidance on what this means in context. Does it essentially mean that where the norms overlap, the norms of humanitarian law prevail? If so, does the assertion that human rights law continues to apply lose much of its legal significance?

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

Nonetheless, the following principles may underlie a general trend in human rights jurisprudence. The first is that the negative dimension of human rights obligations, at least with respect to those rights that are not essentially territorial in the words of the ICJ, will apply to a state's conduct in relation to all those who are directly

266. See generally *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

267. In general, as intergovernmental organizations have no territory, it may be useful to analogize to situations of extraterritorial application of human rights law. However, where an intergovernmental organization acts as the government of a territory (as in, e.g., the U.N. Interim Administrations in Kosovo and East Timor), it may be more appropriate to analogize to infraterritorial application with respect to treatment of individuals within that territory. See Cerone, *supra* note 29, at 42.

affected by that conduct anywhere in the world. The second principle is that the positive dimension of these obligations will be based upon the degree of control exercised by the state, subject to a standard of reasonableness.