

Human Rights Unbound:
A Theory of Extraterritorial Human Rights Obligations
with Special Reference to the International Covenant on
Economic, Social and Cultural Rights

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Declaration

I, Lea Alexa Raible, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

This thesis advances four main arguments aimed at fundamentally changing the way we think about extraterritorial human rights obligations. First, I argue that the questions regarding extraterritoriality are really about justifying the allocation of human rights obligations to specific states. Second, I seek to show that human rights as found in international human rights law, including the International Covenant on Economic, Social and Cultural Rights, are underpinned by the values of integrity and equality. Third, I argue that these same values justify the allocation of human rights obligations towards specific individuals to public institutions – including states – that hold political power over said individuals. And fourth, I show that title to territory is best captured by the value of stability, as opposed to integrity and equality. Because of this, models of jurisdiction that incorporate a close relationship with title to territory cannot be successful. The consequence of these arguments is a major shift in how we view extraterritorial human rights obligations. Namely, the upshot is that all standards in international human rights law that count as human rights require that a threshold of jurisdiction, understood as political power, is met. However, on my account, this threshold is not a conceptual necessity but a normative one. It is the relevant threshold not only for practical reasons, but because it justifies the allocation of human rights obligations.

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Introduction

A Tale of Two Puzzles

The first puzzle is the following. When the Committee on Economic, Social and Cultural Rights (CESCR or Committee)¹ addresses the extraterritoriality of the International Covenant on Economic, Social and Cultural Rights (ICESCR),² it calls on developed states parties to the ICESCR to assign 0.7 per cent of their Gross National Income to development cooperation.³ Now, the Committee does not explicitly refer to this requirement as an obligation according to the ICESCR.⁴ But it is the Committee's task to interpret the Covenant's provisions and to monitor their implementation by states parties.⁵ Considering this, it is fair to assume that the Committee is indeed of the opinion that such an allocation of funds is an obligation falling on developed states parties to the instrument. It is intuitively appealing to suggest that it is morally wrong of a developed state not to spend a given amount on development cooperation. However, it is difficult to see whose human rights are violated if a state does not make available funds for a postulated purpose. If development cooperation is a human rights issue – as this call by the CESCR suggests – who is the holder of the human right and who is the bearer of the corresponding obligation?

Consider another example of puzzling claims. Between 2002 and 2008, prices of globally traded foodstuffs, such as wheat and maize, rose dramatically. A World Bank paper concluded that increased production of biofuels from these crops was the most important factor contributing to the increase.⁶ The main culprits were

¹ The Committee is tasked with interpreting the International Covenant on Economic, Social and Cultural Rights.

² 993 UNTS 3.

³ See, eg, CESCR, *Concluding Observations: Germany* (12 July 2011) E/C.12/DEU/CO/5, para 33.

⁴ More generally, the Committee's use of different auxiliary verbs, such as should or must, and their relationship with the notion of an obligation, are not always consistent: Malcolm Langford, Fons Coomans and Felipe Gomez Isa, 'Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 107.

⁵ On the function of the Committee see generally Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995) 3-4, 30-105.

⁶ Donald Mitchell, 'A Note On Rising Food Prices' (2008) World Bank, Policy Research Working Paper 4682 <<https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-4682>> accessed 22 September 2017.

industrialised countries, but the brunt of the burden was shouldered by the global poor. They typically spend about half of their income on food and increased prices on staples have devastating effects.⁷ As above, it is easy to say that this is a very unhappy state of affairs, or even that, given what we know, the production of biofuels at the expense of the global poor is morally wrong. Picking up on this intuition, it has been suggested that states producing biofuels from food commodities violate the global poor's human right to food.⁸ If this is true, whose human right to food is violated? Does it matter which food they would have consumed? Or which state was responsible for the increase of the price of a particular batch of maize? What about causal links more generally? Again, it is not obvious who is the right holder and who is the duty bearer, or, indeed, how we would find out in the first place.

This thesis addresses the central, shared issue of these puzzles:⁹ Does a state owe human rights obligations towards individuals abroad when its behaviour impacts upon their lives? This is what we mean when we ask if an international human rights instrument is applicable extraterritorially.¹⁰ Against the backdrop of growing political and economic interdependence, this question has rightly received much attention in recent years. However, civil and political rights, as found in the International Covenant on Civil and Political Rights (ICCPR)¹¹ and the European Convention on Human Rights (ECHR or Convention),¹² have received most of said attention.¹³ Significant progress has been made in this area: the debate is advanced, and the models sophisticated.¹⁴

⁷ Ibid.

⁸ Margot E Salomon, 'Deprivation, Causation and the Law of International Cooperation' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013).

⁹ This is not to say, of course, that other questions, for example regarding the content of human rights obligations, do not also arise.

¹⁰ See Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 7-8.

¹¹ 999 UNTS 171.

¹² Formally: Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 213 UNTS 222.

¹³ The ICESCR was only included at some length in Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) but was mostly excluded from consideration in, eg, Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2012) and Milanovic (n 10).

¹⁴ See, eg, Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 *Israel Law Review* 503; Milanovic (n 10); Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857; Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in

The same cannot be said for economic, social, and cultural rights. The gaps in the literature are striking. For example, of the first three monographs on the extraterritorial application of human rights instruments, only Gondek includes an analysis of economic and social rights.¹⁵ Milanovic's monograph focuses almost entirely on the ECHR.¹⁶ Perhaps most remarkably, Da Costa, in a monograph examining the extraterritoriality of selected human rights treaties, includes an analysis of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,¹⁷ but excludes the ICESCR.¹⁸ While there is a treatise on extraterritorial obligations relating to the right to water, it is focused exclusively on this right and its application in Africa.¹⁹ The only systematic treatment of extraterritorial human rights obligations in the area of socioeconomic rights is an edited volume, which does not focus on the ICESCR specifically.²⁰

Given that the puzzles above show how crucial the questions regarding extraterritorial human rights obligations in the ICESCR are, this is surprising. This thesis focuses on the extraterritoriality of the ICESCR because leaving these questions unaddressed is a missed opportunity. Not only are they interesting and important in their own right, the extraterritoriality of economic and social rights also brings to the fore two of the most foundational issues of international human rights law more broadly. Namely, what does it mean for a state to have a human rights obligation towards an individual? And how do we justify the specification of the relevant right holder and duty bearer in each case? The ICESCR, the general instrument enshrining economic and social rights in international law, does not provide any guidance in its text. That is, a clear textual basis or even a starting point is lacking. Thus, making reference to economic and social rights forces us to frame extraterritoriality as a question of identifying right holders and duty bearers. In turn, answering this question, allows us to challenge conventional wisdom on extraterritoriality in general.

International Human Rights Law' (2013) 7 *Law & Ethics of Human Rights* 47; Nehal Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016).

¹⁵ Gondek (n 13) 291-365. The ICESCR is discussed separately from civil and political rights and the discussion is far shorter than this other part of the study.

¹⁶ But see the short extension of his arguments to that instrument in Milanovic (n 10) 227-28.

¹⁷ 1465 UNTS 85.

¹⁸ Da Costa (n 13).

¹⁹ Takele Soboka Bulto, *The Extraterritorial Application of the Human Right to Water in Africa* (Cambridge University Press 2014).

²⁰ Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013).

The first two chapters of this project argue for a change of focus in how we view the question of extraterritoriality. I show that the conventional wisdom of following the rules of interpretation as found in the Vienna Convention of the Law of Treaties (VCLT)²¹ is not sufficient to explain which state owes human rights obligations to which individual. Rather, interpretation is best understood and embraced as an evaluative activity. Thus, international legal human rights need a value-based justification.²² In this spirit, I further elaborate that human rights, to the extent that they are understood as claim rights, are best understood as standards of treatment flowing from and guaranteeing the equal moral status of individuals. One implication of this value-based justification is that human rights apply if, and only if, there is a pre-existing relationship which justifies the allocation of the burdens human rights obligations bring with them. This is true in general, and thus applies to the ICESCR, even though the text does not mention its territorial application. In other words, socioeconomic rights are in need of a threshold criterion to allocate corresponding obligations.²³ In turn, this means that in this regard socioeconomic rights follow the same pattern as civil and political rights, where treaties make explicit provision for such a threshold criterion in their jurisdiction clauses.²⁴

The thesis goes on to show that accounts of the necessary pre-existing relationship, while not often explicitly referred to as such, already exist in the doctrinal scholarship: following the wording of treaties like the ECHR and the ICCPR, it is usually called jurisdiction instead. I argue that the concept of jurisdiction in international human rights law is best understood to capture the pre-existing justificatory relationship. I posit and defend desiderata any account of jurisdiction needs to meet in order to be successful. Based on these criteria, I analyse and critique the most sophisticated accounts of jurisdiction to date. These were developed by

²¹ 1155 UNTS 331.

²² States and their legal advisers may object at this point that they never signed up for this. However, and as we will see in chapter 1 below, neither treating interpretation as an evaluative activity, nor justifying international human rights law according to values and the principles they generate goes against the textual basis of the VCLT or the respective human rights treaties. Rather, the VCLT's reference to 'object and purpose' – I argue – provides for this approach.

²³ The opposite view, namely that the absence of a textual basis for a threshold criterion in the ICESCR means that the instrument does not need one, is a basic assumption in, eg, Langford and others (n 20).

²⁴ Article 1 ECHR; article 2(1) ICCPR.

Marko Milanovic²⁵ and Samantha Besson²⁶ respectively. Neither of them meet all the desiderata: Milanovic's account is internally inconsistent and thus arbitrary. Besson's view, on the other hand, ties itself to the process of identification of the content of the human rights obligations, rather than the justification of the allocation of duties.

The project proceeds to reconstruct the meaning of jurisdiction. In order to do so, I first focus on the conceptual basis of jurisdiction. I argue that power, as opposed to influence and control, should be understood to be the underlying concept that best captures jurisdiction. The chapter demonstrates that a lack of conceptual awareness often translates into conflation of different ideas that fail to appreciate the need to justify the allocation of obligations. We then move from conceptual clarifications to a substantive description and defence of what I argue is the most promising understanding of jurisdiction: political power. The notion of political power is based on equality as the guiding value that allocates human rights duties. It emphasises that human rights apply not between any state and any individual, but only between a state and those individuals, over whom said state holds political power.

The final chapters complement the treatment of extraterritoriality. First, I show that jurisdiction and territory in international law are best treated as independent concepts. Territory and a state's title to it can at best serve as the basis for a rebuttable presumption in favour jurisdiction. Second, in the final chapter, I analyse three case studies to show why jurisdiction understood as political power is superior to other accounts in practice as well as theory. The substantive point of reference remains with socioeconomic rights as found in the ICESCR.

Method, Theoretical Background and Original Contribution to Knowledge

The arguments I put forward are based on careful analysis of existing legal practice and scholarly literature discussing the practice's implications. By existing practice, I mean in particular the work of the CESCR, the Human Rights Committee (HRC), and the case law of the European Court of Human Rights (ECtHR or Court). The literature

²⁵ Milanovic (n 10). See also Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *European Journal of International Law* 121; Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in a Digital Age' (2015) 56 *Harvard International Law Journal* 81.

²⁶ Besson (n 14); Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244.

specifically addressing the merits and shortcomings of the practice is predominantly of the doctrinal kind. That is, it conceptually analyses, elaborates on, and critiques on its own terms legal practice and interpretation.²⁷ Often, authors put forward suggestions for reform, but do not aim to justify their findings in terms of legal or political theory, or value judgments.²⁸

The thesis adds such an external normative dimension to the debate. It is most notably influenced by the work of Ronald Dworkin on a range of issues, including interpretation, and the nature of rights in general, and human rights in particular.²⁹ The thesis relies on his original arguments as well as interpretations and elaborations by others.³⁰ Throughout, there are terms I use in this interpretivist, and at times specifically Dworkinian, spirit. For example, by principle I mean, with Dworkin, ‘a standard, that is to be observed not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.’³¹ As such, principles are closely aligned with (moral) values, but are distinct from rules in that their applicability depends on their weight in a given context.³² The present study methodologically relies on the anti-positivist stance developed by Dworkin. But it also relies on his take on the nature of rights. In particular, the thesis elaborates the implications of the values of integrity and equality for the scope of international human rights treaties.³³ In turn,

²⁷ See for a similar definition of doctrinal scholarship David Kennedy, ‘A New Stream of International Law Scholarship’ (1988) 7 *Wisconsin International Law Journal* 1, 10.

²⁸ A notable exception is Samantha Besson. See, eg, Samantha Besson, ‘The Allocation of Anti-poverty Rights Duties: Our Rights, but Whose Duties?’ in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World’s Poor* (Cambridge University Press 2013); Besson, ‘The Bearers of Human Rights’ Duties and Responsibilities for Human Rights’ (n 26).

²⁹ In particular, this thesis relies on Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977); Ronald Dworkin, *Law’s Empire* (Hart 1986); Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006); Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011).

³⁰ See, eg, Jeremy Waldron, ‘Pildes on Dworkin’s Theory of Rights’ (2000) 29 *Journal of Legal Studies* 301; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2009); Saladin Meckled-Garcia, ‘Giving Up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice, and Imperfect Duties’ (2013) 30 *Journal of Applied Philosophy* 73; Kai Möller, ‘Dworkin’s Theory of Rights in the Age of Proportionality’ (2017), (12) *Law & Ethics of Human Rights* (forthcoming); LSE Legal Studies Working Paper No 11/2017 <<https://ssrn.com/abstract=2981003>> accessed 22 September 2017.

³¹ Dworkin, *Taking Rights Seriously* (n 29) 22.

³² *Ibid* 26-27.

³³ This point surfaces at various stages of the argument, but is most prominent in chapters 2 and 5 below.

these findings also inform the arguments set forth regarding the nature of interpretation, and the substantive meaning of political power.

The analysis of the terms used to describe and define jurisdiction, as well as the argument that power is the relevant notion, relies on the conceptual work by Peter Morriss,³⁴ who insists on the nature of power as a potential and carefully distinguishes it from influence in particular.³⁵ The best understanding of political power specifically, however, is again informed by the work on the nature of rights by Dworkin and accounts that build on his. The reason is that for our purposes the description of political power is an evaluative question, and thus a normative one, as opposed to a conceptual issue.

As already mentioned, the debate on extraterritoriality of human rights treaties is not new. And there is a growing body of case law, particularly originating from the European Court of Human Rights,³⁶ addressing the issue. Discussion and critique of these cases is the main aim of the doctrinal scholarship referred to above. Merely pointing to shortcomings of existing accounts of extraterritoriality would thus be unlikely to make a significant contribution. Instead, this thesis adds value to the debate on extraterritorial human rights obligations in three other ways.

First, the thesis contributes to the debate by systematically addressing extraterritorial human rights obligations in the ICESCR. This is in itself a worthy project because it is the first of its kind. Second, the thesis rationally reconstructs extraterritorial human rights obligations more broadly. Economic and social rights require us to take a step back and address fundamental questions in international human rights law. This in turn requires this thesis to carefully examine the justification of international legal human rights. The project explicitly addresses the values that underpin international human rights law, and how human rights should be understood in this context. It thus sheds light on the root causes of the disagreement about extraterritoriality between authors, and international bodies. By setting out the principles informing the scope of international human rights law, the thesis provides helpful guidance for the adjudication of individual rights, regardless of what

³⁴ Peter Morriss, *Power: A Philosophical Analysis* (2nd edn, Manchester University Press 2002).

³⁵ *Ibid* 8-35.

³⁶ See for a recent summary of the relevant case law Lea Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers' [2016] *European Human Rights Law Review* 161, 163.

international treaty recognises them. In this regard, my main opponents are authors who emphasise the role of economic and social rights in a quest for global justice rather than in their function as individual rights.³⁷

Third, this thesis makes an original contribution to knowledge because it attempts to bridge two gaps that have hampered the debate on the extraterritoriality of human rights instruments. On one hand, it addresses the rift between legal and philosophical investigations of the meaning of human rights obligations. Here, I disagree with doctrinal scholars who regard extraterritoriality implicitly or explicitly as a mere technical issue.³⁸ I argue instead that extraterritorial obligations shine light on the normative heart of international human rights law. On the other hand, and as a consequence of its bridging gaps between law and philosophy, the arguments also transcend the differences between accounts of extraterritoriality regarding civil and political rights, and economic and social rights. Thus, while the present study primarily focuses on the ICESCR and doctrinal problems most relevant to economic and social rights, it contributes to the understanding of extraterritorial human rights obligations in general.

Overall, the thesis intends to upset the results of previous scholarship on issues such as the meaning of jurisdiction, and argues to change approaches to this subject, and to dissolve perceived differences between human rights instruments in this regard. It develops and defends an evaluative account of extraterritoriality and by following this approach consistently arrives at different, but ultimately more defensible claims about extraterritoriality. As such, the thesis makes a major theoretical contribution to the understanding of extraterritoriality in international human rights law.

Structure of the Thesis

Chapter 1 considers the received wisdom that extraterritoriality is a matter of treaty interpretation and that, following on from this, all that is required in discovering the extraterritorial scope of human rights treaties is following the rules of interpretation

³⁷ The CESCR is among them. Examples from the literature include Margot E Salomon, *Global Responsibility for Human Rights* (Oxford University Press 2007); Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084; Langford and others, *Global Justice, State Duties* (n 20); Bulto (n 19).

³⁸ See in particular the arguments and disagreements set out in chapters 1, 3, 4, and 5 below.

set out in the VCLT. I argue that the extraterritorial scope of a treaty is a matter of treaty interpretation, but that it is not sufficient to follow rules in order to give meaning to international legal instruments. What determines the outcome of an interpretation is, in addition to these rules, a question of values. That is, what lies at the heart of interpretation is the determination of the values and principles that underlie a human rights treaty.

Instead of making this argument in the abstract, I consider recent takes on the extraterritoriality of the ICESCR including the work of the Committee, and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) as well as the commentary on these principles.³⁹ The discussion does not show if and why the outcome of each of these interpretations might be considered correct or not. Instead, I show that these writings on the extraterritoriality of the ICESCR share a neglect for the evaluative nature of interpretation and that this is their main problem – at least at the outset. The upshot is that our approach to give meaning to extraterritorial human rights obligations must change. Instead of focusing exclusively on the rules set out in the VCLT, we should establish values and principles that underpin the ICESCR and interpret its extraterritorial scope accordingly.

Chapter 2 addresses two crucial issues extraterritoriality presents – particularly when socioeconomic rights are taken into account. In order to successfully address extraterritorial human rights obligations we need to know why states are the primary duty bearers of international human rights law and which state owes international legal human rights obligations to which individuals.

This chapter begins to address the problem of justifying the allocation of duties and identifying duty bearers in three steps, moving from the formal to the substantive. First, I consider the structure of rights. An examination of Hohfeldian claim rights shows that human rights need both a right holder and a duty bearer. Because this analysis does not speak to the identification of either right holder or duty bearer, I explore approaches to the categorization of rights as opposed to other practical reasons and their potential in this regard. I argue that the two most prominent approaches in this area – interest theories and will theories – do not supply a principle to allocate duties. This does not make either of them right or wrong. Rather, it speaks to their

³⁹ De Schutter and others (n 37).

aspiration as formal theories. Second, the chapter analyses accounts of justifying human rights. Interest theories and will theories of rights are the starting point, but I argue that neither of them are helpful for our purposes as it is not their aim to *justify* rights, let alone ensuing duties and their allocation. Thus, I consider interest-based theories of human rights and show that they cannot overcome the limitations of the interest theories on which they are based.

Third, I argue that an interpretivist account of international human rights law as a context is the best way forward. Recognising international human rights law as a social practice and seeking to determine what human rights require within its system of accountability allows us to specify right holders and duty bearers according to the underlying values. These values, I argue, are integrity and equality. The consequence of interpreting what human rights obligations proper within international human rights law require in the light of these values is twofold. First, integrity and its need for public institutions and a legal system shows that it is no accident that states are the primary bearers of human rights obligations. And second, the value of equality demonstrates that only those public institutions that are able to guarantee equality for a particular individual should be understood to be bearers of the human rights obligations towards said individual.

This last point brings us back to the threshold of applicability mentioned above: jurisdiction. The upshot of the argument in this chapter is that it remains relevant for our discussion in the following sense. Jurisdiction, the argument goes, is about capturing the pre-existing relationship between an individual and a state that puts the latter in a position to guarantee equal respect and concern. It is this position that acts as a justification for the allocation of duties and thus as a threshold criterion for the application of human rights treaties.

In turn, **Chapter 3** argues, first, that existing accounts of jurisdiction are concerned precisely with capturing this necessary, pre-existing relationship between state and individual. Further, I argue that these accounts show that jurisdiction is already understood to be a general threshold criterion that justifies allocating human rights obligations. A threshold criterion is only useful, however, if it allows us to specify a) what is the threshold to be met, and b) how we tell who (that is, which state or public institution) has met the threshold in relation to whom. Second, this chapter asks what the desiderata for an account of jurisdiction are. I argue that the criteria are plausible guidance, a connection to an account of the nature of human rights, the ability

to justify the allocation of obligations to a specific duty bearer, and non-arbitrariness in the sense of internal consistency. Third, the chapter analyses two sophisticated and influential accounts of jurisdiction. The “factual power view” describes jurisdiction as the exercise of actual power or control. The “*de facto* authority view” in turn, adds to the requirement of effective control the need for a claim to legitimacy. I ask whether these accounts meet the desiderata and argue that they do not. Accordingly, the chapter concludes that there is a need to develop an account of jurisdiction that meets the success criteria.

Chapter 4 takes up the first, conceptual step in this exercise. Based on how jurisdiction is described in the factual power view, the *de facto* authority view, but also in the literature on extraterritorial obligations in the area of economic and social rights, it shows that jurisdiction is often described by reference to a concept of power. I also show that it is common for courts and commentators to use terms such as power, control, or influence interchangeably. Following on from these insights, the main argument of the chapter is that the concept of power is rightly placed at the core of jurisdiction. However, this is only true for a clearly defined concept of power best understood as an ‘*ability*, as given by a particular means in a particular context, to bring about, if desired, future states of the world.’⁴⁰ Based on this understanding, I show that power should be distinguished from influence, (use of) force, and control, respectively. These distinctions allow us to capture the difference between power, its exercise, the means through which it is manifested, and the outcome of the exercise of a given power.

These conceptual clarifications are useful for the following reasons. Utilising power instead of influence, force or control when defining jurisdiction has several advantages. In particular, it allows us to differentiate effectively between establishing jurisdiction, which is necessary in order to justify the allocation of human rights obligations, and the violation of these obligations. Further, power makes it more obvious than other concepts that human rights are relevant and may be justified not only when potential duty bearers choose to activate their abilities but before that point as well.

Chapter 5, moving from the conceptual to the substantive, refines our account of jurisdiction based on a concept of power and argues that it is best understood as

⁴⁰ Frank Lovett, ‘Power’ in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy*, vol 2 (2nd edn, Blackwell 2012) 711.

political power, in particular as opposed to coercion. I argue that political power in this context should be conceptualized to denote the capacity of public institutions to determine how individual powers are transformed.⁴¹ That is, political power is the ability of public institutions to mediate the abilities of individuals into a different set of abilities. As such, it is constitutive of and necessary for public institutions, it affects individuals because it provides the very framework for them to pursue their lives in equality, and it is virtually unavoidable. The exercise of political power results in non-exclusive control on particular states of affairs in the area of the rights outlined in any given treaty. The vehicle through which this power is manifested is the choice and application of rules. Political power so understood is the best approximation of a position to guarantee equality, which, as we will have seen in chapter 2, is what justifies human rights obligations of public institutions.

The very term ‘extraterritoriality’ implies that territory is significant. So far, however, the thesis focuses on jurisdiction rather than territory. Thus, **Chapter 6** adds clarifications in this area. It examines the relationship of jurisdiction in international human rights law, whether understood as political power or not, and title to territory in international law. To this end, I start by looking at what international law has to say about jurisdiction as understood in international human rights law, and territory, respectively. The conclusion of the survey is that the two concepts serve different normative purposes underpinned by different values, and that they are thus not the same. Accordingly, an account of their relationship should be approached with conceptual care. To this end I introduce three main models to organise the relationship: the approximation model, the differentiation model, and the separation model. Each of them is evaluated against its fit with the relational nature of human rights.

Further, I suggest a secondary – or half – model, which entails that title to territory serves as a rebuttable presumption in favour of jurisdiction. This model is secondary only in the sense that it does not address jurisdiction and territory in the first step of the application of human rights: the establishment of obligations. Rather, it operates at the stage of the argument that concerns evidence and proxies. I further

⁴¹ On the concept of power see generally Morriss (n 34). For differing takes on the nature of political power in particular see, eg, Pamela Pansardi, ‘Power to and Power over: Two Distinct Concepts of Power?’ (2012) 5 *Journal of Political Power* 73; Laura Valentini, ‘Coercion and (Global) Justice’ (2011) 105 *American Political Science Review* 205.

argue, however, that precisely because of this, the secondary model is the most promising.

Chapter 7 illustrates the findings of this thesis with three case studies. It demonstrates how the understanding of extraterritoriality developed and defended here differs from and improves upon previous accounts. The chapter analyses bilateral cooperation in higher education between Ireland and Bahrain, the implications of a Special Economic Zone, run by Chinese shareholders in Nigeria, and export subsidies for sugar produced in the EU. The case studies cover a range of issues that implicate civil and political, as well as economic and social rights. In each of these case studies, I compare my account of jurisdiction as political power with previous accounts of jurisdiction and extraterritoriality in general. In detailing the disagreements, I show that the present approach is more successful than others in explaining extraterritorial human rights obligations of states. It allows us to assess very different scenarios according to the same principle: jurisdiction is required, and it is based on political power and the application of rules because this is what integrity and equality make it.

Further, my account explains the restrictions that have been sought to apply in terms of international human rights law as such, thus covering not just economic and social rights, but civil and political rights as well. In sum, the case studies show the present theory's potential to supply plausible guidance in a principled manner, and across a very wide spectrum of cases. However, the most pressing need in the field is to clarify the scope the ICESCR. The case studies exemplify that my account achieves this because it develops and defends a model of jurisdiction based on justification, applying the model to the question of extraterritoriality and biting the occasional bullet on the way.

With this in mind, we may now turn to the first two chapters, which discuss in more detail what a debate on extraterritorial human rights obligations, including those in the ICESCR, should be about in the first place.

Chapter 1 Extraterritoriality as a Matter of Interpretation

Do states have human rights obligations towards individuals abroad, and, if so, when? As a question of international human rights law, received wisdom is that this is a technical issue to be solved by recourse to rules of treaty interpretation as set out in the Vienna Convention on the Law of Treaties (VCLT).¹ The same is true for the interpretation of the ICESCR, and for its general obligations provision in particular.² This chapter examines whether the rules set out in the VCLT are sufficient as a framework of analysis, that is, whether they are indeed what determines the outcome of any given treaty interpretation.³ To be clear, I do not intend to say that the rules are superfluous or not useful, let alone that they are not applicable. I only intend to show that authors and bodies relying on the same rules still disagree and that this means that the result of any interpretation cannot be explained by recourse to rules alone. The upshot is that the standard approach to treaty interpretation is, in this context and for our purposes, not very helpful. Before we analyse the implications for treaty interpretation, however, we should consider what the VCLT has to say about territory – given that extraterritoriality is the focus of this study.

Article 29, which, according to its heading, deals with the ‘[t]erritorial scope of treaties’, reads: ‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.’

¹ See, eg, Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 7-8; Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 2; Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2012) 10-11 (implicitly). See also Malcolm Langford and others, ‘Introduction: An Emerging Field’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights* (Cambridge University Press 2013) 9-10, where it is submitted that the aim of the book is to ‘interpret’ international law as it stands. While the text does not refer to the VCLT directly, it mentions differing ‘interpretive orientation[s]’ of the contributors, further referring to wording, object and purpose and *travaux préparatoires* as relevant considerations. However, it is also pointed out that ‘normative or subjective’ perspectives may play a role: *ibid* 10, fn 22.

² See, eg, Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995) 3-4; Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 73-77, where she discusses the relevance of the VCLT for the interpretation of article 2 ICESCR.

³ On treaty interpretation in international law see generally Richard K Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015). The argument is also without prejudice as to whether human rights treaties, or, indeed any treaties, call for special methods of interpretation. Because the present thesis focuses on the ICESCR – a treaty – the arguments bracket the potential significance of customary international law. I do not mean to suggest it is not important.

Leaving aside here the potentially problematic reference to intentionalism as a default,⁴ the text refers to any party's territory. It creates a residual rule to the effect that treaties apply to the entirety of the territory even if a party to said treaty is either a federation or has dependent or overseas territories.⁵ On extraterritoriality, however, this provision is silent: it does neither stipulate a presumption in favour, nor against it.⁶

This leaves us with the '[g]eneral rule of interpretation' in article 31 and, if required, the '[s]upplementary means of interpretation' in article 32. They read as follows:

Article 31 *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

⁴ By intentionalism I mean the idea that interpreting a treaty is primarily an exercise in uncovering what the drafters intended. Accordingly, an intentionalist would place considerable weight on the drafting history and the *travaux préparatoires*. For a recent version of intentionalism in international law, including international human rights law, see generally (and despite the title) Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014); see also the critique in Marko Milanovic, 'Running in Circles: A Note on Bjorge's Evolutionary Interpretation of Treaties' EJIL: Talk! 18 December 2014 <<https://www.ejiltalk.org/running-in-circles-a-comment-on-bjorges-evolutionary-interpretation-of-treaties/>> accessed 22 September 2017. Potential problems with this account include that it does not in itself offer an answer to the question of whose intention would count as the state's, or indeed why the intention of the drafter is more important than, say, what the subjects of a treaty understand it to mean. For an argument against intentionalism as a guiding principle in international human rights law see George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509. For an instructive account of problems with state consent see Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2. For the argument that voluntarism – the view that international law is law because states will it – is historically linked with the understanding of positivism in international law, even though the two do not in any way entail each other see Liam Murphy, 'Law Beyond the State: Some Philosophical Questions' (2017) 28 *European Journal of International Law* 203, 204-07.

⁵ Anthony Aust, 'Treaties, Territorial Application' in *Max Planck Encyclopedia of Public International Law* <<http://www.mpepil.com>> accessed 22 September 2017.

⁶ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 10-11; but see Eyal Benvenisti, 'The Applicability of Human Rights Conventions to Israel and to the Occupied Territories' (1992) 26 *Israel Law Review* 24, 33, fn 36; Matthew Craven, 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 252.

- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Now, I agree that whether a state has obligations towards an individual according to international human rights law is a matter of treaty interpretation – at least when treaty law is concerned. I do not believe, however, that rules on interpretation, whether set out in the VCLT or not, are sufficient to give meaning to treaties. Instead, I will argue here that disagreement on extraterritoriality traces much deeper disagreement about the values underpinning international human rights law. The problem is not the disagreement as such, but that it is based on value judgments that are both necessary and present, but only very rarely made explicit. That is, I suggest, we can only understand and address extraterritorial obligations if we address the underlying value judgments and their differences.⁷ In turn, this means that our approach must change. Our focus should not only be on treaty wording, but also on the purpose of the treaty in question, that is, the values and principles underpinning it, particularly when, as in our case, the treaty does not contain any wording at all.⁸ I argue that the best way forward is to acknowledge treaty interpretation as an evaluative activity and embrace it as such.

⁷ The belief that rules or methods of interpretation are the key to giving meaning to a treaty is not unique to debates on extraterritoriality. For an example in the area of economic, social and cultural rights see Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-based Approach to Health' (2016) 18 *Health and Human Rights* 109, 120-22, where he argues that there are 'special interpretive methods' for human rights treaties and explicitly refers to the VCLT in the process. However, when he outlines those 'methods' the argument is based on a focus on the 'purpose' of the ICESCR. He identifies the reduction of poverty as the main point of the instrument. This, however, is a value judgment that informs his interpretation, not a distinct method. See further section 3 below.

⁸ This is not to say that treaty wording is irrelevant, of course. Quite the opposite: in order to know *what* we are interpreting, the text of the treaty is the starting point. We will come back to this point in section 3 below.

Before delving into the argument, a preliminary note elaborating on the meaning of values and principles is necessary. As mentioned above, my understanding of these terms follows that of Ronald Dworkin.⁹ He did not – to my knowledge – discuss the distinction or relationship between values and principles at length.¹⁰ Thus, I shall state what I think his view is, which happens to be mine as well.¹¹ Values and principles are both moral concepts with some claim on our actions. However, their role in practical reasoning differs. Values represent goods to be promoted but do not necessarily translate into a requirement to do so. For example, and relevantly for our purposes, equality of individuals is a value. That is, our equality is a good to be promoted. But the value in and of itself does not demand that we do anything, let alone anything in particular to come closer to the good of equality. Unlike values, principles are pro tanto requirements to act in a certain way, but for other, more important, moral considerations. For example, the claim that public institutions should afford equal respect to individuals, is a principle. However, values still have a role to play here. To determine the correct course of action we will need to look at the values that justify the relevant principles. When I use the term ‘value judgments’, I refer to any, or all, of these steps in our practical reasoning as they are all relevant for interpretation as an evaluative activity.

Instead of arguing to embrace the evaluative nature of interpretation in the abstract, I will examine some of the more influential recent takes on extraterritoriality in turn. Along the way, I show where the disagreements between them lie, before moving on to explain why rules on interpretation are not sufficient to give meaning of any treaty, including the ICESCR, and what the implications are for a theory of the extraterritoriality of said instrument. Section 1 introduces the problem the ICESCR poses in this respect. The Covenant does not contain a provision on its territorial scope, while most other human rights instruments, including its Optional Protocol, do. Further complicating the matter, the understanding of the general obligations the

⁹ Recall that values and principles are related, and the latter are distinct from rules. See Introduction, above, and on the latter statement Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 22-28.

¹⁰ On values see, in particular, Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 118-20. On the role of principles, see Dworkin, *Taking Rights Seriously* (n 9) 24-28. On the relationship of values and principles, and its relevance in international human rights law see Alexander Green, ‘A Philosophical Taxonomy of European Human Rights Law’ [2012] *European Human Rights Law Review* 71, 72-77.

¹¹ I make these clarifications with gratitude to Allie Hearne, whose insights into this matter have been instrumental in crystallising my thoughts. See Alexandra Hearne to Lea Raible, ‘Dworkin on Values and Principles’ (8 September 2017) Email (on file with the author).

ICESCR imposes on states is not generally very advanced. Section 2 considers the work of the CESCR as well as the Maastricht Principles. The CESCR, unfortunately, has been inconsistent in its approach, contracting and expanding extraterritorial obligations of states with every new statement.¹² The argument regarding the Maastricht Principles is that here, too, the approach is far from consistent, let alone principled. Section 3, drawing on the findings of the previous sections, defends the idea that interpretation is an evaluative project and sketches the implications of this insight for the structure and method of the thesis. Section 4 concludes and outlines what treating extraterritoriality as a matter of principle means for this thesis.

1 Interpreting the ICESCR

1.1 The Missing Jurisdiction Clause

Why is a focus on the nature of interpretation so pressing in the context of this thesis? After all, if I am right about interpretation, all human rights instruments share the same problem, namely, that rules on interpretation are not sufficient to guide interpreters to establish either the meaning of the text or the legal impact of said meaning. In this sense, the ICESCR is no different from other human rights instruments, or any international treaties. I suggest that focusing on the nature of interpretation is not more or less pressing in this context than it is in the context of interpreting any other international treaty. Instead, it is only more obviously necessary because the ICESCR's wording seems to have opened up more leeway for extraterritorial obligations than, for example, the ECHR.

The ICESCR is (in)famous for its lack of a provision on either its territorial scope or jurisdiction.¹³ The reason why this is interesting is that other international human rights instruments do have such provisions.¹⁴ The most common among provisions dealing with the scope of application are jurisdiction clauses. They are usefully referred to as such because they make *jurisdiction* – as opposed to territory –

¹² Kerstin Mechlem, 'Treaty Bodies and their Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905, 938.

¹³ As is the case here, it is routinely the first aspect pointed to when extraterritorial obligations in the ICESCR are discussed. See, eg, Gondek (n 1) 292; Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 1, 5; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 17.

¹⁴ Compare, eg, article 2(1) ICCPR and article 1 ECHR.

the central criterion to be met for a human rights treaty to be applicable. Or, at the very least they have been interpreted that way.¹⁵

Take article 1 ECHR. It reads: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ This is the clearest jurisdiction clause in that it only mentions jurisdiction but leaves aside any notion of territory. Compare this to article 2(1) ICCPR:

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

Here, territory is mentioned along with jurisdiction and a non-discrimination clause.¹⁶ The American Convention on Human Rights also contains a jurisdiction clause in its article 1: ‘The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms... .’ As with the ICCPR this is followed by a non-discrimination clause.

While these provisions are not exactly the same, they have a crucial aspect in common. They all do not simply impose on states parties to uphold and protect the rights recognised in the treaties, but instead introduce criteria that need to be met for these obligations to be triggered. It is for this reason that jurisdiction – whatever its precise meaning – is most usefully referred to as a threshold criterion.¹⁷ This is important to emphasise because the term jurisdiction is a homonym.¹⁸ It may refer to

¹⁵ See Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant* (26 May 2004) CCPR/C/21/Rev.1/Add. 13, para 10: ‘States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means 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.’ For an analysis of this view as well as its development see Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 175-79.

¹⁶ It is to my mind unclear why the connection with a non-discrimination clause should matter for the meaning of jurisdiction.

¹⁷ See Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25 *Leiden Journal of International Law* 857, 860. I take this to be the right approach. However, it is not the purpose of this chapter to defend this claim. Instead, I will come back to this point throughout the thesis, in particular in chapters 3, 4, and 5.

¹⁸ Milanovic outlines the different meanings of jurisdiction in international law, including international human rights law, emphasising the many ordinary meanings of the term, and the fact that this makes jurisdiction a homonym: Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 23-41.

a legal sphere, such as in ‘civil law jurisdiction’, or the jurisdiction of a court, that is, the competence of a court to adjudicate a matter.¹⁹ Specifically relating to international law, we may further distinguish jurisdiction to prescribe and jurisdiction to enforce. Prescriptive jurisdiction is understood to refer to a state’s authority to regulate or assert the applicability of its laws to a particular situation or conduct while enforcement jurisdiction describes the authority to enforce the law.²⁰ Except for the idea of a sort of threshold criterion, none of these meanings seem to be on point when considering the clauses mentioned above.²¹

For treaties with jurisdiction clauses, the quest for the precise content of the threshold criterion has so far framed the discussion on extraterritorial human rights obligations.²² For the ICESCR, this is not immediately possible as the treaty itself does not contain such a jurisdiction clause. Instead, its article 2(1) reads as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through *international assistance and co-operation, especially economic and technical, to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²³

This is plainly very different from the clauses cited above. Rather than implying a threshold, the wording both hints at the importance of the international dimension of the Covenant, but also leaves a range of possibilities as to what this dimension might include. Closest to the truth in terms of the wording alone is that the ICESCR simply does not say anything about its extraterritorial application at all. Like the VCLT, it is silent on the matter.

However, ideas of what this silence might indicate range from the (very) cautious to the radical. The more radical ones raise the possibility that emphasising cooperation for the realisation of economic and social rights in the ICESCR has two consequences. First, the extraterritorial application of the ICESCR ‘often relates to

¹⁹ This is what I take Happold to mean in what is one of the earliest comments on the ECtHR’s case law. See Matthew Happold, ‘Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights’ (2003) 3 *Human Rights Law Review* 77, 82.

²⁰ See, eg, Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice* 735, 736-37; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 9-10.

²¹ This claim needs some defending and, as mentioned above, will receive it at various points below. See, in particular, chapters 2, 3, 4, and 5 below. For now, see, eg, Besson (n 17) 860.

²² That is, the debate focuses on uncovering the true meaning of jurisdiction. See, among many others, Milanovic (n 1); Besson (n 17).

²³ Emphasis my own.

general situations of deprivation that cannot always be qualified in terms of violations of [economic, social, and cultural] rights of specific individual victims.’²⁴ Second, developed states may incur more burdensome obligations of cooperation and assistance than less developed ones. For example, it has been claimed that one dimension of extraterritorial obligations in the ICESCR imposes responsibility to alleviate global poverty on states that are in a position to do so.²⁵ An example of an author who takes this rather extravagant view to an extreme is Margot Salomon, who has repeatedly argued that the universality of human rights and the importance of equality mandate that developed states provide aid to the global poor almost regardless of context.²⁶ As she does not make the underlying value judgments explicit, it is difficult to see how these views would be justified.²⁷ The more cautious views would try, for example, to either read a sort of jurisdiction clause into the Covenant,²⁸ or to emphasise that cooperation is a general obligation that cannot be individuated.

The point here is not primarily to agree or disagree with any of the approaches I outline. Instead, the aim is to show that a seemingly identical interpretational pattern – namely the rules on interpretation set out in the VCLT – yield different results without recourse to a method that would enable us to decide which one is right. To be clear, the disagreement is not the problem. The point of interpretation as an evaluative activity is not to establish a meaning that is satisfactory to everyone. It is important, however, to be clear about the value judgments that are necessary to reach a given interpretation. And the fact that the views surveyed here do not allow for their disagreement to be identified suggests that value judgments are not made explicit when they should be.

On the cautious side, Craven suggests that the existence of jurisdiction clauses in some of the multilateral human rights treaties are not an expression of the territorial limitation of those treaties alone. Instead, he argues that they are a consequence of crucial background assumptions of international law, including international human

²⁴ Fons Coomans, ‘Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 186.

²⁵ Principle 9(c) of the Maastricht Principles.

²⁶ See generally Margot E Salomon, *Global Responsibility for Human Rights* (Oxford University Press 2007); Margot E Salomon, ‘Why Should it Matter that Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law’ (2011) 37 *Review of International Studies* 2137.

²⁷ See further chapter 2 below.

²⁸ See, eg, Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 227-28.

rights law, that rely on a division of labour – and thus responsibility – between territorial states.²⁹ Presumably, on this view, the ICESCR should be read as if it did contain a jurisdiction clause.³⁰

On a rather different and more radical note, Künnemann takes the wording of article 2(1) of the ICESCR to mean that the instrument simply does not recognise any difference between territorial and extraterritorial obligations.³¹ In support of this view he refers to the fact that it mentions international assistance and cooperation. Accordingly, he defends a view that the ICESCR generates and imposes on states parties internal, external and international obligations.³² Internal obligations are the paradigm case: duties of a state towards its own population. External obligations are the equivalent of what I call extraterritorial human rights obligations, that is, obligations of a state's own authorities towards individuals outside its territory. International obligations are those assumed by an individual state because of its membership in a governing body of an international authority.³³ The International Monetary Fund would be an example of such an international authority.³⁴

Künnemann further notes that all types of obligations – internal, external, and international – have dimensions of respect, protect and fulfil.³⁵ Obligations to respect mean that a state must not interfere with an individual's human right. The obligation to protect means that a state must ensure that third parties do not interfere with human rights. Finally, an obligation to fulfil means that a state has a duty to secure a right, for example, by providing an individual with access to adequate food or housing.³⁶

²⁹ Craven 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality' (n 6) 252-53; for an earlier and more general version of Craven's views on the meaning of cooperation and assistance see Craven, *The International Covenant on Economic, Social and Cultural Rights* (n 2) 144-50.

³⁰ For a similar view albeit within the context of a critique of the CESCR's approach, see Mechlem (n 12) 939-40.

³¹ Rolf Künnemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 201-02.

³² Ibid 213-16.

³³ Ibid 216.

³⁴ Ibid 214-15. For the view that it is primarily the member states who bear obligations when participating in such multilateral organisations see Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' (n 24) 194.

³⁵ Künnemann 212-13. The typology was first developed by Asbjorn Eide, *Report of the UN Special Rapporteur on the Right to Food* (7 July 1987) E/CN.4/Sub.2/1987/23, paras 66-69. For a similar view, developed at the same time, but for a different purpose see generally Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996).

³⁶ For a summary on this typology in an extraterritorial context see also Malcolm Langford, Fons Coomans and Felipe Gomez Isa, 'Extraterritorial Duties in International Law' in Malcolm

While Künnemann defends a broad extraterritorial scope of the ICESCR, he also emphasises that extraterritorial duties to protect and fulfil need ‘a detailed approach’.³⁷ For example, he cites the obligation to devote 0.7% of a state’s GNP as an unpromising example of the extraterritorial duty to fulfil and instead advocates for obligations that call for resource allocation to be mainly conceptualised as international obligations. As such, they need to be discharged by states as part of international institutions, and – where suitable institutions do not exist – also imply an obligation to create the necessary institutional background.³⁸ Künnemann’s conclusion is that there is a fundamental difference between negative human rights obligations, that is, obligations to respect, and positive human rights obligations to protect and fulfil.³⁹

Concerning the interpretation of the missing jurisdiction clause, the two examples discussed are different. And the reasons informing them also differ. Yet, both Craven and Künnemann seem to rely on the rules contained in the VCLT and set out above in one way or another. Craven does not refer to the general rule of interpretation. However, he does make an argument against extraterritoriality as the norm (and for conceptualising it narrowly and as an exception) informed by notions of context as well as object and purpose.⁴⁰ Künnemann, comes to the opposite conclusion. For him, extraterritorial obligations in the ICESCR should be seen as the norm, rather than the exception. He reaches his verdict by relying on the same notions as Craven: context, and object and purpose,⁴¹ both of which appear in article 31 VCLT.

How is it possible that two sources rely on the same rules of interpretation but reach different results? Either, one (or both) of the sources make a mistake in which

Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 87-90.

³⁷ Künnemann (n 31) 227. He is by no means the only author to defend a broad approach. See, eg, Magdalena Sepúlveda, ‘Obligations of “International Assistance and Cooperation” in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2006) 24 *Netherlands Quarterly of Human Rights* 271; Wouter Vandenhole, ‘Economic, Social and Cultural Rights in the CRC: Is there a Legal Obligation to Cooperate Internationally for Development?’ (2009) 17 *International Journal of Children’s Rights* 23, 50-55.

³⁸ Künnemann (n 31) 222-27.

³⁹ *Ibid* 227-29. Albeit broader in result, this is not entirely dissimilar from Milanovic’s account. He argues that jurisdiction as a threshold only applies to positive, but not negative human rights obligations. See generally Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1). A similar view on the ICESCR can also be found in Coomans, ‘Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ (n 24) 192-99.

⁴⁰ Craven, ‘Human Rights in the Realm of Order: Sanctions and Extraterritoriality’ (n 6) 240-41, 52.

⁴¹ Künnemann (n 31) 202-03, 27-29.

rules they apply or in how they apply them. Alternatively, it is possible that the *rules* of interpretation are not in and of themselves sufficient to give meaning to a treaty. It seems perfectly plausible to claim – with Craven – that the context of international human rights law primarily consists in its reliance on the state system and the ‘division of labour’ that comes with it. The purpose of a human rights treaty, then is to give effect to this system of allocating duties to particular states. On the other hand, it is not unreasonable to think that human rights treaties are primarily to be interpreted from individuals’ perspective – as Künnemann does. Here, the purpose or point of any human rights treaty could be to improve an individual’s well-being.

But how are we to decide which interpretation is true to the ICESCR? What seems to be important here is not *that* the purpose of a treaty matters, but *how* we should choose the (true) purpose of the treaty. That is, the disagreement between Craven and Künnemann is about how to determine the purpose of the ICESCR and what that purpose says about its extraterritorial application. Both of them rely on facts to make their point but neither of them explains what makes their facts – as opposed to the other’s – relevant. To my mind, the two authors disagree fundamentally about what international human rights law is for. That is, it is not the VCLT or its rules that determine the outcome of their interpretation. Rather, the meaning they ascribe to the ICESCR depends on underlying value judgments. In this sense, rules of interpretation might be necessary (or not) to determine meaning, but they are certainly not sufficient. We shall come back to this point below.⁴²

1.2 The Optional Protocol

The Optional Protocol to the ICESCR (Optional Protocol)⁴³ provides the CESCR with the competence to receive individual communications (article 1). Along with provisions on admissibility (article 3), interim measures (article 5), and friendly settlement (article 7), it also outlines what kind of individual communications the Committee may receive. Article 2, which is concerned with the latter, reads:

Communications may be submitted by or on behalf of individuals or groups of individuals, *under the jurisdiction of a State Party*, claiming to be *victims of a violation* of any of the economic, social and cultural rights set forth in the Covenant *by that State Party*. ...⁴⁴

⁴² See section 2.4 below.

⁴³ A/RES/63/117.

⁴⁴ Emphasis my own.

Unlike the Covenant itself this provision contains a jurisdiction clause not unlike the ones discussed above. The same restrictions do not apply to interstate communications (article 10) or the inquiry procedure (article 11).⁴⁵

While it seems obvious that the Optional Protocol does not change the meaning of article 2(1) of the ICESCR with respect to extraterritorial obligations of states, it is nevertheless important to note the following. Whether or not one thinks that the Optional Protocol should or should not contain such a jurisdiction clause is of course a discussion worth having.⁴⁶ The relevant tension here is between cooperation and jurisdiction. The emphasis on cooperation raises the possibility that developed states may be responsible to alleviate general deprivation. Emphasising jurisdiction, on the other hand, suggests that a state only has obligations towards deprived individuals to whom some kind of prior link should exist.⁴⁷

However, it seems the real question is this: given that the Optional Protocol does mention jurisdiction, what is the CESCR supposed to do when it receives a communication with an extraterritorial dimension? How should it decide which of the different conceptions of jurisdiction is correct in the light of the object and purpose of the ICESCR? Neither the Covenant nor the Protocol answer these questions. Instead, we are again faced with the issue of interpretation.

If we start, with the received wisdom, by looking at the rules in the VCLT, article 31(2) is relevant. It describes the ‘context’ in the light of which a treaty must be interpreted. Subsection (b) lists among the facts that constitute said context ‘any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.’ The Optional Protocol certainly fits the bill. It is a related instrument, ratified by some of the parties to the ICESCR and generally accepted to be related to the latter. But what does it tell us that the context of the ICESCR mentions jurisdiction? Does it mean it should be read into the treaty as well? Or does the Optional Protocol imply the extraterritorial application of the ICESCR and thus seeks to limit individual complaints in an area where far reaching obligations should now be seen as the norm?

⁴⁵ For an analysis see Christian Curtis and Magdalena Sepúlveda, ‘Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?’ (2009) 27 *Nordic Journal of Human Rights* 54, 59-62.

⁴⁶ For different views on the implications of the jurisdiction clause see, eg, *ibid*; Langford, Coomans and Gomez Isa (n 36) 60-62.

⁴⁷ But see Principle 9(c) Maastricht Principles mentioned in section 1.1 above, and the discussion in section 2.2, as well as chapter 5 below.

Again, none of these options is obviously superior or closer to the true meaning of the Optional Protocol, or the ICESCR, for that matter, than the others. Despite a detailed rule on the context of treaties, we are none the wiser about how to determine the point of any of these provisions, let alone their relationship. Instead, which interpretation we pick turns on what values and principles the ICESCR and the Optional Protocol incorporate, respectively. It would be important to know, for example, if the point of the Optional Protocol is to clarify the general obligations of states in the ICESCR or whether its point is to add particular procedural rights in addition to the substantive ones contained in the original treaty. But again, the rules in the VCLT, including the provisions on context, do not provide us with an answer to this question. They only provide *that* context and purpose are relevant, but do not specify how we would go about identifying their relevant properties.

After the discussion in this section it should be clear that interpretation is not only a matter of rules. Nothing so far weakens my initial hypothesis that interpretation is an evaluative activity, even where this is not admitted. In other words, giving meaning to international treaties involves value judgments, whether this is made explicit or not. To illustrate this further, let us consider the roles of two competing ideas in the interpretation of extraterritoriality: human rights and global justice. The next section shows how these concepts, and the values and principles underpinning them – rather than any rules on interpretation – pull the outcomes of respective interpretations in different directions.

2 The Problem of Implied Values: Human Rights and Global Justice

2.1 The Committee on Economic, Social and Cultural Rights

The CESCR⁴⁸ has pronounced its views on extraterritorial dimensions⁴⁹ of the ICESCR regarding a number of issues, rather than extraterritoriality as such.⁵⁰ These

⁴⁸ For an analysis of the role of the Committee in interpreting the ICESCR see Craven, *The International Covenant on Economic, Social and Cultural Rights* (n 2) 3-4, 30-105.

⁴⁹ I use this term purposefully as it is not clear what the CESCR means by ‘obligations’ and whether some or all of the issues on extraterritoriality are to be considered obligations, goals, or something else altogether. See, eg, CESCR, *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, (23 June 2017) E./C.12/GC/24, para 31, where the Committee sets out to define states’ obligations (in the title), but uses the verb ‘may’ with regard to states regulating the extraterritorial activities of businesses domiciled within its territory.

⁵⁰ For detailed analyses of the CESCR’s jurisprudence see Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights’ (n 13); Langford, Coomans and Gomez Isa (n 36) 95-111.

issues include the disruptive effect of sanctions,⁵¹ occupation,⁵² the regulation of non-state actors abroad,⁵³ membership of international organisations,⁵⁴ and ‘international assistance and cooperation’.⁵⁵ These issues are usually addressed separately and the Committee can be (and has been) criticised for not clarifying extraterritorial human rights obligations on a conceptual level.⁵⁶ The Committee’s 2017 General Comment on obligations regarding business activities is an exception, and perhaps signifying the emergence of a trend in this regard.⁵⁷ It discusses extraterritorial obligations under its own heading and thus pulls together some of the issues otherwise addressed on separate bases.⁵⁸ While this may appear helpful at first glance, the Committee does not seem to make any meaningful headway in terms of clarity. For example, the Committee uses an array of different auxiliary verbs, including may and should, in a context where it is professing to set out states’ obligations.⁵⁹ However, a lack of clarity – conceptual and otherwise – is not seen as unique to the CESCR’s work in the area of extraterritoriality.

On the contrary, scholars have identified that the Committee’s statements in General Comments and Concluding Observations often do not contribute to clarity.⁶⁰ Mechlem has accused the CESCR of not paying sufficient attention to the rules of interpretation in international law, that is, those set out in the VCLT.⁶¹ On a different note, Moeckli argues that the Committee neglects the burden of legitimacy its

⁵¹ See, eg, CESCR, *General Comment No 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights* (12 December 1997) E/C.12/1997/8.

⁵² See, eg, CESCR, *Concluding Observations: Morocco* (30 May 1994) E/C.12/1994/5, para 10; CESCR, *Concluding Observations: Israel* (26 June 2003) E/C.12/1/Add.90, paras 31-35.

⁵³ See, eg, CESCR, *General Comment No 14, The Right to the Highest Attainable Standard of Health* (11 August 2000) E/C.12/2000/4, para 39; CESCR, *Concluding Observations: China* (13 June 2014) E/C.12/CHN/CO/2, para 13.

⁵⁴ See, eg, CESCR, *General Comment No 14* (n 52) para 42.

⁵⁵ See, eg, CESCR, *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights* (10 May 2001) E/C.12/2001/10; CESCR, *Concluding Observations: Germany* (24 September 2001) E/C.12/1/Add.68, para 15.

⁵⁶ Mechlem (n 12) 935-40; Langford, Coomans and Gomez Isa (n 36) 112. For the conclusion that the Committee has in fact clarified states’ obligations in this area see Sigrun Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia 2006) 153. I disagree with the latter statement. The Committee has – to my mind – not clarified the issues, but instead relies on oversimplification, which it then compensates for by using different auxiliary verbs. On this see text before n (58) below.

⁵⁷ CESCR, *General Comment No 24* (n 48).

⁵⁸ *Ibid* paras 25-37.

⁵⁹ *Ibid* paras 31-33.

⁶⁰ See generally Mechlem (n 12); Daniel Moeckli, ‘Interpretation of the ICESCR: Between Morality and State Consent’ (2016) <<https://ssrn.com/abstract=2720351>> accessed 22 September 2017.

⁶¹ See Mechlem (n 12). She argues, first, that treaty bodies (including the CESCR) interpret human rights instruments in lieu of states and should thus be bound by the same rules, and second, that following the VCLT would make their pronouncements more acceptable and legitimate.

interpretive function carries, struggling instead to balance morality and state consent.⁶² These points are justified. However, neither of them captures or explains fully why the CESCR has been unhelpful in the area of extraterritoriality.

When Mechlem analyses the statements on extraterritoriality she emphasises – not unlike Craven – that they exhibit a lack of attention to the *context* of the ICESCR.⁶³ She notes that the CESCR could have taken into account the wording or object and purpose of the ICESCR, but insists that the gravest mistake here is the neglect of the context of international human rights law generally.⁶⁴ The underlying issue she takes with the Committee’s approach, however, is not only with the lack of legal method, but obviously also with the result of the interpretation.⁶⁵ This hints at the same problem we have identified above: the real disagreement between authors, or authors and the Committee, is not about rules on interpretation but about how these rules should be applied, or, in other words, about the values that inform the purpose of the treaty and thus about the *point* of international human rights law. The real question is thus how to determine the object and purpose of the ICESCR.

Moeckli’s argument tracks the latter concern more closely. He points out that the Committee can be seen to be adhering to the VCLT even when it is employing what it calls special methods of interpretation, but that it neglects the importance of legitimacy for treaty interpretation.⁶⁶ In other words, the problem with the CESCR’s interpretation is not the rules it follows but the results it reaches and how these results are perceived by the interpretive community in general and states in particular. This becomes clear when he notes that

Nevertheless, sometimes the two poles [morality and state consent] do pull in different directions, so that it becomes inevitable that the Committee resolves the conflict by giving priority to one of them.

This is the case where the pull towards morality leads the Committee to invoke the teleological element and the effectiveness principle to justify expansive interpretations of rights and correlating duties, which arguably do not reflect the will of the states parties.⁶⁷

⁶² Moeckli (n 60) 10-12, 20-24.

⁶³ Mechlem (n 12) 939-40, citing Craven, ‘Human Rights in the Realm of Order: Sanctions and Extraterritoriality’ (n 6), with whom she shares the value judgment about the point of human rights; but not Künnemann (n 31) or Coomans, ‘Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ (n 24), with whom she does not.

⁶⁴ Mechlem (n 12) 939.

⁶⁵ *Ibid* 939-40.

⁶⁶ Moeckli (n 60) 10-12, 20-24. This is not surprising as the VCLT does not commit one to a particular ‘method of interpretation’ in this sense at all. On this see Letsas (n 4) 532.

⁶⁷ Moeckli (n 60) 19.

He goes on to propose that the tension between these two poles cannot be resolved and that, accordingly, the Committee should focus on generating legitimacy for its interpretation by adhering to the rules in the VCLT, and keeping an eye on transparency and coherence.⁶⁸

Is this sufficient to tackle the issues regarding the CESCR's findings on extraterritoriality? I do not believe it is. Instead, the lack of clarity can be explained more constructively if we accept interpretation to be guided by values that inform the interpretation and the application of the VCLT rules, and thus as an evaluative activity. The Committee's engagement with this aspect is not sufficiently rigorous. To this end, it is useful to compare the Committee's approaches to extraterritorial obligations of states regarding military occupation and international assistance and cooperation, respectively.

On occupation, the CESCR found that a '...State party's obligations under the Covenant apply to all territories and populations under its effective control...' ⁶⁹ in relation to Israel's duties towards the population of the Occupied Palestinian Territories. However, the Committee has not made a similar finding regarding Morocco's obligations in Western Sahara, choosing instead to focus on the issue of self-determination.⁷⁰ The comparison between these two approaches could already be seen as problematic, as the situations are indeed similar but the CESCR's findings are not. We may at least infer that the Committee feels that effective control over a territory and populations is a relevant consideration when it comes to extraterritorial obligations. However, it is of course less than clear why the Committee thinks this is as it has never offered any reasoning for this view.

Moving to the comparison with the CESCR's view on international assistance and cooperation, consider the following. In its Statement on Poverty, the Committee emphasised that

... it is particularly incumbent on all those in a position to assist, to provide "international assistance and cooperation, especially economic and technical" to enable developing countries to fulfil their core obligations. In short, core obligations give rise to national responsibilities for all States

⁶⁸ Ibid 20-24.

⁶⁹ CESCR, *Concluding Observations: Israel* (n 52) para 31; reaffirmed in CESCR, *Concluding Observations: Israel* (16 December 2011) E./C.12/ISR/CO/3, paras 3 and 5.

⁷⁰ See for the most recent statement (or lack thereof) to this effect CESCR, *Concluding Observations: Morocco* (22 October 2015) E./C.12/MAR/CO/4.

and international responsibilities for developed States, as well as others that are “in a position to assist”.⁷¹

Core obligations are an innovation of the Committee to denote the most basic levels of the rights contained in the ICESCR.⁷² There are a number of issues with this concept.⁷³ However, for our purposes, we may leave them aside for now. What is interesting about the above statement for us is the criterion the Committee uses to identify who bears extraterritorial human rights obligations. It refers to actors that are ‘in a position to assist’. Against the background of a statement on poverty, the only plausible way to read this is to say that a) states parties have obligations of resource distribution and b) that these obligations are differentiated according to a state’s capacity to provide resources of a kind relevant to a given situation.

This is very different from the standard of territorial control used to illuminate the obligations of Israel and Morocco referred to above. Whether a state is economically and technically in a position to assist and whether it is in control of territory of individuals are different questions. One may obtain while the other does not. For example, viewed in isolation,⁷⁴ Germany would be in a position to assist Greece to run a few of its refugee camps set up in response to the large number of people fleeing war and devastation in Syria.⁷⁵ But Germany is not in control of Greece’s territory, or, presumably, even a part thereof. Conversely, we could say Morocco is in control of at least part of Western Sahara, but – because of its lower level of resources – may not be able to assist with the same number of hypothetical refugee camps.

⁷¹ CESCR, *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights* (n 55) para 16; citing CESCR, *General Comment No 14* (n 52) para 45.

⁷² CESCR, *General Comment No 3: The Nature of States Parties’ Obligations* (14 December 1990) E./1991/23 para 10; see further Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (n 2) 365-70.

⁷³ The concept of ‘core obligations’ or the ‘minimum core’ of socioeconomic rights is among the most controversial concepts developed by the Committee. For an analysis relating to the interpretation of the ICESCR in particular see Mechlem (n 12) 940-45. For a more extensive discussion see generally Katharine G Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale Journal of International Law* 113. See in particular *ibid* 126-27, where she makes the point that any interpretation of the minimum core of social rights depends on the values underpinning its justification.

⁷⁴ This statement would not be true if one or two refugee camps are not viewed in isolation. If Germany’s general position to assist with *all* refugee camps *everywhere* is to be assessed we would need principles of priority as it cannot be plausibly said that one state can assist with all situations of humanitarian concern. I shall return to this point below.

⁷⁵ For a summary of the humanitarian situation at the end of 2015 see, eg, UN High Commissioner for Refugees (UNHCR), ‘Protecting and Supporting the Displaced in Syria - UNHCR Syria End of Year Report 2015’ (February 2016) <<http://www.refworld.org/docid/56cac3254.html>> accessed 22 September 2017.

As such, this would not be a problem. The Committee could say that these are different ways to allocate different obligations and that they are both applicable depending on the situation.⁷⁶ It could also point out that, conceptually speaking, both control and being in a position to assist could be interpreted as different kinds of capacity. What is problematic, however, is that the Committee does not say any of this. Instead, by discussing an obligation to provide international assistance along with general, domestic core obligations, the CESCR seems to suggest that the obligations regardless of how different they may be, are informed and allocated by the same principles.

But this is implausible. It is necessary to investigate what values and principles are implied in the Committee's statements. Take the suggestion that (core) obligations to assist internationally are tied to the capacity of a given state to provide assistance when this is precisely one of the caveats core obligations on the national level are supposed to address and – to a certain extent – exclude.⁷⁷ Accordingly, it seems inconsistent to take capacities into account internationally. Only, of course, our intuition suggests that in the context of assistance and cooperation different obligations according to capacity make rather a lot of sense. This is because global shortcomings of resources, when put together, most likely outstrip any single state's capacity to assist.⁷⁸ Thus, what we need to operationalise obligations to assist, whether internationally or not, are principles of priority in distributing resources and opportunities.⁷⁹ Human rights do not provide these. Instead their focus is on provisions that are resistant to exactly such trade-offs.⁸⁰ What does provide principles of global distribution are accounts of distributive justice, be it in the form of social justice, global

⁷⁶ I believe this would be a plausible stance to take. See on this chapter 2, section 3.3 below.

⁷⁷ At least according to approaches which characterise the minimum core as a normative essence of socioeconomic rights. See Young (n 73) 126-38.

⁷⁸ Take the point made above regarding Germany and Greek refugee camps: it is entirely plausible to say that Germany is in a position to assist Greece with, say, five of these camps. But it is implausible to say that Germany could assist Greece, Turkey, Lebanon, and Jordan with all of their camps.

⁷⁹ These are supplied by accounts of social, global, or international distributive justice. Examples of theories of social justice include, among many others, John Rawls, *A Theory of Justice* (Harvard University Press 1971); Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990); Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2000). Global justice is a term preferred by cosmopolitan thinkers such as Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford University Press 2005). More statist theorists prefer the term international justice. See, eg, Saladin Meckled-Garcia, 'On the Very Idea of Cosmopolitan Justice: Constructivism and International Agency' (2008) 16 *Journal of Political Philosophy* 245; see also Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy & Public Affairs* 113.

⁸⁰ See on this idea Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984). See further chapter 2 below.

justice, or international justice.⁸¹ Yet, the Committee seems to suggest that rights, human rights, global justice and social justice are somehow all the same, governed by the same values, without ever specifying what these values might be.

Where does this leave us? The meaning(s) the CESCR gives to the Covenant are puzzling. I suggest that the problem with the Committee's approach is not primarily its results: they may well be right, but we do not know enough about its interpretation to say anything to that effect. A problem we can identify instead is with the Committee's take on the activity of interpretation itself. By avoiding spelling out the value judgments it makes, the CESCR neglects the normative weight of interpretation as such. Demanding that they follow the rules set out in the VCLT will not change this. After all, as we have seen, the Committee operates within these already. Rather, what we must do is to demand that the CESCR follow the rules *differently*: we need to demand that the Committee recognises the evaluative nature of interpretation, and that it should be upfront about the corresponding value judgments it makes.⁸²

On a more optimistic note, the Committee's pronouncements – if ambiguous and often unhelpful – could at least be read to allow for a differentiation between different kinds of obligations informed by different values. Gondek, for example, explicitly makes the point that a charitable reading of the General Comments and Concluding Observations imply that control and cooperation are two separate and distinct legal bases for extraterritorial obligations and even hints at some differences in the obligations themselves. However, he also concedes that the content of obligations remains largely unclear.⁸³

This possibility of an interpretation underpinned explicitly by different values present in the ICESCR is not open to other contributions to the debate. Most importantly, the Maastricht Principles exhibit even greater neglect for both the evaluative nature of interpretation and the fact that depending on the values identified different right holders, duty bearers, and obligations would result.

⁸¹ For a similar distinction between social-distributive justice and human rights see Saladin Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (2009) 2 *Ethics & Global Politics* 259.

⁸² This may well result in the inconsistencies pointed out here turning out to be even more egregious than I have shown. Even so, it would be helpful because it would allow for the inconsistencies to be addressed explicitly.

⁸³ See Gondek (n 1) 291-365. For a similar conclusion see Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights' (n 13).

2.2 The Maastricht Principles

The Maastricht Principles are an example of how tensions in interpretive results go overlooked when value judgments are not made explicit. They were drafted and adopted by a group of experts and activists, and purport to clarify and interpret existing international law.⁸⁴ A subset of the drafters also supplied a commentary.⁸⁵ Leaving aside the various issues arising from the authorship,⁸⁶ I shall focus on Principle 8 on the ‘Definition of extraterritorial obligations’ and the competing values that shape it.⁸⁷

Principle 8 reads as follows:

8. Definition of extraterritorial obligations.

For the purposes of these Principles, extraterritorial obligations encompass:

- a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory; and
- b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

What is interesting about this phrasing is that it defines extraterritorial obligations without reference to their bearers and the right holders who would benefit from being owed such obligations. Instead it refers to situations where these obligations are supposed to arise, without also specifying why that is and who these obligations would benefit.

The commentary adds little in terms of clarity. On the contrary, it implies that specification regarding the duties set out in the ICESCR in particular is not necessary because the Covenant itself does not specify the right holders.⁸⁸ Instead, ‘[i]t may be presumed that such obligations are *always* owed, *at least to those persons whose*

⁸⁴ This is implied in the preamble of the Principles, which states that the Principles are ‘[d]rawn from international law’ and that their aim is to ‘clarify the content of extraterritorial State obligations to realize economic, social and cultural rights...’. See also Langford and others 9-10. The latter book was published after the Principles were adopted and shares with them a significant proportion of contributors.

⁸⁵ Olivier De Schutter and others, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights’ (2012) 34 *Human Rights Quarterly* 1084.

⁸⁶ For a very valuable analysis of the tensions the authorship of the Principles raises see Ralph Wilde, ‘Dilemmas in Promoting Global Economic Justice through Human Rights Law’ in Nehal Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016).

⁸⁷ For a more in-depth discussion of the Maastricht Principles, and in particular Principle 9 on the scope of jurisdiction, see chapter 4, section 3.3 below.

⁸⁸ De Schutter and others (n 85) 1102-03.

*enjoyment of the human rights referred to in that instrument are within a state's control, power, or authority to ensure.*⁸⁹ This statement is problematic because it contradicts its context. If it is necessary to say that persons need to be within the authority or control of a state for obligations to be owed, it follows that a specification of the duty bearer was necessary after all: only the state that has control owes the obligations. But if it is necessary to specify duty bearers as well as the content of the obligations owed, the interesting finding is not that the obligations always apply. The interesting question would rather be to whom they are owed and when. But the wording of Principle 8, which focuses on *effects* on human rights or their *realisation*, that is, on outcomes rather than standards, makes it near impossible to ask this question.⁹⁰

The commentary further notes that, ‘...while the *beneficiaries* of the human rights obligations are the *rights-holders who are under a state's authority and control, the legal obligations to ensure the rights in question are owed to the international community as a whole*’⁹¹ essentially because the ‘preservation of human rights is in the interest of all states.’⁹² These statements follow the quote cited in the paragraph above. The problem here is that the first quote says that individuals are right holders, while the ones in this paragraph state that individuals are beneficiaries and that the international community as a whole is the right holder. This follows from saying that obligations are owed to the international community.⁹³ To add that the ‘preservation of human rights’ is of global interest does not add anything to alleviate the confusion. The interesting questions here would be whether it makes a difference for individuals if they are right holders or beneficiaries, and, if so, what that difference is. How to make sense of third party beneficiaries to promises as right holders – such as individuals who benefit from the promises states make to each other when they ratify a human rights treaty – is a long-standing debate in rights theory and it would merit discussion here.⁹⁴ But the commentary is silent on the matter.

⁸⁹ Ibid 1102 (emphasis my own).

⁹⁰ For an argument on the problems of outcome focused views of human rights more generally see Meckled-Garcia, ‘Do Transnational Economic Effects Violate Human Rights?’ (n 81).

⁹¹ De Schutter and others (n 85) 1103 (emphasis my own).

⁹² Ibid.

⁹³ This draws on the structure of rights as being correlative to duties. I discuss this issue further in chapter 2, section 1.1 below.

⁹⁴ How to draw the line between agents who are owed a duty as a beneficiary of a promise and those who just happen to benefit from the state of affairs created by the honouring of the duty is the most important question for our purposes. On the debate between the interest theories and the will

Would it have been helpful had the Principles and the commentary – or their respective authors – followed the rules of interpretation set out in the VCLT more explicitly? I do not believe so. While the Principles and the commentary might have benefitted from an explicit reference to the VCLT, the main problems with their interpretation would not have been alleviated by rules alone. Take, for example, the assertion in Principle 8(a) that extraterritorial obligations are those relating to acts and omissions that have effects on the enjoyment of human rights outside a state's territory. The implication is that human rights are understood to have as their main goal to bring about a certain outcome that can be enjoyed and effects on which are judged as infringing human rights.⁹⁵

This assumption is related to the question of the object and purpose of a given international human rights treaty. Whether it turns out to be true or not does not depend on the fact *that* the object and purpose is taken into account (which is what the rule stipulates) but rather on the question of *what* the object and purpose is (on which the VCLT is silent). If the purpose of the ICESCR, say, is the furthering of individual wellbeing, then this assumption is true. If its purpose is to ensure a minimum standard of treatment, its truthfulness is uncertain. The assumption as such implies that the authors of the Maastricht Principles and the Commentary made a value judgment in favour of the former, but neglected to make this explicit. This in turn means that their allocation of duties will have to follow from a distributive principle. All of this would be covered by the rules in the VCLT and it could even be true. Perhaps the ICESCR and other treaties containing socioeconomic rights are best understood as an expression of distributive justice. However, an interpretation to this effect would have to rely on value judgments and these in turn need to be made explicit to be argued for and against.

We have seen that treaty interpretation has not led to principled results regarding the meaning of extraterritoriality. An important reason is that values and principles are not part of the discussion when they should be. This means that we need to understand the role moral values play in treaty interpretation in order to make progress in the debate on extraterritoriality. The following section argues that the

theories of rights and its bearing on this see, eg, Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 *Oxford Journal of Legal Studies* 257, 262-67. See also chapter 2 below.

⁹⁵ This is an assumption the Principles share with interest-based accounts of human rights, which, in turn, is no coincidence. See further chapter 2, section 1.2, and chapter 4, section 3 below.

difficulties we encountered are not surprising because interpretation is necessarily an evaluative activity. The problem, of course, is not the nature of interpretation, but that said nature is not usually acknowledged and acted upon by interpreters.

3 How to Give Meaning When Rules on Interpretation Are Not Sufficient

The goal of legal interpretation is *giving* meaning to law, and, in our case, legal texts. This definition captures that interpretation is at once conservative and creative. It is an exercise in being faithful to whatever is being interpreted, and in creating meaning based on the original, which goes beyond mere reproduction.⁹⁶ The rules of interpretation in articles 31 and 32 VCLT, in turn, suggest that all that is required to successfully interpret a treaty is following the set of techniques of interpretation they outline. However – and as we have seen – when authors or treaty bodies claim that their interpretation of a treaty is supported by the rules provided for in the VCLT, they still, usually, end up disagreeing on something or other.

Take, for example, and in addition to the views examined above, the different results concerning the extraterritorial application of the ECHR in the *Banković* decision: The ECtHR found that a NATO bombing of a television and radio station in Belgrade did not mean that Belgium owed any obligations under the Convention to the victims of the strike.⁹⁷ Gondek disagrees.⁹⁸ Yet, again, both the Court and the author rely on the VCLT to explain and justify their approach.⁹⁹ The same is true for the examples discussed throughout this chapter. There are many different views on the extraterritorial application of the ICESCR, all of which at least implicitly follow the rules set out in the VCLT in order to justify their respective interpretations. What does this show?

⁹⁶ Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/legal-reas-interpret/#RolIntLegRea>> accessed 22 September 2017. On an abstract level, even Raz and Dworkin agree on this: see Ronald Dworkin, *Law's Empire* (Hart 1986); Joseph Raz, 'Why Interpret?' (1996) 9 *Ratio Juris* 349.

⁹⁷ *Banković v Belgium*, App no 52207/99 (ECtHR, Decision, 12 December 2001), paras 74-82.

⁹⁸ Michal Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 *Netherlands International Law Review* 349; Gondek, *The Reach of Human Rights in a Globalising World* (n 1) 178-79.

⁹⁹ *Banković* (n 97) paras 16-19 (citing *Golder v United Kingdom*, App no 4451/70, (ECtHR, Judgment, 21 February 1975)), and 55-66; Gondek, *The Reach of Human Rights in a Globalising World* (n 1) 7-8, 29-47. As regards the ECtHR, this is an exception. Generally, it has not opted to give the VCLT a lot of explicit traction in its case law. In particular, the Court is largely dismissive of intentionalist arguments and instead endorses a moral reading of the Convention. See generally Letsas (n 4).

It shows that our initial hypothesis is right, namely that following rules on interpretation is not, or at least not only, what determines the outcome of a given interpretation. Employing the tools the rules provide for – looking at the wording and the context in light of the object and purpose of the treaty, and, sometimes, the drafting history – does not, in and of itself allow us to ‘give meaning’ to treaties; let alone a sense of what the contribution of the treaty to the law is. If they did, everyone who follows them would reach the same result. However, given that this is not the case, it seems that giving meaning involves much more than using the right tools. And on a less generous reading of the phenomenon, one might conclude that the VCLT rules are a red herring, designed and intended to detract from what is really at stake when we interpret treaties.

A closer look at the provisions makes clear that this is unsurprising. Take article 31(1) VCLT. It asks us to interpret a treaty in the light of the instrument’s object and purpose. Now, saying *that* the object and purpose is to be taken into account is not the same as saying *how* to determine what the object and purpose of a given treaty is. But this is what is actually at stake.¹⁰⁰ Take the doctrine of the margin of appreciation in the jurisprudence of the ECtHR as an example.¹⁰¹ It is conceivable to think that, say, the ECHR’s object are human rights and its purpose is to harmonise the rights of individuals against their government across the states that have ratified the Convention. This would mean that any idea of a margin of appreciation needs to be approached with caution. On the other hand, one could think, equally reasonably, that the purpose of the Convention is to hold states accountable for the worst abuses of power. This, in turn, would mean that a margin of appreciation as the Court has developed it is not only reasonable, but indeed necessary. But we are none the wiser as to which, if any, of these purposes is the right one.¹⁰²

Klabbers, drawing on Oakeshott’s work on rationalism,¹⁰³ summarises the problem with rules on interpretation as follows:

¹⁰⁰ Letsas (n 4) 532-33. See also the argument in sections 1 and 2 above.

¹⁰¹ On the margin of appreciation doctrine, see, eg, Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (31) 31 *NYU Journal of International Law & Politics* 843; George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012); Oddný Mjöll Arnardóttir, ‘Rethinking the Two Margins of Appreciation’ (2016) 12 *European Constitutional Law Review* 27.

¹⁰² I am assuming here that value judgments can be objectively true. On the relevance of this question for international law and a defence of this assumption see Emmanuel Voyiakis, ‘International Law and the Objectivity of Value’ (2009) 22 *Leiden Journal of International Law* 51.

¹⁰³ Michael Oakeshott, *Rationalism in Politics and Other Essays* (Methuen 1962).

The attempt to capture interpretation in rules not only aims to rationalize behaviour; it also aims to depoliticize. It aims to suggest that the one and only true interpretation of a treaty (or any other document, for that matter) is waiting somewhere just around the corner, waiting to be laid bare or discovered by whoever approaches it with the right tools. It suggests that interpretation is not a matter of politics, and it suggests likewise that the text-to-be-interpreted is not, or no longer, a matter of politics.¹⁰⁴

This statement is preceded by the argument that interpretation, much like cooking, cannot be explained only by reference to rules. After all, following a recipe does not make one a good cook. Experience, knowledge, and a certain feel for temperatures, textures, and smells informing the act of cooking do.¹⁰⁵ Klabbers concludes that interpretation of treaties is indeed both a form of art and a political process, and that rules on interpretation do not change this.¹⁰⁶

I agree with this diagnosis. But I think it needs to be supplemented if we want to do more than describe the process of interpretation. The fact that treaties need to be interpreted in light of their purpose, is instructive here. Purpose means that each treaty has a point or value which it pursues. Saying that a treaty must be interpreted according to its point, however, is like saying that the instrument ‘must be interpreted as it *should* be interpreted.’¹⁰⁷ In other words, identifying the purpose of a treaty must eventually be justified with a normative proposition. When an interpreter ascertains the point of a treaty, they take into account as set of facts: the text, including the preamble, the drafting history, and so forth. But the interpreter must also supply a justification as to why some of these facts (but not others) are important. The facts themselves do not yield any conclusion as to their own relevance. Only normative propositions do.¹⁰⁸

Take, for example an intentionalist international lawyer. She would say that in affirming the purpose of any treaty we must take into account its wording. She might then go on and say that this is because the wording expresses the intention of states. But this would not be an actual justification because it only begs the further question why we should care about the intention of states, and so on. Trying to justify the

¹⁰⁴ Jan Klabbbers, ‘On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization’ (2005) 74 *Nordic Journal of International Law* 405, 411.

¹⁰⁵ *Ibid* 409-11.

¹⁰⁶ *Ibid* 426-28.

¹⁰⁷ Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (n 4) 536 (emphasis my own).

¹⁰⁸ Nicos Stavropoulos, ‘Why Principles?’ (2007) Oxford Legal Studies Research Paper Series, Working Paper No 28/2007, 10-11 <<https://ssrn.com/abstract=1023758>> accessed 22 September 2017; Letsas (n 4) 534. See also Mark Greenberg, ‘How Facts Make Law’ (2004) 10 *Legal Theory* 157.

relevance of a fact with another fact leads to an infinite regress.¹⁰⁹ Instead, we would need to say, for example, that there is a duty to respect and further states' projects that they pursue through treaty making.¹¹⁰ This is not a statement of fact but a normative proposition: it states a moral duty. It is also a principle that is independent of and insensitive to facts.¹¹¹ That is, its truth does not depend on any one fact obtaining. States may pursue projects, or not, and the proposition that there is a duty to respect such projects would still hold true. What changes when states are indeed pursuing projects through international treaties is that the normative proposition, the principle it embodies, is now applicable.¹¹² And when it is applicable it can serve to justify the relevance of facts such as state's intentions for the interpretation of a treaty.

The consequence is that interpretation is evaluative, not empirical, in the sense that it will involve reasoning about which normative propositions about moral values or principles reflect the point of a treaty. Often, there will be more than one value at play. The ICESCR, for example may well have several points. It could be about fair distribution, equal concern, or both of these at the same time. That is, the treaty may have a point, each provision and even parts thereof may have further, additional, or different points.¹¹³ None of what I say here excludes this possibility. The recognition that interpretation is evaluative allows us to take these values into account when we interpret treaties without prejudice as to which value prevails in which case. Understanding treaties and their interpretation to be only a matter of politics neglects this evaluative aspect and keeps us from affirming their relationship with political morality, when what is really at stake is precisely the role human rights law and the rights it bestows on individuals play in it.

4 Conclusion: Extraterritoriality as a Matter of Principle

What does this mean for an argument about or an interpretation of extraterritoriality? I have shown that neither conventional reliance on rules of interpretation, nor implicit (as opposed to explicit and reasoned) reliance on value judgments, have equipped us

¹⁰⁹ Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (n 4) 534; see also G A Cohen, 'Facts and Principles' (2003) 31 *Philosophy & Public Affairs* 211, in particular 219-20.

¹¹⁰ Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (n 4) 535.

¹¹¹ See generally Cohen (n 108). This is in line with Dworkin's definition of a principle as a standard required by some dimension of morality: Dworkin, *Taking Rights Seriously* (n 9) 22.

¹¹² Cohen (n 108) 215-16; Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (n 4) 534-35

¹¹³ On the implications of this insight for extraterritoriality see chapter 2, section 3 below.

to explain or address disagreement about extraterritorial human rights obligations. The main point is that rules on interpretation, be they laid down in the VCLT or not, do not seem to determine the outcome of treaty interpretations. We have also seen that this illustrates the necessity to treat interpretation as evaluative activity. An interpretation of extraterritorial human rights obligations in the ICESCR, like any other interpretation of international treaties, then, should be guided by normative principles that are not sensitive to facts. The upshot is that any interpretation of the extraterritorial scope of the ICESCR – whether it supports or denies obligations towards individuals outside a state party’s territory – will involve reasoning about values. This is related to, but not quite the same as what is often referred to as purposive interpretation in doctrinal scholarship.¹¹⁴ Rather, the focus on the values underpinning a treaty is logically prior to using any of the tools the VCLT suggests because these tools can only be used to interpret a treaty once its point has been established.¹¹⁵

One consequence of this change of approach is that the ICESCR could be seen to incorporate a number of different points or values, each of which informs different parts of provisions.¹¹⁶ It could, for example, well be that the ICESCR has human rights elements and distributive justice elements that are each tracked by a different set of values and principles. However, this will likely mean that they also allocate duties in a different way. One way of differentiating human rights and distributive justice is to say that human rights (including parts of the ICESCR) are about channelling political power, while distributive justice, including global justice, is about allocating to each moral unity of concern (say, individuals) a fair share of resources and opportunities. In each case, the relevant right holders and duty bearers would be identified according to different principles and it is thus entirely possible that we end up with different pairs of actors depending on which value underpins the part of the ICESCR we are interpreting.

For example, if the point of article 11 ICESCR or parts thereof is to allocate a fair share of a resource like food, the capacity to supply food in excess of what a developed state needs to feed its population is certainly a relevant consideration. If the point of the same provision is to channel political power, a capacity to provide food on the part of a particular state is not obviously relevant. Instead, the question becomes

¹¹⁴ On interpretation according to object and purpose see, eg, Gardiner (n 3) 211-22.

¹¹⁵ See Letsas, ‘Two Concepts of the Margin of Appreciation’ (n 101) 532-33.

¹¹⁶ I think this is plausible and will defend this position further in chapter 2 below.

whether the state in question has political power over an individual that can and should be channelled in the first place. This illustrates that any account of extraterritoriality, of any treaty or provision therein, can only be provided by basing it on values rather than just on rules of interpretation. These only become relevant once the underpinning values have been established and can then be followed according to these values.

Throughout this chapter, I have focused on showing how the different views on extraterritoriality expressed by commentators and the CESCO are premised on different values rather than different rules of interpretation. I have not shown why any of the examined views are right or wrong and why we might think one or the other. My reasons for this structure of argument should become clear now. The disagreement I address here is not primarily one of substance, but of method. In other words, I disagree with the idea that rules on interpretation somehow enable us to interpret treaties and their contribution to the law without resorting to value judgments. I do not think this can be done and that any attempt to do it anyway likely results in asking the wrong questions.

The implication of recognising treaty interpretation as an evaluative activity, then, is that asking questions about the meaning of an international treaty will often translate into asking questions about values. Accordingly, in this thesis on the extraterritoriality of the ICESCR, the questions we must ask (and, eventually, answer) are the following: how do we determine the values and principles underpinning the purpose of the treaty, what are they, and how do we interpret the ICESCR in light of these values? Employing the answers to these questions to shed light on its extraterritoriality will be the main task of this thesis.

Chapter 2 The Values of International Human Rights Law

A theory of extraterritorial human rights obligations, as suggested in the Introduction, will have at its heart the search for an answer to the following question: Who owes (which) human rights obligations to whom? Regarding economic and social rights, including those recognised in the ICESCR, some of the purported answers to this question have been radical. As we have seen in the previous chapter, the CESCR, in its Statement on Poverty found that a shortfall on minimum essential levels of the rights to food, health, and education places human rights obligations on the territorial state, but also developed states, and unspecified others, who are ‘in a position to assist’.¹ The underlying assumption is that poverty as a phenomenon violates these rights.² But the Committee is not on its own here. Salomon, for example, has claimed that beyond poverty alleviation, the ICESCR also imposes obligations to counter global inequalities, presumably on those who continue to secure a ‘maximum level of rights’.³

None of this is to deny that poverty and inequality are problematic, or morally wrong. They are. What I want to challenge instead, is the failure by the CESCR, and authors such as Salomon,⁴ to incorporate an answer to our initial question of who owes human rights obligations to whom. Beyond general gestures in the direction of those who ‘are in a position to assist’, who would bear the resulting burdens, and why, are not addressed. Instead, the Committee and Salomon alike ask us to accept that ‘can implies ought’.⁵ I argue that it does not and in sections 2 and 3 of this chapter I offer an alternative understanding of the ICESCR. Following on from the insight that treaty interpretation is evaluative,⁶ I do so by tracing the values and principles underpinning the Covenant and international human rights law more broadly, employing them to justify the allocation of obligations. However, before we embark on defending this

¹ CESCR, *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights* (10 May 2001) E/C.12/2001/10, para 16. See also chapter 1, section 2.1, above.

² CESCR, *Statement on Poverty* (n 1) para 4.

³ Margot E Salomon, ‘Why Should it Matter that Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law’ (2011) 37 *Review of International Studies* 2137, 2144.

⁴ See the discussion in chapter 1 above.

⁵ I owe the inversion of the ‘ought implies can’-principle to Saladin Meckled-Garcia, *What Interest in Human Rights? The Primacy of Reasons over Interests in Justifying Practical Rights* (2016, manuscript on file with the author) 10.

⁶ See chapter 1 above.

challenge of current accounts of extraterritoriality a few preliminary remarks are necessary.

One may object to the assumption – which is implied in how I frame the question of extraterritoriality – that human rights imply corresponding obligations or duties. Griffin, who has developed an influential account of human rights based on personhood,⁷ for example, does not accept that human rights necessarily refer to rights in this narrow, technical sense.⁸ I concede that this may indeed not be true for every instance of human rights being invoked. After all, human rights claims are made and used in a myriad of contexts.⁹ And it is indeed possible that some of those contexts in fact do not identify rights at all, but instead identify political goals,¹⁰ or duties, whether moral or legal, that do not follow from rights.¹¹ I do not take issue with this, and I do not argue that any of these contexts is obviously more important or salient than others.¹² However, I shall insist on the following.

First, rights have a particular normative force in that they justify reasons why someone other than the right holder should bear burdens regarding the right for the sake of said right holder.¹³ This is at least one salient context of human rights claims and I believe incorporating this understanding interprets international human rights law in its best light.¹⁴ The special normative force of rights, including legal rights, is, after all, an important part of the reason why human *rights* claims are used so often to appeal to what is deemed fundamental or important to human flourishing, even if other approaches would prove more fruitful.¹⁵

⁷ James Griffin, *On Human Rights* (Oxford University Press 2008).

⁸ James Griffin, 'Replies' in Roger Crisp (ed), *Griffin on Human Rights* (Oxford University Press 2014) 209-10

⁹ George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2009) 21-26; George Letsas, 'Philosophical Foundations of the Covenants: Is there a Unitary Concept of Human Rights?' (ESIL Symposium, Zürich, 14 April 2016).

¹⁰ Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) 23-24.

¹¹ In other words, while I subscribe to and defend the view that there is a corresponding duty for every right, I do not defend the opposite claim that every duty necessitates a right. For a rejection of the latter see, eg, Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) ch 8.

¹² On the importance of context see also section 3 below.

¹³ Meckled-Garcia, *What Interest in Human Rights?*(n 5) 6-7

¹⁴ This reflects the broadly Dworkinian spirit of this chapter and, indeed, this thesis: see Ronald Dworkin, *Law's Empire* (Hart 1986) ch 2. See also sections 2 and 3 below.

¹⁵ In this sense, human rights are the victims of their own success. This also taps into the worries about human rights vocabularies crowding out dialogue about other means to reach a desired outcome expressed in David Kennedy, 'International Human Rights Movement: Part of the Problem?' 15 *Harvard Human Rights Journal* 101, 108-12.

Second, this study asks if and when a state owes international legal human rights obligations in the ICESCR to individuals outside its territory because this question has given rise to a host of practical difficulties, in particular with regard to adjudication.¹⁶ However, this is only a difficult or relevant question insofar as human rights do indeed refer to rights in the sense postulated immediately above. That is, extraterritoriality is only as problematic as it currently is if human rights concern the justification of practical reasons why someone other than the right holder should bear directly corresponding duties. If international human rights law did not do this at all, neither its adjudication nor the difficulty with extraterritoriality that courts and commentators have encountered would make sense.

Third, none of this is to deny that international human rights law may – in addition to human rights provisions in the strict sense – also incorporate rights rooted in global or social distributive justice, or obligations that do not track corresponding rights at all. It is well possible and – at least to me – plausible that international human rights law gives rise to all of the above. The duties to cooperate internationally imposed by the ICESCR, for example, may well be an example best understood as either a duty of justice or even a duty without a corresponding individual right.¹⁷ However, rights rooted in cooperative schemes like distributive justice, or duties that do not correspond to rights, do not necessarily rely on the same principles and values to justify the burdens they consist of.¹⁸ As we will see, what makes an international legal human right what it is, are exactly these underpinning principles.¹⁹

That a conception of human rights based on principles justifying why a particular agent should shoulder a particular burden may only cover some aspects of the ICESCR, or international human rights law, but not others, should not worry us. On the contrary, allowing for different justifying principles to underpin different aspects of a practice makes our understanding more nuanced and forceful.²⁰ What I

¹⁶ The most prominent example is the case law on extraterritoriality of the ECtHR: ‘Like any good thriller, its twists and turns leave the observer suspended in fearful anticipation on a never ending quest for legal certainty.’ Aurel Sari, ‘Jaloud v. Netherlands: New Directions in Extra-Territorial Military Operations’ EJIL: Talk! 14 November 2014 <<https://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/>> accessed 22 September 2017.

¹⁷ See further section 3.3 below.

¹⁸ See *ibid.* On this difference see generally, Saladin Meckled-Garcia, ‘Giving Up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice, and Imperfect Duties’ (2013) 30 *Journal of Applied Philosophy* 73.

¹⁹ See sections 2 and 3 below.

²⁰ It may also be preferable to discuss some aspects of what duties states owe to foreign stakeholders in terms entirely separate from human rights law. For a good example of how these wider

say here, and in this thesis more widely, is relevant to the extent that international human rights law generally, and the ICESCR in particular, refers to human *rights* in the specified narrow sense. And to the extent that it does, extraterritoriality is essentially a question about the identification of the relevant right holders and a justification of who is to be considered a duty bearer.

This chapter begins to address the problem of justifying the allocation of duties and identifying duty bearers in three steps, moving from the formal to the substantive. First, I consider the structure of rights. An examination of Hohfeldian claim rights shows that human rights need both a right holder and a duty bearer. Because this analysis does not speak to the identification of either right holder or duty bearer, I explore approaches to the categorisation of rights as opposed to other practical reasons and their potential in this regard. I argue that the two most prominent approaches in this area – interest theories and will theories – do not supply a principle to allocate duties. This does not make either of them right or wrong. Rather, it speaks to their aspiration as formal theories. Second, the chapter analyses accounts of justifying human right in order to show that the mode of justification matters for the outcome of the interpretation of the ICESCR, and international human rights treaties more broadly. In particular, I consider interest-based theories of human rights and show that they cannot overcome the limitations of the interest theories on which they are based. I argue that these accounts misappropriate interest theories. Their main mistake is that they rely on individual interests to *justify* human rights rather than to use interests as a qualifying feature to distinguish rights from mere duties – as interest theories do.

Third, I argue that an interpretivist account of international human rights law as a context is the best way forward. Recognising international human rights law as a social practice and seeking to determine what human rights, or, rather, what I call human rights, require within its system of accountability allows us to specify right holders and duty bearers according to the underlying values. These values, I argue, are integrity and equality. The consequence of interpreting what human rights obligations proper within international human rights law require in the light of these values is twofold. First, integrity and its need for public institutions and a legal system shows that it is no accident that states are the primary bearers of human rights obligations.

considerations could be brought to bear on international law see Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295.

And second, the value of equality demonstrates that only those public institutions that are able to guarantee equality for a particular individual should be understood to be duty bearers of the human rights of said individual.

None of this is to say that my explanation here somehow picks out the essence of what human rights are about. Instead, my aim is to show that international human rights law and the rights provisions it contains can be understood in a way that suggests how we are to interpret jurisdiction and tackle the question of extraterritoriality more generally.

1 Explaining (Human) Rights

Human rights theory is dominated by three ways of classifying (human) rights along different criteria of distinction. Debates on rights in general focus on their structure and on how to distinguish them from other reasons for action, such as mere duties. The most prominent debate on human rights, on the other hand, concerns their grounds, or the lack thereof, respectively. This and the following section consider these debates in light of advancing our purpose, that is, identifying when and under which circumstances a state owes human rights obligations to individuals abroad.

1.1 Human Rights as Claim Rights

The discussion about the internal structure of rights seeks to analyse the necessary and sufficient characteristics of a relationship between actors in order for that relationship to qualify as a right. To this day, it is influenced by Wesley N. Hohfeld who proposed to distinguish legal relationships between four (now called) Hohfeldian incidents.²¹ Hohfeld's scheme distinguishes four types of entitlements: claims (or rights),²² privileges (or liberties),²³ powers, and immunities.²⁴ The "right" to free expression, for example, is most aptly framed as a privilege (or liberty) to speak one's mind. Whereas

²¹ Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16. For an analysis of and some elaboration on the original proposition see, eg, Matthew H. Kramer, 'Rights Without Trimmings' in Matthew Kramer, Nigel E Simmonds and Hillel Steiner (eds), *A Debate over Rights* (Oxford University Press 1998); Leif Wenar, 'The Nature of Rights' (2005) 33 *Philosophy & Public Affairs* 223.

²² This is to emphasise that claims or claim rights are widely considered the paradigmatic instance of a right. In an early version of the scheme, Hohfeld himself uses the term "right" for this incident: Hohfeld (n 21) 30.

²³ Kramer prefers "liberties": Kramer (n 21). Hohfeld himself relied on the term "privilege": *ibid.* The same is true for Wenar: Wenar (n 21).

²⁴ Hohfeld (n 21) 30.

the “right” not to be hindered in that expression is a claim towards others – the duty bearers – that they do not interfere.

This last example is the Hohfeldian incident that paradigmatically captures rights assertions in a strict sense: the claim.²⁵ These are assertions that A has a right that B x, where x is an active verb.²⁶ A claim right thus relates the *right* of A with a *duty* to (or not to) x held by B towards A. A general formulation of a claim is that A has a (claim-)right that B x (or not x) if B has a duty towards A to (or not to) x. Importantly, this analysis is neutral regarding the function of rights as well as in terms of what justifies or grounds them.²⁷ The right holder A and the duty bearer B need to be specified or at least specifiable.²⁸ Hohfeld thought of his analysis as making sense of legal relationships. However, his conceptual taxonomy has since been used to describe moral entitlements as well.²⁹

The internal structure of rights, especially claim rights, is – by jurisprudential standards – uncontroversial. That is, there is little significant disagreement about the fact that at least in a fundamentally important sense a right needs to regulate what a duty bearer owes to a right holder.³⁰ At least this is true for the paradigmatic instance of a claim right. In the present context regarding the extraterritoriality of the ICESCR, the analysis of the internal structure of rights nevertheless throws up a puzzle: how do we make sense of a claim right to, say, food if the right is seemingly to a particular good? What is the obligation of the duty bearer and what role does it play in relation to the good that is supposed to be provided? We have said above, that the duty of B towards A consists in verbs (doing or not doing). The consequence is that duties in this sense must be a kind of conduct or behaviour, rather than a good. While the conduct in question could be characterised as, say, “securing a given good”, the emphasis would still have to be on the fact that the duty imposed by the right is an action.

There are two possibilities to deal with this issue. Either, a right to a good is not a right, or, rights to particular goods, such as food, are (claim)-rights, but in an

²⁵ Kramer (n 21) 9; Leif Wenar, ‘The Nature of Claim-Rights’ (2013) 123 *Ethics* 202.

²⁶ Wenar, ‘The Nature of Rights’ (n 21) 225.

²⁷ Gopal Sreenivasan, ‘A Hybrid Theory of Claim-Rights’ (2005) 25 *Oxford Journal of Legal Studies* 257, 258.

²⁸ Kramer (n 21) 9.

²⁹ See, eg, Wenar, ‘The Nature of Rights’ (n 21). The difference (or lack thereof) between moral and legal rights is important to keep in mind. However, I will not discuss it here. The formal issues this chapter takes up are applicable to both kinds of rights, and the substantive take on international legal human rights only refers to this category without necessarily claiming that the arguments apply to other categories as well.

³⁰ Sreenivasan (n 27) 258.

imprecisely expressed form. The first possibility would mean that the term “right” is misplaced here, that the statement A has a right to food is nonsensical. This is because both privileges and claims are to engage in an action or to have some other person engage in one. However, food is not an action and can thus not form the object of a right. Given the analysis above, this is entirely plausible, but unsatisfactory for our purposes. It would be too quick to suggest that because an assertion of a right that resonates with ordinary language but does not comply with our conceptual analysis should be dismissed on a technicality. This is not to say that a right to food is a human right, or that it justifies allocating specific duties to anyone. It may well fail this test. But that is a normative question, not a conceptual one.³¹ That is, it is too early, at the conceptual stage to exclude even the possibility that we could make sense of a right to food.

The second possibility – that a right to a good is an imprecise expression of a right – would mean that we need to translate “food” into specific actions that could form the content of the duty.³² This is more to the point of interpreting international human rights law. In order to make sense of the phrase “A has a right to food”, we would thus have to say that “A has a right to enjoy access to food” to make it into a liberty. Or we would have to specify that “A has a right that B provide her with food” to make a right to food a claim. At this point in the argument it is not vital to know exactly, *how* to specify a right to a good. The key here is to acknowledge *that* such a specification is necessary.³³ All claim rights that appear to be to a particular good have to be translated into the following form: A has a right that B does (or does not do) x, rather than to good Y.

Why does the above insight matter for human rights theory? Claims in the Hohfeldian sense at first glance seem to fit well with common descriptions of the basic form of human rights. One of these definitions is the following. Human rights have right holders, an object and an addressee, that is, an agent on whom they place a duty to act in order to secure the enjoyment of the right’s object by the right holder.³⁴ Here,

³¹ Letsas scepticism of social rights, for example, is based on the vagueness of the moral complaint underlying the claim that they should be protected in judicial proceedings. This is a normative rather than conceptual concern: Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) 26.

³² The discussion in this paragraph draws on Wenar, ‘The Nature of Rights’ (n 21) 234-35.

³³ For the same concern see Onora O’Neill, *Bounds of Justice* (Cambridge University Press 2000) 98-99, 103.

³⁴ James W Nickel, *Making Sense of Human Rights* (2nd edn, Balckwell 2007) 23.

as above with our more concrete example of the right to food, we encounter a problem. The “object” of a right in this formulation is a good or an aim. But this cannot be the end of the matter because the actual duty will have to consist in a particular action instead. In this general form this means that the duty consists in “securing the enjoyment of a good”. This change of emphasis is helpful in two ways. First, it makes the description of a human right, including those embodied in international human rights law, fit with Hohfeldian claims and, second, it enables us to track the difficulty of justifying human rights obligations. The first insight allows us to make sense of the idea of imposing duties in the area of economic and social rights. The second insight moves the present discussion forward by imposing order on a few ideas in doctrinal legal scholarship that have made it difficult to relate socioeconomic rights to the debate on rights generally.

Doctrinal scholarship of international human rights law sometimes distinguishes between obligations of conduct and obligations of result.³⁵ After the analysis above, it should become clear that all duties corresponding to claim rights are obligations of conduct as a matter of conceptual necessity. The conduct in question might be informed by or be required to be geared towards a result. It may even consist in securing – come what may – access to a certain good. But a violation of the duty would consist in a failure to *act in a certain way* not in the failure of individuals to enjoy a certain result regardless of the agents involved.

Take article 11 of the ICESCR, which provides that parties to the Covenant ‘recognize the right to everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.’ This statement does not refer to conduct, nor does it refer to who has to carry out or refrain from a particular action.³⁶ Now, if we apply the idea that obligations that correspond to rights need to be specified as an action (or omission), we can say that article 11 ICESCR, as it stands, is not a claim right. Accordingly, it would be a mistake to say that a state party to the Covenant violates a person’s right to adequate housing only for the reason that the person has no home.

³⁵ See for this distinction in the context of extraterritorial obligations and socioeconomic rights Malcolm Langford, Fons Coomans and Felipe Gomez Isa, ‘Extraterritorial Duties in International Law’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 82-84.

³⁶ The identity of the duty bearer is a separate, but related point to the fact that claim rights are to an act or omission. See further section 1.2 below.

This is not because being homeless is not to the detriment of the person – it is! – but because this is not a statement that takes into account the conduct of a potential duty bearer. It thus does not fit the form of a claim right.

This has implications for our understanding of human rights treaties in general. Any provision that purports to recognise a right to a certain good needs to be specified in at least two ways: the good needs to be translated into actions or conduct and we need to know who has to carry out said conduct.³⁷ This is as true for civil and political rights as it is for economic and social rights. Both the right to adequate food in article 11 of the ICESCR and the right to freedom and security of the person as enshrined in article 9 of the ICCPR need to be translated into actions that an actor other than the right holder needs to perform or omit in order to fit the form of a claim right. In this sense, it is eminently also true that there is no fundamental, structural difference regarding the types of obligations these rights impose on duty bearers.³⁸

The analysis of the internal structure of claim rights, then, allows us to capture the fact that rights that seemingly entitle the right holder to a certain outcome need to be specified in terms of concrete mandated behaviour or conduct, if need be to securing that outcome. What we need to take away from it is that rights, including international legal human rights, primarily impose duties of conduct. As a result of their imprecise framing in the treaties in this regard, a sort of translation is necessary. What this translation brings to the fore is the following. Conceptually speaking, rights mandate conduct in the form of acts or omissions. This requirement is imposed on someone other than the right holder. This has implications for the normative content of rights. They need to provide reasons for others to act in a certain way for the sake of the right holder and the normative content needs to be justified by recourse to principles that supply these reasons.³⁹ In other words, the concept of rights is important because it impacts on what would count as a justification of their normative content.⁴⁰

³⁷ A similar concern is expressed in Saladin Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (2009) 2 *Ethics & Global Politics* 259, where the author demonstrates problematic aspects of what he calls 'outcome views of human rights'. The worry he addresses is one of principle and context, whereas I am emphasising the conceptual aspect here. However, these points are related and we will come back to this issue below. See also Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) 114, where he implies a similar problem for interest-based theories, albeit as opposed to reason-blocking theories of rights.

³⁸ See for a more doctrinal conclusion to this effect (albeit for different reasons) Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 184-85.

³⁹ See Meckled-Garcia, *What Interest in Human Rights?* (n 5).

⁴⁰ We will come back to this in section 2 below.

Hohfeldian claims explain the structure of rights. They do not, however, help us identify either a specific right holder or duty bearer nor the exact content of either the right or the correlating obligation.⁴¹ For our purposes, this means we have to look further for a way of analysing extraterritoriality in general and that of the ICESCR in particular. After all, the relevant question is who owes human rights obligations to whom. In a first step, we should ask where an actor – be they a person or an institution – would find guidance *how* to define what actions are required and of whom to translate rights to certain goods? One way is the attempt to gain insights from theories that aim at distinguishing rights from other deontic reasons, such as mere duties. Two kinds of theory have been particularly influential in this respect: interest theories and will theories. I discuss both of them briefly, but will be focusing on interest theories and what they have been taken to imply for our purposes next.

1.2 Interests and Duties: A Problem for Socioeconomic Rights

Will theorists hold that what makes something a right is that it affords ‘discretion over the duty of another.’⁴² This emphasis on discretion reveals that the will theory bases itself clearly on the paradigms of rights found in private law, especially in property and contract law.⁴³ Interest theorists, on the other hand would say that a right is a right because it protects an interest of the right holder, usually furthering their well-being.⁴⁴ Take a right to property. Will theories hold that this is a right because it gives the right holder choices over what to do or not to do with it.⁴⁵ An interest theorist would say that the right to property is a right because it protects the right holder’s interests, and furthers their well-being.

Clearly enough, these are accounts of what rights (as opposed to other reasons for action) should be understood to do for a right holder and not about what justifies their allocation.⁴⁶ However, both will theories and interest theories have been

⁴¹ Sreenivasan (n 27) 258.

⁴² Wenar, ‘The Nature of Rights’ (n 21) 238. Hart, one of the most influential proponents of a version of the will theory referred to this discretion as control. See HLA Hart, *Essays on Bentham* (Oxford University Press 1982) 183.

⁴³ Sreenivasan (n 27) 259. Hart even holds that his version of the will theory is only adequate in this context and – accordingly – he does not defend it with regard to individual rights at constitutional level: Hart (n 42) 192-93.

⁴⁴ See, eg, Raz (n 11) 166; Kramer (n 21) 62; Wenar, ‘The Nature of Rights’ (n 21) 240-41.

⁴⁵ See, eg, Hart (n 42) 185; Kramer (n 21) 62.

⁴⁶ Similar Kramer (n 21) 60. See also Wenar, ‘The Nature of Claim-Rights’ (n 25) 207-08. He is right in pointing out the fact that neither interest theories nor will theories solve the problem of justifying the allocation of rights and duties to specific agents. I do not think it is fair, however, to treat

associated – rightly or wrongly – with accounts of rights’ justification.⁴⁷ Sreenivasan puts it as follows:

On the account associated with [will theories], the justification for empowering Y to waive the duty correlative to her claim-right, and so for vesting her with the claim-right, lies in the fact that so doing serves Y’s interest in autonomous choice. In the paradigm cases, empowering Y to waive this duty also advances her interests on balance. By contrast, on the account associated with [interest theories], the justification for the structure of Y’s normative standing, as we might put it, lies in the more general fact of what advances Y’s interests on balance. It is not tied to the more specific fact of what advances Y’s interest in autonomous choice.⁴⁸

What this passage explains is that interest theories of rights are more easily associated with a broad range of interests and with the moral standing, as opposed to the autonomy, of the right holder. While it does not justify this stance, the passage also offers the kernel of an explanation why the justification of human rights have more often been associated with notions of interest more broadly as opposed to autonomy only.⁴⁹

Why do these observations matter for our purposes? They matter because the association of interest theories with a justification of rights that furthers – on balance – the well-being of an individual sometimes means that the conceptual and the justificatory claim are not as clearly separated as they should be. This insight, in turn, traces a seemingly small but crucial mistake: the idea that interests *justify* the existence and allocation of rights and duties. This is not a necessary part of a conceptual or formal interest theory, but is relevant for interest-based accounts of human rights.⁵⁰ We now turn to what I believe is a plausible explanation of how the mistake came about and what this has meant for human rights theory. To this end, I aim to capture the move from an interest theory of rights to an interest-based account of human rights.

What makes something, including a human right, a right, according to interest theories is that it furthers an individual’s well-being and the underlying interests.⁵¹ Interests in this sense must be sufficiently important to give rise to obligations on the

this as a fault of these theories: justification of burdens is not what they set out to do. Rather, they distinguish rights from mere duties and this is what should be used as a standard of success.

⁴⁷ Sreenivasan (n 27) 262.

⁴⁸ Ibid (footnotes omitted).

⁴⁹ See, eg, Nickel (n 34) ; John Tasioulas, ‘Towards a Philosophy of Human Rights’ (2012) 65 *Current Legal Problems* 1. For an account that is based more closely on autonomy see generally Griffin, *On Human Rights* (n 7).

⁵⁰ See Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) ch 5; Meckled-Garcia, *What Interest in Human Rights?* (n 5) 5-6.

⁵¹ Wenar, ‘The Nature of Rights’ (n 21) 240-41.

part of others to respect these interests of the right holder.⁵² Raz's general definition of a right – which expresses a version of an interest theory of rights – is worth considering here.

Definition: 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.⁵³

He continues to state that a right of one person grounds duties of another⁵⁴ and even states that '[a] right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, such as a burden imposed being too weighty, justifies holding that other person to have the duty.'⁵⁵

When put this way, it seems indeed that the application of interest theories generates *reasons* for duties. This is not so, however. The work of justification here is not done by an individual's well-being or interests *simpliciter*, but by the fact the interest in question is *sufficiently important* and that there are *no countervailing considerations*.⁵⁶ Raz even states something to a similar effect when he admits that interests are only part of the justification of rights, and rights are only part of the justification of duties.⁵⁷ For Raz's general theory of rights, then, the peculiarity of his formulation is not of great consequence.

However, for interest-based theories of human rights, the consequences have been stark. One of them is the idea that basing an account of human rights on interests means that duties are not allocated by a moral or legal principle but by reference to the capacity of the potential duty bearer to further interests of the right holder in a relevant way.⁵⁸ Thus, such interest-based accounts, usually characterise human rights as fulfilled when certain outcomes are achieved.⁵⁹ In the area of economic and social rights this idea leads to superficially powerful but ultimately indefensible results.

⁵² Raz (n 11) 166; John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford University Press 2007) 77.

⁵³ Raz (n 11) 166 (footnote omitted).

⁵⁴ Ibid 167-68.

⁵⁵ Ibid 171.

⁵⁶ For an argument on why such interest-based accounts of human rights fail in general see Meckled-Garcia, *What Interest in Human Rights?* (n 5).

⁵⁷ Raz (n 11) 181-82.

⁵⁸ Raz himself does not fall into this trap. He explicitly leaves room for moral principles in the justification of rights and correlating duties: ibid 182, 84-85.

⁵⁹ See generally Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (n 37); Meckled-Garcia, 'Giving Up the Goods' (n 18).

Consider this idea when applied to the right to adequate housing, which is part of the right to an adequate standard of living in article 11 of the ICESCR. Applying Raz's formulation without explicitly leaving room for principles of responsibility would yield an analysis along the following lines. A person has a right to adequate housing when, other things being equal, their interest in such housing is sufficient reason to hold another person under a duty. Combined with the observations made above about the structure of claim rights, the duty would have to be an action. Given this, the duty following from the right to adequate housing according to an interest-based view would be to provide the right holder with an adequate dwelling. The duty bearer in this equation is whoever happens to have the capacity to provide the right holder with such housing.⁶⁰ The CESCR, for example, has implied that the lack of provision of adequate housing is a violation of the right to housing and that it is all the worse when this happens in developed countries without significant resource constraints.⁶¹ In other words, capacity is the decisive criterion.

There are two things worth noting here. First, a move from interests to duties requires several steps. And second, what justifies the duty is not the actual interest of the right holder but a combination of the interest's importance for the them and a capacity of the potential duty bearer.⁶² Notably absent are the means to justify why one agent, rather than another, should carry the associated burdens. This brings us back to the point raised in the introduction of this chapter. Because of their focus on capacities of potential duty bearers interest-based accounts of human rights are outcome oriented and have a tendency to argue that 'can implies ought'. That is, they tend to impose heavy burdens of duty on (other than by capacity) unspecified duty bearers. In addition to the examples mentioned in the introduction to this chapter, some of the more radical claims regarding the extraterritoriality of the ICESCR – especially those by the Committee, the Maastricht Principles, and Salomon – implicitly rely on the mistake detailed here.⁶³

⁶⁰ Sometimes, this is supplemented by statements that aim to take costs to the duty bearer into account. However, this simply passes the buck. We would still need an account of what burdens would be too costly for whom and why. See generally Meckled-Garcia, *What Interest in Human Rights?* (n 5).

⁶¹ CESCR, *General Comment No 4: The Right to Adequate Housing* (13 December 1991) E/1992/23, para 4.

⁶² See on the role of the interest's importance Jeremy Waldron, 'Introduction' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 14.

⁶³ See chapter 1, sections 1.2 and 2 above.

Why should we consider the use of interests as justifications of human rights a mistake? The focus on the justification of who owes the duty provided here exposes a shortcoming of relying on interests to *justify* human rights as opposed to describing their function. Urgent interests – even if they are clearly present – only tell us who is a potential right holder and in which area of human activity a right might be relevant. They do not embody a moral principle that connects the interests of right holders with duty bearers who would have to shoulder the obligations generated by an interest.⁶⁴ However, thinking about claim rights without also supplying a principle that would enable the specification of particular duty bearers and the justification of their obligations misses the mark; particularly in the context of extraterritoriality where the identification of the duty bearer and their connection with the right holder is at the heart of the question.⁶⁵ Put differently, interests and their urgency only frame the questions human rights purport to answer. To answer those questions, however, human rights, ensuing obligations, and their allocation need to be justified by recourse to principles that justify why specific duty bearers should carry the burdens associated with duties. Such a moral principle is thus necessary but has to be supplied independently, that is, without relying on to interests or their importance.⁶⁶

The fact that outcome oriented views of human rights – such as the unfortunate appropriation of interest theories sketched above – cannot explain which state is the duty bearer without falling back on the territorial state means that they cannot in and of themselves identify the duty-bearer at all. This in turn suggests that, at least for the present purposes, they should be abandoned.⁶⁷ Where would we find principles to *justify* human rights and correlating duties as well as to identify the relevant pair of

⁶⁴ Saladin Meckled-Garcia, ‘Specifying Human Rights’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 312-14.

⁶⁵ In the context of interpreting the ICESCR this is not the same as a ‘claimability objection’ as it remains agnostic about whether a human right can only be said to exist if it is clear against whom the relevant claim has to be made. See O’Neill (n 33) 105, 25; Tasioulas, ‘The Moral Reality of Human Rights’ (n 52) 88-95.

⁶⁶ Of course, one could rely on capacity to fulfil human rights as a moral ground for responsibility. However, this is either tied to a view of human rights that focuses on outcomes rather than a standard of treatment and thus collapses into an idea of social justice, or it fails as a principle. See Meckled-Garcia, ‘Do Transnational Economic Effects Violate Human Rights?’ (n 37) 268-71; Meckled-Garcia, *What Interest in Human Rights?* (n 5). Recall also that principles need to be insensitive to facts. That is, a true principle would say something about *why* the interests in question are important, rather than just point to importance as such. See chapter 1 above. For the application see section 3 below.

⁶⁷ This is not an argument as to whether interest theories are true, or preferable to will theories. Rather, the argument is that teleological, interest-based accounts of human rights (as opposed to interest theories of rights) are not successful in justifying the allocation of duties.

actors instead? The next section considers how we should go about finding an answer to this question.

2 Justifying Human Rights: An Interpretivist Alternative

There are different contexts in which human rights claims are made and it is not necessary that all of these claims originate in, or trace the same values and concerns. This is because different contexts of the human rights practice may well track different normative concerns.⁶⁸ It is perfectly plausible to think – with Rawls – that one concept referred to as human rights addresses the value of sovereignty in the sense that it justifies intervention in otherwise sovereign states, and, to hold at the same time – with Griffin – that another concept that is also referred to as human rights has the purpose of protecting personhood and normative agency. At the very least, this means we should not assume that there is a unitary concept of human rights to the exclusion of all other concepts.⁶⁹

This leaves us with the question of what the role of context is in making sense of human rights claims. In other words: how do we determine what context we are in at any given moment? Letsas – based on Dworkin and with Stavropoulos – argues that any privileging of a certain context is not a given but needs to be treated as a normative question.⁷⁰ This is where we come back to the point made in the introduction to this chapter. The privileged context in this study is “international human rights law” with specific reference to the ICESCR. If this is a sound context for human rights claims to be analysed in, then we should be able to identify normative concerns that are tracked by international human rights law as such. Or, put it the other way around: If we cannot find normative concerns that fit the practice of international human rights law, it is not a salient context.

To be clear, I am not defending the view that international human rights law is the focal point or most important instantiation of human rights practice.⁷¹ However, for this study to be clearly motivated and defined it is nevertheless necessary to ascertain which parts of this practice constitute a normatively salient context for

⁶⁸ Letsas, ‘Philosophical Foundations of the Covenants’ (n 9) 3-7.

⁶⁹ Ibid.

⁷⁰ Ibid. See also Dworkin, *Law’s Empire* (n 14); Nicos Stavropoulos, ‘Why Principles?’ (2007) Oxford Legal Studies Research Paper Series, Working Paper No 28/2007, 10-11 <<https://ssrn.com/abstract=1023758>> accessed 22 September 2017.

⁷¹ For this view see generally Allen Buchanan, *The Heart of Human Rights* (Oxford University Press 2013).

human rights. The reason is that normative concerns, that is, values and principles, determine the contours of a relevant practice, not the other way around.⁷² If parts of what we originally thought constituted the context we are interested in do not in fact track the value or values that are constitutive of said context, we can no longer regard it to form part of it.⁷³ This is what Dworkin means when he says that a theory needs to both ‘fit and justify’ the practice it aims to explain.⁷⁴

The latter statement is essentially the shortest possible summary of the interpretive methodology first championed by the same author.⁷⁵ It requires that concepts referring to shared practices which are taken to have value – such as the social practice of law or any parts thereof – be understood as interpretive.⁷⁶ In his last ever paper, Dworkin says about interpretive concepts that:

We share [them] not by agreeing about tests for application but by agreeing that something important turns on [their] application and then disagreeing, sometimes dramatically, about what tests are therefore appropriate to [their] use, given that [their] application has those consequences. Any theory about the correct analysis of an interpretive political concept must be a normative theory: a theory of political morality about the circumstances in which something ought or ought not to happen. Since the doctrinal conception of law is interpretive, we provide a theory of the grounds of law by posing and answering questions of political morality.⁷⁷

This means that law as a practice needs to be interpreted and applied according to its value or point.⁷⁸ This point of the practice then not only sets out why the practice

⁷² See generally Stavropoulos (n 70); Letsas, ‘Philosophical Foundations of the Covenants’ (n 9) 9.

⁷³ I take this to be the right approach in order to determine salient *contexts* within a shared practice without trying to disregard or, indeed, say anything about other parts of the practice. However, the same formulation is a flawed view when one asks the question why, when, and how a given practice has normative force. See Stavropoulos (n 70) 12-16, where he argues against this ‘moral filter conception’ of legal principles, which lead to disregard for any law that does not track true moral propositions.

⁷⁴ Dworkin, *Law’s Empire* (n 14) 380; Letsas, ‘Philosophical Foundations of the Covenants:’ (n 9) 9.

⁷⁵ See generally (and among others) Dworkin, *Law’s Empire* (n 14). I do not focus on the question of the nature of law, nor the question whether Dworkin adequately captures what courts do, but on interpretivism as an epistemological tool. Interpretivism helps explain why not everything contained in a human rights treaty needs to be understood and treated as a human right in the strict sense and is thus valuable in structuring the debate on extraterritoriality, especially in the area of economic, social and cultural rights. Throughout the thesis, I aim to show that this is useful, even if one does not agree with Dworkin on the nature of law or the behaviour of courts as such.

⁷⁶ With Dworkin, I take it that this applies to international law as well. See generally Dworkin, ‘A New Philosophy for International Law’ (n 4).

⁷⁷ Ibid 11 (footnote omitted).

⁷⁸ Dworkin, *Law’s Empire* (n 14) 47; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) 29-30.

exists, but also shapes what it requires.⁷⁹ As such, an interpretivist approach is sensitive to values and principles that determine and inform a shared practice and does not rely on social facts. Consequently, it does not follow ordinary use of language. It is, in other words ‘...bound to be controversial and insensitive to how most people talk and what they think.’⁸⁰ It is useful here to point out that this approach is entailed by and builds on the nature of interpretation, including treaty interpretation, defended in chapter 1 above.

While the interpretation of law, including international human rights law, turns on values, it remains interpretation. As such, it integrates conservative and creative aspects.⁸¹ Accordingly, one of the features of an interpretive concept is that interpreters are constrained by the history of the practice. This is particularly salient with regard to international human rights law. Usually, participants will try and search for provisions and cases they find relevant to what they want to say about the practice. It is then against this background, against the background of the history of the practice, that interpretation occurs. We argue about whether a certain case is in line with the point of the practice. Or even whether a case might change what is required – recall the criterion of fit.

However, when a philosopher makes an argument about the best possible understanding of moral human rights,⁸² it is treated as a different matter entirely.⁸³ Philosophical writing of this sort could well count as a justification of the practice, especially when the claim is connected to the idea that international human rights law is about giving effect to human rights morality.⁸⁴ But this is not how the practice and participants usually deal with such writings. On the contrary, exclusively philosophical commentary is not usually counted as being about, let alone part of the practice. This could well be a mistake. And, as this thesis shows, we can learn much about the interpretation of international legal human rights from philosophical writings. Nevertheless, the way participants in the practice of international human rights law treat philosophy shows that the history of the practice plays a key role in interpretation.

⁷⁹ Dworkin, *Law's Empire* (n 14) 48.

⁸⁰ Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) 30.

⁸¹ Julie Dickson, ‘Interpretation and Coherence in Legal Reasoning’ Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/legal-reas-interpret/#RolIntLegRea>> accessed 22 September 2017. See also chapter 1, section 3 above.

⁸² See, eg, Griffin, *On Human Rights* (n 7).

⁸³ Admittedly, I am including “complete ignorance of” in the term “treating”.

⁸⁴ As in, eg, John Tasioulas, ‘Exiting the Hall of Mirrors: Morality and Law in Human Rights’ (10 February 2017) <<https://ssrn.com/abstract=2915307>> accessed 22 March 2017.

To illustrate the consequences of adopting an interpretivist approach, consider again the pronouncements of the CESCR on development cooperation introduced in the previous chapter.⁸⁵ The primary function of the CESCR as a UN Treaty Body is to interpret the ICESCR, and to review contracting states' reports on their compliance with the treaty.⁸⁶ In the capacity as a monitoring body, the CESCR publishes concluding observations that include recommendations as to how states could improve their compliance record. Accordingly, the Committee's statements in these capacities would routinely be expected to form part of practice of international human rights law, even in a technical sense.

Now, the CESCR has repeatedly called upon leading industrial countries to devote 0.7% of their GNP to development cooperation. On the face of it, this seems to be a paradigmatic example of extraterritoriality. However, as we have seen in the previous chapter,⁸⁷ this is puzzling. For example, we would expect that a statement on how to comply with a human rights treaty would involve spelling out why certain acts or policies mean that a state's government is violating duties imposed on it by human rights. However, if a state does not spend a certain amount of money on a goal such as development cooperation, this does not in and of itself mean that a state has wronged specific individuals. It is also not clear, if this would fall into a specific human rights obligation, or which one this would be. Put differently, such pronouncements are certainly very different from other statements associated with international legal human rights practice, such as a prohibition of torture,⁸⁸ or the right not to be discriminated against.⁸⁹ They are also different from violations of socioeconomic human rights, which may have some distributive effects but not necessarily and primarily so.

I do not believe that distributive justice is significant for an argument about extraterritorial human rights application. And, as such, I find these pronouncements of the Committee worrying because they suggest that they are built on deeper conceptual and normative confluences that are difficult to uphold, let alone justify. We will come back to the differences between socioeconomic human rights and distributive justice

⁸⁵ See chapter 1, section 2.1 above.

⁸⁶ See further Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995) 3-4, 30-105.

⁸⁷ See in particular chapter 1, section 2.1 and the Introduction above.

⁸⁸ See article 7 ICCPR and article 3 ECHR.

⁸⁹ See articles 2, 3, and 26 ICCPR, articles 2(2) and 3 ICESCR, article 14 ECHR.

more broadly, as well as the sources of this conflation below.⁹⁰ However, I have not yet shown that this is the case, and, accordingly I should address a more fundamental potential worry first.

Should it worry us from the outset that the CESCR focuses on distributive outcomes rather than what we would expect in the realm of international legal human rights? I think not. It might well be that the practice of international human rights law incorporates a very broad range of concerns that are all tracked by the same value. If the only value informing the practice is equality in the sense of equal respect owed to each individual, then it is plausible to say that a prohibition of torture and provision of a certain amount of development cooperation are part of the same practice. In this case, a theory based on equality would both ‘fit and justify’ the practice of international human rights law. If equality in this sense is either not the only value or not the value that determines the context of international human rights law at all, the conclusion would be a different one. We would have to say that it is not plausible that a prohibition of torture and a suggestion to contribute a certain amount to aid are part of the same practice. This is because they do not track the same normative concern. In this case, the revision of our theory narrows the scope of justification and must narrow the scope of fit accordingly.

This does not yet show, of course, that equal respect is the central value according to which the context of international human rights law must be defined. What it does show is that the crucial question here is *whether* equality in this sense is the only value and/or the right value, that is tracked by international legal human rights. It also shows that it is not necessarily worrisome if a theory of international legal human rights does not cover each provision in each human rights instrument, let alone every statement made by UN Treaty Bodies.⁹¹

This does not mean that parts of the international legal human rights practice that will not be covered by this picture are not legally required. They may well be. What I am arguing instead, is that international human rights law, which is itself a context, contains several other contexts, governed by different principles (even if, at times, by the same value). I am arguing, and this is crucial, that what I call human rights proper require allocating duties in a certain way and other parts of the international legal human rights practice do not necessarily share this feature. In other

⁹⁰ Section 3.3 below.

⁹¹ Letsas, ‘Philosophical Foundations of the Covenants’ (n 9) 9-10.

words, this is an argument about what I call human rights obligations in international human rights law as opposed to other kinds of obligations imposed by the same body of law. To put it yet another way: international human rights law is an interpretive concept that provides the context for human rights, which is another interpretive concept. The label “human rights” does not matter in this story. We could call them human shrights, replacing the original term as we go, and it would not change the argument.

Accordingly, the next section seeks to answer the question which values determine the meaning of what I call human rights in the context of international human rights law. I argue that international legal human rights are best understood as being determined by two values: integrity and equality. Integrity points to international human rights law as a system of accountability. Equality in the form of equal respect, in turn, generates a substantive account of human rights as standards of treatment. Both values, as well as their connection, help us answer our original question of how human rights identify duty bearers and rights holders of international legal human rights in relation to each other. In turn, this will suggest an avenue for shedding light on extraterritorial human rights obligations in the ICESCR, and the implications for international human rights law more broadly.

3 Human Rights in the Context of International Human Rights Law

3.1 Integrity: Legitimacy in International Human Rights Law

As an interpretive concept, international human rights law has a point, or potentially several ones, which govern its interpretation and, accordingly, what makes propositions of international human rights law true depends on this point or points. Dworkin argued that the value unique to law is legality or the rule of law.⁹² Law’s fundamental character is to ‘guide and constrain the power of government... as licensed ... by past political decisions about when collective force is justified.’⁹³ The point of law according to legality is that it consists of legal rights and responsibilities which constrain and channel collective coercion according to standards previously set through an accepted procedure.⁹⁴ Importantly, these rights and responsibilities can

⁹² Dworkin, *Law’s Empire* (n 14) 93; Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 169.

⁹³ Dworkin, *Law’s Empire* (n 14) 93. See also Başak Çali, ‘On Interpretivism and International Law’ (2009) 20 *European Journal of International Law* 805-22, 810.

⁹⁴ Dworkin, *Law’s Empire* 93.

then be enforced on demand without the need for further political decision making.⁹⁵ When the intervening value of legality is understood as integrity, law's contribution is to enable principled and coherent treatment of individuals.⁹⁶ This characterisation of law is meant to reflect how it is best understood in a defined political community, usually within a state.⁹⁷

Some interpretivists, including Dworkin himself, have argued that international law is not and cannot be governed by the value of integrity.⁹⁸ The objection is the following. Integrity tracks what is valuable about law in a given political community, namely that it both mandates and enables principled and consistent treatment of individuals by their government. International law, however, is distinct from domestic legal systems in that it does not regulate the dealings of a coercive authority with its subjects. On the contrary, the function of international law is to enable cooperation between states (its subjects) in the absence of such an authority.⁹⁹ It is, in other words, fundamentally statist.¹⁰⁰ Dworkin realised this. Instead of imploring integrity, he argued that international law should be understood to be governed by two other values: legitimacy and salience. This view generates a standing duty of coercive governments to increase their legitimacy.¹⁰¹ However, they are not required to do this in just any way, but rather primarily in the ways that are already accepted by states. This latter point is what salience adds.¹⁰² It is why, for example, interpretation of international law will very often start from the wording and meaning of treaties, rather than questions about what would be morally required without them.¹⁰³ I do not take issue with either the statist nature of international law nor with the role of the value of

⁹⁵ Dworkin, 'A New Philosophy for International Law' (n 4) 12.

⁹⁶ Dworkin, *Justice in Robes* (n 92) 176-78.

⁹⁷ See *ibid* 171-78.

⁹⁸ See generally Saladin Meckled-Garcia, 'International Law and the Limits of Global Justice' (2011) 37 *Review of International Studies* 2073; Dworkin, 'A New Philosophy for International Law' (n 4). I am assuming that interpretivism is a plausible view of international law. However, I am not defending this here because the main argument does not hinge on it. For an argument that international law is not susceptible to interpretivism see Jason A. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 *European Journal of International Law* 627-50; for an argument of the opposite see to an extent John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85-128; and more generally Çali (n 93).

⁹⁹ Meckled-Garcia, 'International Law and the Limits of Global Justice' (n 98) 2077-85; similar Dworkin, 'A New Philosophy for International Law' (n 4) 13-14.

¹⁰⁰ Meckled-Garcia, 'International Law and the Limits of Global Justice' (n 98) 2079, 85.

¹⁰¹ Dworkin, 'A New Philosophy for International Law' (n 4) 19. This is no accident either. The justification of collective coercion or, as Dworkin calls it at times, political power, is at the heart of the bulk of modern political philosophy.

¹⁰² *Ibid*.

¹⁰³ See generally chapter 1 above.

salience. However, I shall insist on the fact that international human rights law is both statist in nature and governed by integrity. Let me explain why I think this is so by building on Dworkin's account of the role of legitimacy.

The argument for legitimacy as a governing value for international law rests on the reason that each state's coercive power needs to be justified. Dworkin then argues that international law is part of the coercive system states impose, not just on each other, but also on their citizens and extrapolates the following:

If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction. Of course that obligation demands only what, in the circumstances, is feasible. It does not require any state to ignore the division of the world into distinct states and suppose that it has the same responsibilities to citizens of other nations as it has to its own. But it does require a state to accept feasible and shared constraints on its own power. That requirement sets out, in my view, the true moral basis of international law.¹⁰⁴

This is a statist account with the standing duty of any coercive government to enhance its legitimacy at its heart. However, the reason why coercive power is in need of justification is a basic moral concern for individuals. Dworkin confirms this reading when he argues that a failure to accept a cooperative international order on any state's part would result in a failure to meet obligations towards its citizens.¹⁰⁵ That is, without at least some concern for individuals, international law would not have legitimacy at its heart. As we will see, in this sense at least, international human rights law and the concern for individuals its obligations encompass is particularly closely related.

International human rights law consists mostly of treaties, which are a paradigmatic example of the cooperative rather than authoritative nature of international law and thus underline its inherent statism.¹⁰⁶ However, the duties generated by these treaties do not only benefit states. They benefit individuals, mostly (but, as should be clear in the context of this thesis, not exclusively) within their own state. That is, the enhancement of legitimacy, in this case, takes a specific form. It consists at least in part of facilitating principled treatment of individuals. In other words, in the case of international human rights law, legitimacy generates integrity as

¹⁰⁴ Dworkin, 'A New Philosophy for International Law' (n 4) 17.

¹⁰⁵ Ibid.

¹⁰⁶ Meckled-Garcia, 'International Law and the Limits of Global Justice' (n 98) 2080.

the governing value of this area of international law, at least as far as it is concerned with the treatment of individuals.¹⁰⁷

If integrity is the governing value of international human rights law the upshot is that the primary duty bearers are public institutions because they are the primary actors who claim the legitimate use of collective coercion.¹⁰⁸ International human rights law is thus not statist by accident, but because it has at its heart a function to justify coercion.¹⁰⁹ And the standing duty to enhance their legitimacy is the feature of states that makes it so. Having said this, however, we do not need to show that enhancing their legitimacy is a free-standing commitment of states. Fidelity to the text of the agreements between states commonly referred to as human rights treaties leads us to the same conclusion. The concern for individuals and their standing is their focal point. That is, at the very least we can and should say this: when a state ratifies a human rights treaty, such as the ICESCR, the value of integrity requires fidelity to the idea of individual rights. While states are the paradigmatic agents in this regard, this view does not exclude the possibility of non-state actors having human rights obligations. However, it would require that these agents behave in relevant ways like states.¹¹⁰

Importantly, integrity connects more directly to our concern of how human rights standards in international human rights law justify the allocation of duties. Integrity tells us that, at least in first instance, states, their public institutions, and their legal system are essential components of international human rights law. When we look to allocating human rights obligations, integrity tells us not only *that* we should look to public institutions, that is, states, but also what it is *about* states that makes this true. The point of integrity – as a value informing international human rights treaties – is to constrain and channel government coercion not just in any way but to afford principled and coherent treatment to individuals. This means that international human rights law binds the kind of institution that makes use of a legal system in need of

¹⁰⁷ Which may not be the case for all of its provisions: think only of inter-state complaints provided for in article 33 of the ECHR. See also sections 3.2 and 3.3 below.

¹⁰⁸ Primary here is meant in the following sense. There are, of course, all kinds of collective coercion, such as, say, the power of employers over employees. However, as far as legal coercion is concerned, the state and its public institutions are the background agents who could pull the plug on all of this, while a random employer could not. I am grateful to Emmanuel Voyiakis for pressing me on this point.

¹⁰⁹ At least on Dworkin's terminology. As we will see, I do not believe that coercion captures what it is about states that makes them primary human rights duty bearers. Instead, I argue for a conception of political power to perform this function. See chapter 5, in particular section 4, below.

¹¹⁰ See chapter 5 section 5 below.

principles that justify its enforcement. In turn, this confirms the statist nature of international human rights law.

So much for the governing value of international human rights law. What follows is a substantive account of what I take to be the best understanding of what I call human rights within this context.

3.2 Equality: Human Rights as Standards of Treatment

When we discussed rights as claim rights, we identified two key features. First, rights as claims are held against someone. There is, in other words, necessarily a duty bearer. And second, a claim right is always a right *that this duty bearer act in a certain way*, and not a right primarily geared towards a good or outcome.¹¹¹ The discussion immediately preceding this section, on the other hand, found that the value of integrity means that the point of international human rights law is to extend principled and coherent *treatment* of individuals by governments.¹¹² The significant overlap here is the relevance of action as treatment: human rights as claim rights track the treatment of a right holder by the duty bearer while international human rights law by virtue of integrity tracks the treatment of individuals by public institutions. This means that the structure of human rights as claim rights and integrity solve part of our puzzle regarding the allocation of human rights duties. Combining the two allows us to say that governments or, possibly, public institutions more generally are the primary duty bearers of human rights and that the point of international human rights law generally is to say that states, having ratified the relevant treaties, are required to extend principled treatment to individuals.

The structure and wording of international human rights instruments raise questions in this regard. Recall, for example, the right to housing, and the need to translate it into a right that the duty bearer behave in a particular way.¹¹³ Many provisions in international human rights treaties face the same problem. The ICCPR contains rights to life (article 6), liberty and security of the person (article 9), and freedom of thought, conscience, and religion (article 18). The ICESCR provides for rights to work (article 6), social security (article 9), and health (article 12), in addition to the right to an adequate standard of living (article 11) as discussed above. These

¹¹¹ See section 1.1 above.

¹¹² See section 3.1 above.

¹¹³ See section 1.1 above.

formulations point to a good as the object of the right rather than treatment. As we have seen above, these rights need to be translated into rights that the duty bearer perform or refrain from an action. This raises the questions we left open above: how do we decide which kind of behaviour this is? And how do we find out who should behave in this way?

Other rights, like the right not to be subjected to torture in article 7 ICCPR or the right to form trade unions in article 8(a) ICESCR do not raise this issue. They exhibit the form of Hohfeldian liberties, which nevertheless require protection in the form of claims against others to refrain from certain actions, such as committing torture or hindering the formation of trade unions.¹¹⁴ While these rights do not refer to a good as their object, these two types of provision share another problem: neither of them identifies the potential bearer of corresponding obligations, or even the obligations as such. That is, neither the Covenants' provisions, nor the fact that states are the primary duty bearers, tell us anything about *which* state party owes which obligations to which individuals. In other words, the journey from Hohfeldian incidents to integrity has explained and justified *that* governments are indeed the primary bearers of human rights obligations. But the question of the relevant pair of actors needs to be explored further. To do so, I will sketch what I think is the most promising conceptualisation of human rights in international human rights law and then defend it by reference to the ICESCR and the ICCPR.

Dworkin famously argued that rights are trumps.¹¹⁵ However, in his later works, the notion of trumps loses much of its relevance.¹¹⁶ Thus, with Möller, I rely on Dworkin's account of the foundational values of rights (human dignity, equality and liberty), but unlike the former, I will not go into detail what this means for the structure of rights.¹¹⁷ Instead, I rely on the conceptual arguments defended earlier in this chapter,¹¹⁸ and recapped immediately above. Dworkin's account is deontological.

¹¹⁴ See Wenar, 'The Nature of Rights' (n 21) 232-34, who argues that most rights, especially vague ones, are best understood as complex molecular rights that comprise several (or all) Hohfeldian incidents at once.

¹¹⁵ See generally Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984); Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

¹¹⁶ See Kai Möller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2017), (12) *Law & Ethics of Human Rights* (forthcoming), LSE Legal Studies Working Paper No 11/2017 <<https://ssrn.com/abstract=2981003>> accessed 22 September 2017.

¹¹⁷ See *ibid* 7. On the interplay of proportionality and values underpinning rights see further George Letsas, 'Rescuing Proportionality' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

¹¹⁸ Section 1.1 above.

It is an account that is concerned with reasons, as opposed to interests. Specifically, it identifies which reasons a government should and should not take into account when the treatment of individuals is at stake.¹¹⁹ Such a reason-blocking account is distinct from the interest-based accounts surveyed, and – at least for our purposes – rejected, above.¹²⁰ That is, what is important about Dworkin’s conceptualisation of rights, is its focus on the reasons that justify the allocation of duties to others rather than on interests (whether important or not) of right holders.

In the interpretivist spirit, we should ask again which value or point a conceptualisation of human rights in international law tracks. For Dworkin, human dignity is that value.¹²¹ It generates two principles: the principle of intrinsic value – equality of worth of each individual –,¹²² and the principle of personal responsibility, that is, a principle of liberty.¹²³ Dworkin, who refers here to what I call a human right, as a political right, argues:

Someone who claims a political right makes a very strong claim: that government cannot properly do what might be in the community’s overall best interests. He must show *why* the individual interests he cites are *so important that they justify that strong claim*. If we accept the two principles of human dignity that I described in the last chapter, we can look to those principles for that justification. We can insist that people have political rights to whatever protection is necessary to respect the equal importance of their lives and their sovereign responsibility to identify and create value in their own lives.¹²⁴

This quote is important because it shows that Dworkin mentions interests, but emphasizes that only reasons justify the allocation of the duties that correlate with rights. It adds that a combination of the principles of equality and liberty should yield a list of political rights.

Here, I diverge from and add to Dworkin’s account. First, as I see it, the equality principle in particular, justifies duties and their allocation not just to public

¹¹⁹ Jeremy Waldron, ‘Pildes on Dworkin’s Theory of Rights’ (2000) 29 *Journal of Legal Studies* 301, 302.

¹²⁰ Section 1.2 above. The term “reason-blocking” is Letsas’: Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) 101, citing Waldron, ‘Pildes on Dworkin’s Theory of Rights’ (n 119), who uses the phrase ‘to block reasons’, but not the term as such.

¹²¹ Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 9-10.

¹²² *Ibid* 11-17; Möller (n 116) 4-5.

¹²³ Dworkin, *Is Democracy Possible Here?* (n 121) 17-21; Möller (n 116) 5.

¹²⁴ Dworkin, *Is Democracy Possible Here?* (n 121) 32 (emphasis my own).

institutions but to particular ones.¹²⁵ This is different from Dworkin's account of human rights. He maintains that human rights are a more fundamental set of political rights,¹²⁶ while I do not insist on this distinction.¹²⁷ And second, these principles do not only generate a list of political rights, but also human rights in international human rights law, that is, international legal human rights. Both the divergence and the addition are necessary in order to rely on Dworkin's account to illuminate extraterritorial human rights obligations in the ICESCR. Let me take them in turn.

First, equality in the sense of intrinsic value of each human life, is a plausible candidate for a value that informs not just rights according to Dworkin's terminology, but in particular also international human rights. The equality principle in the context of rights excludes any treatment of individuals that fails to respect their intrinsic and equal worth. On Dworkin's account (which I share), the clearest examples of a violation of this principle are blatant discrimination and genocide because both of these are based on the belief that the individuals or groups so singled out are inferior to others.¹²⁸ In short, the principle of intrinsic value requires that public institutions accord equal concern and respect to each individual.¹²⁹

Before we further our inquiry, I should address the most obvious objection to this point in the context of socioeconomic human rights. The ICESCR in its article 2(3) explicitly provides for a differentiation of protections for nationals and non-nationals that developing countries may rely on in the area of economic rights. Relevant state practice often makes this differentiation in general. It is common, for example, to exclude non-nationals from certain welfare benefits, or at least restrict their access.¹³⁰ How can we square these facts with the notion of equal respect? The

¹²⁵ While I believe that equality is particularly salient and important in this respect, I should note that its general importance is by no means universally accepted. See, eg, Derek Parfit, 'Equality and Priority' (1997) 10 *Ratio* 202; T M Scanlon, 'The Diversity of Objections to Inequality' in *The Difficulty of Tolerance* (Cambridge University Press 2003). However, Parfit points out that appeals to the intrinsic value of equality are most plausible in terms of legal, political, and, presumably, moral, status, which is exactly what we are concerned with here: *ibid* 215.

¹²⁶ See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 332-39, where he argues that violations of human rights express contempt over and above mistake.

¹²⁷ See also the critique in George Letsas, 'Dworkin on Human Rights' (2015) 6 *Jurisprudence* 327. While I amend Dworkin's account here, I am not sure I disagree with him on the substance. My concern is to identify the best understanding of what I call human rights in the context of international human rights law. It may well be that Dworkin is talking about something else and we just happen to have the same name for different concepts.

¹²⁸ Dworkin, *Is Democracy Possible Here?* (n 121); Möller (n 116) 5.

¹²⁹ Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) ch 5.

¹³⁰ For an analysis of an example to this effect see Claire Breen, 'The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing' (2008) 20 *International Journal of Refugee Law* 611.

answer is this: as long as a floor of protection is granted that does not fail to respect the equal moral standing of an individual or the intrinsic value of their life, the principle is upheld even when distributive inequalities remain.¹³¹ Of course, if inequalities turn out to be disrespectful in the required sense, they may still constitute a failure of a state to discharge its obligations.

When establishing whether the principle of equal respect captures the point of international human rights following the interpretivist method, we should first gather data to interpret. Our data are international human rights instruments. As I take it, there is broad agreement that they form a practice that is accorded value by participants but with considerable disagreement as to what that value is. One important feature of that practice is its apparent reliance on the idea that individuals have an equal moral status.¹³² This is expressed in the preambles of the ICCPR and the ICESCR, which profess that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom,’ Further, both of these instruments contain individual rights against discrimination,¹³³ which may depend on whether one of the rights listed in the instrument is implicated,¹³⁴ but not on whether fundamental interests are touched upon. This chimes well with Dworkin’s idea that rights are about treatment espousing equal respect. Accordingly, human rights proper in international human rights law as interpreted with reference to the value of equality should be understood as rights to treatment with equal concern and respect.

The lists of rights contained in the human rights instruments, our raw data, take on a nuanced function. They specify areas of human activity considered central to human existence. And because they are central, equal concern and respect are particularly important within those areas of human activity. For example, everyone needs access to adequate housing. According to the theory of rights defended here, this does not mean that everyone needs to be provided with a dwelling regardless of the costs. Instead, it means that any scheme of distribution or the lack thereof must not neglect equal concern and respect for individuals. It would be a violation of their human rights if they were denied housing because of the colour of their skin or their

¹³¹ See further section 3.3 below.

¹³² Even though my account relies on Dworkin’s, interpretivists are not the only ones who emphasise equality in relation to human rights. See, eg, Allen Buchanan, ‘The Egalitarianism of Human Rights’ (2010) 120 *Ethics* 679; Samantha Besson, ‘The Egalitarian Dimension of Human Rights’ (2013) 136 *Beiheft, Archiv für Rechts- und Sozialphilosophie* 19.

¹³³ Articles 4 and 26 ICCPR.

¹³⁴ Article 2(1) ICCPR, article 2(2) ICESCR.

religious believes. The violation consists in the disrespect of their equal moral status combined with the denial of housing, not in each of these facts alone.¹³⁵ That said, international human rights law might impose requirements on states that go beyond what I say here. However, what I say here means that these obligations do not fall within the conceptualisation of human rights in international human rights law that I defend.

Second, if we connect this understanding of equality to integrity as a guiding value of the practice of international legal human rights, the following picture emerges. This kind of treatment can be claimed against public institutions,¹³⁶ but not just any public institution. The value of equality allows us to say that the institutions in question must be such that they are in a position to guarantee equality in the sense of intrinsic and equal worth of each individual. In other words, the public institution must have a pre-existing relationship with a particular individual that puts the institution in such a position. I shall argue below, that an equality based view of human rights means that international legal human rights rely on institutions that make political decisions with respect to the individual in question. It must be a government which has some form of political power over of the individual in a given case. The argument will be that jurisdiction, the criterion of applicability some human rights treaties contain, should be understood to capture this relationship.¹³⁷

3.3 Interpretivism, Socioeconomic Rights, and Distributive Justice

Before concluding this chapter I want to consider one potential objection to how I conceptualise what I call human rights in international human rights law. Human rights as standards of treatment is an influential and accepted view of civil and political rights. But the same is not true for economic and social rights. The objection is that the ICESCR plainly is about more than some form of minimum treatment. It contains references to international assistance and co-operation in article 2 and article 11, as well as the distribution of resources, particularly food, again, in article 11. It contains rights to social security in article 9 and the highest attainable standard of health in article 12. How could one make sense of these provisions by reference to minimally

¹³⁵ Given that a liberty principle also exists, we might say that there is some sort of minimum threshold to protect dignity. While this is not central to my claims here, and I do not wish to defend it further, it is nevertheless important to raise the possibility.

¹³⁶ This is based on the value of integrity. See section 3.1 above.

¹³⁷ See chapters 3, 4, and 5 below for a full defence of this view.

respectful treatment? The short answer is this: human rights as a standard of respectful treatment do not – and should not – make sense of these provisions. Or at least do not make full sense of them.

Interpretivism as I understand it, explicitly makes room for disregarding some of the practice if it is not justified by the its guiding values.¹³⁸ This means that the fact that the theory defended here does not cover all aspects of ICESCR provisions does not say anything about its success as a theory. Nevertheless, there are two intuitions I would like to take seriously here. First, there is the idea that the core of the ICESCR should be its distributive function. Second, and building on the first, is the intuition that the extraterritorial application of economic and social rights is primarily and mainly about global or international distributive justice.¹³⁹ In what follows I aim to unpack these intuitions in order to show that even readers who do not agree with my approach to human rights may be able to get on board with this study as a whole.

The equality based approach to human rights I defended here is not the only theory of human rights to suggest that not every question of distributive justice, robust notions of equality or wise government are also human rights issues.¹⁴⁰ Nickel – having in mind social rights in particular – describes the relationship in the following way. ‘...[H]uman rights should not attempt to provide a full account of the requirements of distributive justice.’¹⁴¹ His concern here is that social and economic human rights should only address the most serious distributive problems.¹⁴² In other words, we do not need to endorse my conceptualisations to recognise that human rights in international human rights law are not maximising requirements. There are any number of issues that are not tracked by these specific international legal human rights.

I argue that a standard of treatment rooted in equal respect and concern, coupled with integrity, is the most successful account of international legal human rights, that is, of what I call human rights in the context of international human rights law. It allows us to decide which particular role legal human rights play in our moral

¹³⁸ See section 2 above.

¹³⁹ See generally, eg, Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013); Margot E Salomon, ‘Why Should it Matter that Others Have More?’ (n 2). See also chapter 1, section 2 above.

¹⁴⁰ See, eg, Allen Buchanan, ‘Equality and Human Rights’ (2005) 4 *Politics, Philosophy & Economics* 69; Samantha Besson, ‘Human Rights and Democracy in a Global Context: Decoupling and Recoupling’ (2011) 4 *Ethics & Global Politics* 19, n 23.

¹⁴¹ Nickel (n 34) 138.

¹⁴² Ibid. See also Buchanan, ‘Equality and Human Rights’ (n 140).

repertoire and to distinguish them from requirements of distributive justice.¹⁴³ This does not make it an inadequate account of human rights, including socioeconomic rights, but a more nuanced one.¹⁴⁴ However, we need not agree on this for my overall argument on extraterritoriality to take off. In fact, the opposite is true.

Recall the purpose of this chapter, which is to elucidate how international legal human rights justify the allocation of obligations to specific duty bearers. If human rights are best understood as a particular standard of treatment they rely on public institutions. These institutions, in turn, rely on a domestic legal system, and are therefore in need of some sort of jurisdiction requirement. Now, if civil and political rights are standards of treatment and socioeconomic rights are entitlements to a specific threshold of provision of goods and services, they still rely on political institutions for their specification.¹⁴⁵ This is especially true for allocation of specific shares in cooperative schemes of redistribution, such as taxes or social insurance. If the rights in the ICESCR cover these instances as well, socioeconomic rights are, if anything, more in need of jurisdiction than civil and political rights. That is, the jurisdictional threshold is going to rise, not fall. In other words, for the purposes of this thesis jurisdiction (or something like it) is required for socioeconomic rights in any case, even if one does not subscribe to the account of human rights I defend here. In sum, jurisdiction is relevant here regardless of the specific account of human rights one subscribes to. Whether or not the ICESCR should indeed serve a distributive function above and beyond what I have said about human rights in the context of international human rights law, is a different question to which I will come back a little further below.

What about the concern regarding global distributive justice and its connection to extraterritoriality? The most plausible claim that there is a connection or overlap in the first place is this. Article 2 of the ICESCR, which enumerates the general obligation of state parties to the treaty, mentions explicitly that states should take steps ‘individually and through international assistance and cooperation ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant.’ The fact that rights can be ‘realised’ implies that duties imposed may

¹⁴³ See Meckled-Garcia, ‘Do Transnational Economic Effects Violate Human Rights?’ (n 37).

¹⁴⁴ See Meckled-Garcia, ‘Giving Up the Goods’ (n 18).

¹⁴⁵ See for examples of the complex tasks of specification and refinement in the practice of the UK Jeff King, *Judging Social Rights* (Cambridge University Press 2012).

require the provision of goods and services, which in turn implies distribution.¹⁴⁶ References to ‘assistance and cooperation’ further mean that distributive principles are meant to apply beyond existing political communities, in other words, globally.¹⁴⁷

The problem for an account of extraterritorial obligations that relies on jurisdiction, is that such global distribution could not possibly rely on thresholds if it is to make any sense at all.¹⁴⁸ This is because assistance and cooperation do not rely on a domestic set of institutions. On the contrary, they form part of a very different set of institutions: international ones.¹⁴⁹ They must, in other words, always go beyond the public institutions or government of one state. The solution to this problem is not to say that a requirement of jurisdiction is foreign to the ICESCR, however. Rather, it is to say that the ICESCR imposes on states different kinds of duties which result in different dimensions of extraterritorial obligations.¹⁵⁰ As such, obligations to assist and cooperate are not human rights obligations as I understand them.

None of this is to say that global inequalities are not a valid concern. They are. However, extraterritorial obligations generated by what I refer to as human rights in international human rights law overlap with distributive concerns but are not the primary, let alone best, way to address them. Recognising and protecting socioeconomic human rights will of course have distributive effects. But that is not their main point: minimally respectful treatment according to the principles of integrity and equality is. In turn, this does not mean that the ICESCR does not address the issue of distribution. However, there are good reasons to think that distribution of resources and opportunities should follow different normative principles, or certainly not necessarily the same principles, than what I have outlined to be the basis of human

¹⁴⁶ See Meckled-Garcia, ‘Do Transnational Economic Effects Violate Human Rights?’ (n 37).

¹⁴⁷ The implied account of global justice is most likely a cosmopolitan one. For defences of cosmopolitanism and its implications see, eg, Stefan Gosepath, ‘The Global Scope of Justice’ (2001) 32 *Metaphilosophy* 135; Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2004); Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford University Press 2005); Thomas Pogge, *World Poverty and Human Rights* (Polity 2008). For accounts either sceptical of, or attacking cosmopolitanism see, eg, Thomas Nagel, ‘The Problem of Global Justice’ (2005) 33 *Philosophy & Public Affairs* 113; Saladin Meckled-Garcia, ‘On the Very Idea of Cosmopolitan Justice: Constructivism and International Agency’ (2008) 16 *Journal of Political Philosophy* 245.

¹⁴⁸ Rolf Künemann, ‘Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

¹⁴⁹ We could also say that facilitating cooperation is one of the very points of international law. See Meckled-Garcia, ‘International Law and the Limits of Global Justice’ (n 98).

¹⁵⁰ See in general Fons Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’ (2011) 11 *Human Rights Law Review* 1.

rights. And these principles may well address distributive issues far more effectively.¹⁵¹

4 Conclusion: Jurisdiction Beyond Treaty Wording

Extraterritoriality of international human rights instruments is at its core a question about justifying the allocation of duties towards the relevant right holder on a particular duty bearer in a given case. In this chapter, we have seen that human rights as claim rights need both a right holder and a duty bearer as a matter of conceptual necessity. We have also seen that individual interests, regardless of how fundamental they might seem, neither justify duties nor allocate the burden of a human rights obligation to a specific duty bearer. In other words, interest-based theories of human rights fail on this account.

From all of this, we have followed an interpretivist alternative to trace what human rights should be understood as doing within the context of international human rights law. The ensuing account of human rights in the context of international human rights law allows us to explain how international legal human rights allocate duties. Recognising international human rights law as a social practice and seeking to determine what human rights require within this system allows us to specify right holders and duty bearers according to the underlying values and the principles they generate. These values, I argued, are integrity and equality, which in turn generate the principle of equal concern and respect. Finally, we have seen that global justice and cooperation between states are no obstacle to my account of human rights or, indeed, the need for jurisdiction.

The consequence of interpreting international human rights law in the light of integrity and equality is twofold. First, integrity and its need for public institutions and a legal system shows that we must identify a threshold criterion for applying international human rights law. And second, the value of equality demonstrates that only those public institutions that are able to discharge obligations resulting from equal respect and concern for a particular individual should be understood to be duty bearers of human rights of that particular individual.

¹⁵¹ For arguments to exactly this effect on a domestic and a global level, respectively, see Meckled-Garcia, 'Giving Up the Goods' (n 18); Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (n 37).

Chapter 2

What we must do next is identify when the pre-existing relationship that justifies the allocation of duties to a particular duty bearer is present. Chapter 3 argues that jurisdiction, the threshold of applicability mentioned in some human rights instruments, is precisely about capturing this relationship. It develops criteria that need to be met by an account of jurisdiction, surveys two existing approaches, and argues that neither of them meets these criteria. Chapters 4 and 5 then take up the task of developing and defending an account that does.

Chapter 3 Jurisdiction and Justification

Human rights in international human rights law rely on the existence of states, their public institutions and legal systems. And human rights only justify that for every individual those public institutions that are in a position to guarantee equality in the sense of treatment with equal respect and concern can be said to be the duty bearer. In other words, they only make sense within a particular, pre-existing relationship between the state and the individual. And this relationship depends on the nature of human rights in the sense that it should justify the allocation of duties to a specific duty bearer.¹ One of the implications of this approach is that it not only justifies but demands that we look at threshold criteria for the application of international human rights. Some human rights instruments, including the ECHR and the ICCPR, include jurisdiction clauses, which make the applicability of the instrument in question depend on whether a state has jurisdiction.² This, I will argue means that international human rights law already contains reference to this pre-existing relationship. We have also seen that human rights obligations in the ICESCR are no exception here, even though its text does not mention jurisdiction.³

This chapter argues, first, that existing accounts of jurisdiction are concerned precisely with capturing this necessary, pre-existing relationship between state and individual. Further, I argue that these accounts show that jurisdiction is already understood to be a general threshold criterion that justifies allocating human rights obligations. I also argue, however, that a threshold criterion is only useful if it allows us to specify a) what is the threshold to be met, and b) how we tell who (that is, which state or public institution) has met the threshold in relation to whom. Accordingly, this chapter asks, second, what the desiderata for an account of jurisdiction are. Third, the chapter analyses two sophisticated and influential accounts of jurisdiction and asks whether they meet the desiderata. I argue that they do not. The conclusion of this chapter is that there is a need to develop an account of jurisdiction that meets the success criteria.

¹ See chapter 2 above.

² See chapter 1, section 1 above.

³ See chapter 2, section 3 above.

1 Taking a Step Back: Why We Need a Theory of Human Rights to Explain Jurisdiction

My hypothesis is that jurisdiction is about the pre-existing relationship between right holder and duty bearer that justifies the allocation of obligations to the latter. Before I move to develop an account of jurisdiction, however, it is worth checking whether any of the existing ones could be followed instead. That is, I am not yet concerned with showing what the best understanding of jurisdiction is or should be.⁴ What I want to show in the first instance is that existing accounts of jurisdiction in the debate about extraterritoriality of civil and political rights already address this relationship.

We have seen in chapter 1 above that treaty interpretation is not only a question of the wording, or of following the rules set out in articles 31 and 32 of the VCLT. Instead, it is often also a question of value judgments that generate normative principles because interpretation is an evaluative activity.⁵ Building on this account of treaty interpretation, I aim to shed light on two issues. First, I show that existing accounts of jurisdiction are in fact descriptions of precisely such a pre-existing relationship between states and individuals I have in mind and mention above. I argue that this follows from the fact that substantive disagreement about jurisdiction can be traced to and explained by disagreement about how human rights justify the allocation of obligations. This brings me to the second issue. Existing accounts of jurisdiction rely on value judgments, as we would expect, given the nature of interpretation. However, they rely on a specific kind of value judgment, namely, normative propositions about the nature of human rights. The upshot is that the desiderata I develop next are both necessary for and applicable to existing accounts of jurisdiction and evaluating them accordingly is not unfair, but called for. Let us consider a few examples of existing accounts of jurisdiction in this light.

I start here by indicating how international human rights practice and doctrinal scholarship have so far viewed jurisdiction explicitly or implicitly as a pre-existing relationship between a right holder and a duty bearer. The Human Rights Committee in particular has been explicit about this. It has stated that the question about extraterritorial human rights obligations is fundamentally not a question about territory but about a connection between a state and an individual.⁶ This implies that it is also

⁴ For the defence of my account see chapters 4 and 5 below.

⁵ See chapter 1, section 3 above.

⁶ For a clear and powerful expression of this line of argument see Human Rights Committee, *Lopez Burgos v Uruguay*, Communication no 52/1979 (29 July 1981) CCPR/13/D/52/1979 paras 12.2

a question about what such a relationship needs to look like in order to make it a pertinent underlying framework of human rights obligations that is tied to the nature of human rights. In turn, this necessitates a characterisation of the underlying relationship between a state and individuals presumed by international legal human rights. The Human Rights Committee's views on this concern the ICCPR. But similar statements have been made regarding the ICESCR as well.

A clear indication that such a link is widely seen to be necessary and thus warranting examination are the Maastricht Principles.⁷ Principle 9 on the scope of jurisdiction reads as follows:

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

- a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
- c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.⁸

This shows that jurisdiction is considered to be a threshold criterion that triggers obligations of states. The principle first sets out that states have obligations in the situations described and further implies that the presence of at least one of these situations is a necessary condition for such obligations. Sections b) and c) are based on views of human rights that focus on outcomes and are thus more closely related to what I consider to be requirements of global distributive justice. They are also linked to interest-based accounts of human rights and thus at least in this regard problematic.⁹ Section a), however, mirrors quite closely what we will see to be the most influential

and 12.3. See also Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857.

⁷ In addition, international bodies and academic literature have occasionally stated that jurisdiction (or something like it) in fact is relevant to the extraterritorial application of the ICESCR. See International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 112; John Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context' (2007) 40 *Israel Law Review* 396, 424; Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 315-16.

⁸ For further discussion of this principle see chapter 4, section 3.3 below.

⁹ See chapter 2 above.

view of jurisdiction in the context of human rights treaties.¹⁰ In addition, the title reveals that this principle is indeed offering an interpretation of jurisdiction relating to economic, social and cultural rights, that is, as it relates to the ICESCR. The choice of terminology indicates the possibility that the idea was to apply current approaches to jurisdiction to the ICESCR.

Turning now to the issue of underlying value judgments, take Marko Milanovic's claim that jurisdiction is just the exercise of factual power by another name.¹¹ This conclusion, as we would expect, remains the same for the ECHR and the ICCPR, despite the differences in their wording.¹² The idea behind such reasoning is that the capacity to influence certain situations or outcomes for individuals is at the heart of bearing human rights duties.¹³ This can plausibly be linked only to a teleological, interest-based view of human rights that describes human rights as identifying aims to be achieved because said outcomes are in themselves valuable to individuals. While this is not an unpopular view¹⁴ it is nevertheless just that: a view.¹⁵ It is, in other words, an assumption about what human rights do (or should do) in the law and in the world. One can agree or disagree with this view of human rights,¹⁶ but that is beside the point. What matters instead, is that this particular assumption

¹⁰ See section 3 below.

¹¹ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) ch 2. His overall theory is more complex than this assertion but the other components are less to the point with regard the role of human rights theory. I discuss the other, more nuanced, aspects of his model in section 3 below.

¹² Implicitly *ibid* ch 4; explicitly Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in a Digital Age' (2015) 56 *Harvard International Law Journal* 81, 111.

¹³ Milanovic explicitly endorses this view, although only in passing and not in the chapter that is dedicated to the interpretation of jurisdiction as a term. See Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 107, 09. Interestingly, his view has also been criticised as arbitrary precisely because he does not follow through on this capacity approach, but again without explicit acknowledgement as to how this relates to the view of human rights employed, see Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 *Law & Ethics of Human Rights* 47, 61-64.

¹⁴ In addition to the sources cited in chapter 1 above see, eg, Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996); Thomas Pogge, 'Severe Poverty as a Human Rights Violation' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007); James Griffin, *On Human Rights* (Oxford University Press 2008). For an account on what it means to allocate duties according to capacity see Leif Wenar, 'Responsibility and Severe Poverty' in Thomas Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007).

¹⁵ For our purposes, it also happens to be a flawed view. I argue above that interest-based accounts of human rights fail to justify the allocation of duties and thus do not shed light on extraterritoriality. See chapter 2, section 1.2 above.

¹⁶ See chapter 2, section 1.2 above. For a more exhaustive critique of teleological views of human rights in the context of extraterritoriality see Saladin Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (2009) 2 *Ethics & Global Politics* 259, 266-71.

concerns the nature of human rights and – precisely because of this – has a bearing on how jurisdiction is interpreted. Contrast the above definition of jurisdiction with the one given by Samantha Besson. She defines jurisdiction as Razian *de facto* legal and political authority.¹⁷ She gives as her main reason for this that the link with political membership and thus the relational dimension of human rights is at the heart of her view of their nature.¹⁸

As a consequence of these different starting points, Besson and Milanovic have different views about the meaning of jurisdiction. Their disagreement is not superficial. On the contrary, it goes to the heart of the theory of human rights that is endorsed implicitly or explicitly as well as to the values and principles informing it. Milanovic hints to the connection of extraterritoriality and the normative foundation of choice when he identifies the latter in international human rights law as the ideal of universality.¹⁹ But it is telling that it is Besson – the more theoretically inclined of the two – who acknowledges the existence of a deep disagreement²⁰ and notes that ‘...jurisdiction qua normative relationship between subjects and authorities actually captures the core of what human rights are about...’.²¹ In sum, relying on normative propositions about the nature of human rights is at the heart of both of these accounts of jurisdiction.

Even if that were not the case, there are good reasons for looking to the nature of human rights. There have been complaints by both doctrinal scholars and a judge that the ECtHR’s case law on extraterritoriality has been makeshift and patchy at best.²² Given that the case law and debate on the extraterritorial application of the ECHR is by comparison the most sophisticated interpretation available, the complaint is even more salient with regard to the ICESCR. A common diagnosis of why there is such bafflement surrounding this topic cites a version of the tension between

¹⁷ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6) 864-65.

¹⁸ Ibid 865-66; see further Samantha Besson, ‘Human Rights and Democracy in a Global Context: Decoupling and Recoupling’ (2011) 4 *Ethics & Global Politics* 19.

¹⁹ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 106.

²⁰ Samantha Besson, ‘LJIL Symposium: A Response by Samantha Besson’ (*Opinio Juris*, 21 December 2012) <<http://opiniojuris.org/2012/12/21/ljil-symposium-a-response-by-samantha-besson/>> accessed 22 September 2017.

²¹ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6) 860.

²² Shany, ‘Taking Universality Seriously’ (n 13) 57; *Al-Skeini v United Kingdom*, App no 55721/07 (ECtHR, Judgment, 7 July 2011), Concurring Opinion of Judge Bonello para 5.

universality in aspiration and particularism in political reality as well as enforcement.²³ While I do agree with the observation, the diagnosis falls short. Indeed, as we have seen above, how jurisdiction is interpreted depends first and foremost on the nature of human rights it is built on. The problem is that the underlying assumption's influence is rarely acknowledged. This means that the actual differences in opinion are not treatable because there is no clarity as to their cause. Taking a step back by asking what it means to have a human rights obligation in the first place is thus long overdue, which is why this thesis should be understood as a major intervention in the debate.

It follows from the above that a theory of the nature of human rights is necessary in determining the existence and meaning of any threshold criteria for the application of human rights treaties in general and the ICESCR in particular. The next step is to determine, what such a theory would have to elucidate in this respect. These findings will in turn inform the evaluation of current approaches to jurisdiction. It could well be that they are successful in what they seek to explain even if they do not explicitly acknowledge underlying assumptions about the nature of human rights.

2 Desiderata for an Account of Jurisdiction

While not all current approaches to jurisdiction state or acknowledge the connection to the nature of human rights, it is nevertheless possible that they are adequate. Thus, before we venture into developing a new account of jurisdiction, it is necessary to analyse the current ones. In order to assess whether any approach is adequate, however, we need to know exactly what a theory of jurisdiction needs to account for. What is needed here is a justification of a relationship between a state and individuals that is susceptible to human rights obligations.

I suggest that a theory, which lives up to the (yet to be defined) desiderata, provides solutions to the following puzzles. First, it would equip us with a principle to determine which state (or states) has (or have) the right kind of relationship with an individual to trigger human rights obligations of said state. Second, it should enable us to distinguish acts outside of a state's territory that do trigger human rights obligations and acts that do not. Third, it would allow us to identify state behaviour with an extraterritorial impact (as opposed to an extraterritorial act) that triggers

²³ Shany, 'Taking Universality Seriously' (n 13); Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 109.

human rights obligations towards individuals abroad. Crucially, however, a successful theory ties the notion of a connection between a state and an individual to the nature – the normative weight – of international legal human rights as such rather than to assumptions about the role of territory.²⁴ This has several advantages. Specifically, such an approach avoids unnecessary confusion surrounding the different wording of different human rights treaties and it shifts the focus away from technicalities to the relevant normative considerations.

Building on the arguments above, and in particular on the account of human rights in international human rights law developed and defended in chapter 2, I suggest the following desiderata any theory of jurisdiction must meet. All of them derive from the role of values and principles in interpretation generally.²⁵ That is, they are aspects of what makes an account principled. While accounts of human rights that focus on reasons, especially within an interpretivist framework, will normally meet these desiderata, I offer desiderata that could be met by accounts that do not share these theoretical leanings. Having said this, an account of jurisdiction should meet, at least, the following criteria to be considered successful.

- a) It should offer *plausible guidance*, that is, it should tell us what the underlying relationship between a state and an individual looks like.
- b) It should show how this connection forms part of the *nature of human rights*.
- c) It should tie the relationship to the part of the theory of human rights that concerns the *justification of the allocation of obligations to a specific duty bearer* rather than, say, the process of specification of the content of the obligations.
- d) It should justify (not just define) the underlying relationship, and it should show that the distinctions it makes are in this sense *not arbitrary* at least on its own terms.

Before developing my own account, I test whether two of the most sophisticated accounts of jurisdiction meet these success criteria. If they do, there is no need to venture any further. To this end, I outline two contrasting views about the

²⁴ For a discussion of the difference between jurisdiction in international human rights law and title to territory see chapter 6 below.

²⁵ See chapter 1 above.

connection between states and individuals that trigger human rights obligations of the state. This will both illustrate when the above desiderata are met (or not) and clarify whether these current approaches are adequate. The view I call “factual power” approach normally does not explicitly²⁶ endorse any view of the nature of international legal human rights or a necessary underlying relationship between states and individuals in general. Instead, it only specifically addresses the interpretation of what state jurisdiction means when applying particular human rights treaties extraterritorially. However, proponents of this account do claim to address at least part of the puzzles posed by the desiderata outlined above. Consequently, and in addition to the reasons stated in section 1 above, analysing this view in the light of the more general issues and how it fails to meet them is fair.

The second account I refer to as the “legal and political authority” view. This approach does address the general question of why jurisdiction is indeed best understood as expressing the need for an underlying relationship between a state and individuals. Unlike the “factual power” view it does therefore ask the right kind of question. However, as we will see, the threshold criteria defined following the general question are unsuccessful with respect to both plausible guidance and non-arbitrariness.

These are, in my view, the two most sophisticated accounts to date. If one wants to test whether a new approach is warranted, these are thus the opponents of choice. The following analysis reveals in more detail the reasons why both views are problematic. In particular, it shows that an equality-based account of human rights focused on reasons, like the one defended above,²⁷ which incorporates the underlying relationship between states and individuals, is preferable to explaining jurisdiction as a standalone concept. This is because jurisdiction captures the relationship which justifies allocation obligations to particular agents in the first place.

²⁶ The approach might not do so implicitly, and in fact usually assumes a specific view of human rights but are unable to utilise this to justify their interpretation of jurisdiction. See discussion under 3.1 below.

²⁷ See chapter 2, section 3 above.

3 The “Factual Power” View

The “factual power” view (FP) is the dominant approach to jurisdiction in doctrinal legal scholarship on the extraterritorial application of human rights treaties.²⁸ It asserts the following. The meaning of jurisdiction in international human rights law is seen purely as a question of fact and the relevant fact is that a state exercises power over either territory or people abroad.²⁹ In particular, it emphasises that it is insignificant whether said power is exercised lawfully or not.³⁰ Only some formulations make explicit that it is meant to be a general requirement applicable to state conduct within and outside of the state’s territory.³¹

In the spirit of fairness I should stress that this view and its variations are in part reactions to an approach, which holds that states only incur obligations when they act lawfully outside their territory and are intended to address the conflation of factual power and legitimacy.³² Now, it is obviously true that exercising power outside a state’s legal competence cannot possibly serve as a reason to avoid human rights obligations, or, in fact, any obligations under international law. Wilde has shown this so convincingly that there is, in my view, no need to further entertain the possibility that only lawful acts could trigger human rights obligations.³³ Regarding this particular aim (FP) is successful and thus correct. However, (FP) does not stop there. It also aims at explaining the meaning of jurisdiction as a threshold criterion for the applicability

²⁸ See Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) for the most influential formulation of this approach. Variations of this view can also be found in, eg, Theodor Meron, ‘Extraterritoriality of Human Rights Treaties’ (1995) 89 *American Journal of International Law* 78; Rick Lawson, ‘Life after Bancovic: On the Extraterritorial Application of the European Convention on Human Rights’ in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Virginia Mantouvalou, ‘Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality’ 9 *The International Journal of Human Rights* 147; Cerone (n 7); Olivier De Schutter and others, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights’ (2012) 34 *Human Rights Quarterly* 1084; Maarten Den Heijer and Rick Lawson, ‘Extraterritorial Human Rights and the Concept of ‘Jurisdiction’’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013); Cedric Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013); Beth Van Shaack, ‘The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now Is the Time for Change’ (2014) 90 *International Law Studies US Naval War College* 20.

²⁹ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 8, 53. Interestingly, the author’s approach first refers to the exercise of “power or control” but then restates this to mean factual power only.

³⁰ See, eg, Ralph Wilde, ‘Legal Black Hole – Extraterritorial State Action and International Treaty Law on Civil and Political Rights’ (2004) 26 *Michigan Journal of International Law* 739.

³¹ See, eg, De Schutter and others (n 28) 1107.

³² Den Heijer and Lawson (n 28) 164-65.

³³ On this issue see generally Wilde (n 30).

of human rights treaties.³⁴ And it does so by relying on a specific relationship between states and individuals.³⁵ This is not always made explicit but the aim is clearly present when authors speak of a connection, link or relationship between a state and an individual that is sufficiently or reasonably close and thus warrants triggering human rights obligations.³⁶ I take this to mean that the aim is to provide a justification for the allocation of human rights obligations to a specific duty bearer.

Milanovic, providing the most sophisticated and influential version of (FP) to date mitigates this concern in that he does not content himself with describing jurisdiction as a threshold criterion but adds a qualification. Jurisdiction – described as factual power or overall control over territory – only acts as a threshold criterion for positive human rights obligations (protect, ensure, fulfil) but not for negative ones (respect).³⁷ The idea behind this is to avoid imposing obligations on states that might be considered too burdensome and thus in violation of the “ought implies can” principle.³⁸

The problem with this approach is that it is very difficult to distinguish negative and positive obligations.³⁹ Milanovic implicitly acknowledges this problem in the form of a peculiar argument about prophylactic and procedural (in other words: positive) obligations that are rooted directly in negative ones and are thus to be treated like the latter.⁴⁰ To consider the general difficulty, take, for example, the claim that respecting the prohibition of torture is a negative obligation. This is true in terms of the outcome envisaged, but not in terms of what it means for a state to make sure this obligation is met. Any institution or state will have to train and oversee its agents to ensure they know about the prohibition of torture, and about what practices torture consists of.

The implication is that the distinction between negative and positive duties shifts the problem of drawing lines to another level instead of solving it. Thus, while this approach certainly explains the extraterritorial application of human rights

³⁴ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 19.

³⁵ See section 1 above.

³⁶ Ryngaert (n 28) 200-01.

³⁷ He calls this the “third model”, which is supposed to strike a balance between the “spatial model”, which relies on control over an area, and the “personal model”, which hinges on control over individuals: Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 209-22. Regarding the difference between obligations to respect, protect, and fulfil see chapter 1, section 1.1 above.

³⁸ Implicitly *ibid* 209-10.

³⁹ See Wenar, ‘Responsibility and Severe Poverty’ (n 14) 267.

⁴⁰ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 215-19.

treaties, it shifts the problematic aspect from one concept to another. Instead of the meaning of jurisdiction, drawing the line between negative and positive obligations becomes the centre of attention. That is, Milanovic's model does not so much address the problem of the allocation of duties. Rather, it passes the buck. However, for the sake of discussion we can grant that it may not be possible to separate negative and positive obligations but that we could draw up a kind of practical canon that would avoid this difficulty.

Regarding both versions of (FP) (with and without the qualification added by Milanovic), I agree with the characterisation of jurisdiction as a threshold criterion for the applicability of human rights treaties and the description as a link or a relationship. At least I agree as far as it concerns human rights obligations proper. But I do not think that (FP) is useful when it comes to defining where to draw the line – it does, in other words – not live up to the desiderata of plausible guidance and non-arbitrariness. As noted above, proponents of (FP) rarely connect it to theoretical reasoning. This in itself means that (FP) as it stands cannot meet desideratum b), which requires that an account of jurisdiction should be part of an account of the nature of human rights. However, this could be challenged as an unfair criticism of a doctrinal view. For the purposes of the present argument, I will thus build on the observation that (FP) in fact relies on assumptions on human rights albeit not explicitly. In doing this, I grant that it does interpret the relevant link between a state and an individual in the light of a view on the nature and function of human rights with the aim of justifying the allocation of duties to a particular state. Thus, it may be possible even for this doctrinal view to meet desideratum c).

This leads us to the first actual objection. (FP) describes jurisdiction as factual power and is linked to an interest-based, teleological view of human rights.⁴¹ This is problematic because a view of human rights focused on outcomes is not sufficient when it comes to specifying correlating duties and even less so with regard to the justification of who the duty bearers are.⁴² It would mean that (FP) fails desideratum c), which requires jurisdiction to be explained through the part of a theory that justifies

⁴¹ See chapter 2, section 1.2 above for the general worry that such views do not justify the allocation of duties.

⁴² See Shue (n 14) 161, who expresses the idea that it is possible to first establish valuable states of affairs and to only after establish who should be responsible from bringing them about. I do not believe this is true. Instead, we should start from values and principles that justify the rights, the duties, and their allocation. See also chapter 2 above.

obligations for specific duty bearers. However, such a dismissal could be challenged as too quick. If we expand “theory of human rights” to mean all parts of a theory including independent accounts for such a justification of the allocation of duties, however, we have to examine whether (FP) is underpinned by such an account. In the following paragraphs I first sketch why (FP) – particularly its unqualified version – fails to provide plausible guidance. I go on to suggest a possible reading of (FP) with respect to how duties are allocated. I show that (FP) can be afforded that it meets desideratum c), if we grant that capacity embodies a principle that justifies the allocation of human rights obligations, but not d) because it does not match its own requirements and is thus arbitrary.

In its suggestion that the underlying relationship that triggers human rights obligations is identical with factual power, (FP) relies on a non- or at least ill-defined meaning of power. Power is equated with control,⁴³ even though these are only part synonyms.⁴⁴ The mistake here is that power is treated as if it only consisted in its outcome rather than the disposition or potential that precedes its manifestation. In other words, it is used to denote the *exercise* of power, not power as such.⁴⁵ In itself, this does not seem problematic beyond the semantics. However, when the unqualified version of (FP) is applied to tackle the question of whether a state owes extraterritorial human rights obligations to individuals or not, the focus on the outcome of the exercise of power tends to confuse the underlying relationship we are looking for with the violation of a human right. The lack of a description of what kind of power (FP) has in mind only exacerbates this problem.

To illustrate this, it is useful to look at the now infamous *Banković* case.⁴⁶ The ECtHR had to decide whether the North Atlantic Treaty Organization (NATO) bombing of a television station in Belgrade violated the right to life (among other provisions) of the people killed in the attack. In the admissibility decision, the Court held that the ECHR was not applicable because the victims were not within the jurisdiction of the defendant states. Granting for a moment that the Court got this case right – which it may not have – consider the following. If we take the tenet of (FP) that jurisdiction is a threshold criterion for all human rights obligations and consists in the

⁴³ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 39.

⁴⁴ See generally the analysis in Peter Morriss, *Power: A Philosophical Analysis* (2nd edn, Manchester University Press 2002). See further chapter 4 below.

⁴⁵ Morriss (n 44).

⁴⁶ *Banković v Belgium*, App no 52207/99 (ECtHR, Decision, 12 December 2001).

exercise of power, we run into two problems. First, the bombing of a building is clearly the exercise of a power of some sort. The relevant power could be a power to bomb a building, the power to deploy armed forces, the power to order a pilot or crew to carry out a specific attack, and so forth. However, it is doubtful that a “power to bomb a building”, or indeed any of the powers mentioned above, is the kind of power that defines jurisdiction. Every actor who has the means of deploying the relevant kind of aircraft, or, indeed missiles of any sort, has the potential and thus the power to bomb any building they like. It follows that neither the mere ability to bomb a building nor its exercise tell us anything about whether an actor has jurisdiction in the relevant sense.

As a partial answer to this objection (FP) stipulates that the power must be over territory⁴⁷ and that it needs to be exercised in actuality. However, this narrows the picture only slightly as long as the relevant kind of power is not specified.⁴⁸ If power over territory could take any form, it being brought about by the ability to bomb buildings would not pose any problems – it just had to be the case for a relatively large area. If the power has to be exercised to count as jurisdiction and the power could consist in the ability to bomb buildings it follows that an actor does not have jurisdiction over territory before they decide to bomb it and then follow through.

It becomes clear now that the lack of a definition of power combined with the focus on its exercise, as opposed to power as a potential, makes it very difficult to distinguish between establishing jurisdiction and violating human rights obligations. This is because a focus on outcomes both relating to the nature of human rights combined with the outcome of power (its exercise) tend to merge the two distinct situations or behaviours.⁴⁹ Given that human rights obligations do not actually exist unless a state has jurisdiction and that, logically speaking, obligations cannot be violated unless they are present, this is conceptually unsatisfactory. In *Banković* it amounts to saying something as absurd as the following: the defendant states bombed a television building abroad and thus created human rights obligations by violating them.⁵⁰

⁴⁷ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 210. See also the critique in Shany, ‘Taking Universality Seriously’ (n 13) 61-63.

⁴⁸ Even Milanovic himself has hinted at this aspect. See Milanovic, ‘Human Rights Treaties and Foreign Surveillance’ (n 12) 128-29

⁴⁹ Lea Raible, ‘The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers’ [2016] *European Human Rights Law Review* 161, 166.

⁵⁰ See generally *ibid.*

The criticism regarding the application of (FP) to the facts of *Banković* is not salient regarding the qualified version of (FP) as put forward by Milanovic. He could simply say that the negative obligation to refrain from killing civilians is – as a negative obligation – not subject to a jurisdictional threshold and thus always applies. However, the unclear meaning of power is relevant for this view in a different way.

Saying that jurisdiction means exercising factual power without defining which kind of power one has in mind, cannot make sense of states' behaviour (acts and omissions) that takes place within their territory but impacts people abroad. Consider the following. If power is not connected to a theory of human rights and human rights obligations nor defined in any other way, we could say that actors who heavily influence the global political and economic order have power over almost all people everywhere.⁵¹ For example, there are harsh economic consequences when the US subsidises cotton or members of the EU do the same with sugar.⁵² If power is defined as influence on people's lives, the US and members of the EU – among others – clearly exercise power over people abroad even if their actions only take place within their territory.⁵³ However, it seems these are the kinds of examples Milanovic hopes to exclude with his distinction between negative and positive obligations.⁵⁴ This illustrates that this qualification merely dodges the problem for a while but does not solve it. The conclusion must be that neither version of (FP) provides any plausible guidance and thus fails on account of desideratum a).

The second objection is particularly salient with regard the version of (FP) that calls for a threshold criterion in form of jurisdiction only for positive human rights obligations. I argue that this version produces arbitrary results and thus does not meet desideratum d), which states that any view on the relevant underlying relationship needs to justify this relationship in addition to defining it. The quick and dirty way of proving this would be to say that (FP) in fact cannot be otherwise as it does not even

⁵¹ We will see that this is a crucial difference when compared to my account: see chapters 4, 5, and 7 below.

⁵² For elaborations on US subsidies and their implications see Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (n 16). For an analysis of European Union (EU) policy and sugar subsidies see Wouter Vandenhoe, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy' (2007) 76 *Nordic Journal of International Law* 73. See also chapter 7, section 4 below.

⁵³ For a similar critique of (FP) see Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521, 537.

⁵⁴ See, eg, his interpretation of Colombia spraying its border regions with Ecuador with herbicides and the implications for economic and social rights. Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 228.

attempt to justify jurisdiction but only describes it. To avoid charges of unfairness in this regard, I first suggest a reading of (FP) that points to a form of justification. (FP) could be characterised to incorporate a model of assigning obligations that relies on capacity in conjunction with the least cost. But, as we will see, even if (FP) is supplied with such a justificatory reading it is inconsistent on its own terms and thus fails desideratum d).

The qualified version of (FP) could be taken as an attempt to allocate obligations according to a basic version of the least-cost-principle.⁵⁵ When interpreted thusly, (FP) presupposes a favourable outcome,⁵⁶ seeks out actors with the necessary capacity to secure (or avoid hampering) the favourable outcome and then purports to identify the actor, which can do so most easily or at the least cost. The actor thus identified is under an obligation to bring about the desired outcome unless placing such an obligation on this actor would result in an excessive burden. I suspect the distinction of negative and positive human rights obligations is intended to do justice to this principle. But does it deliver on this promise?

Applying the least-cost principle to the example of environmental harm across borders, which Milanovic himself employs, suggests otherwise. His example rests on an application by Ecuador against Colombia to the ICJ.⁵⁷ Ecuador alleged that Colombia's spraying of the border region with herbicides caused its population in the region serious adverse health effects as well as widespread damage to local crops necessary for subsistence.⁵⁸ Milanovic's interpretation of this set of facts – according to his version of (FP) – is that Colombia would have violated its negative obligations stemming from the rights to health and food but would have no responsibility to provide the affected population with healthcare or foodstuffs because it does not have jurisdiction in Ecuador.⁵⁹ In the same vein, Colombia would not have any obligations to prevent private actors from causing the described harms because both scenarios would fall under the definition of positive obligations.⁶⁰

⁵⁵ For a full discussion of how to allocate responsibility “for averting threats to basic well-being” according to this principle see Wenar, ‘Responsibility and severe poverty’

⁵⁶ Above 1.

⁵⁷ *Aerial Herbicide Spraying (Ecuador v Colombia)* (Application Instituting Proceedings) 2008 <<http://www.icj-cij.org/en/case/138>>. Nothing came of it: the ICJ removed the application from its docket on 12 September 2013 after the parties had reached an agreement. Nevertheless, this case makes for an illustrative example.

⁵⁸ *Ibid* para 4.

⁵⁹ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 228.

⁶⁰ *Ibid* 218; see also the critique in Shany, ‘Taking Universality Seriously’ (n 13) 62-63.

On an application of the capacity plus least-cost-principle, however, it would make absolutely no difference whether Colombia has jurisdiction in the sense of factual power over territory. It would, in the first instance, not even be relevant that Colombia caused the harm.⁶¹ Only its capacity to provide relief or to prevent private actors from performing harmful actions would be taken into account and Colombia would bear all obligations if Ecuador (or another actor) is either not in a better position or fails to do so.⁶² That is, Colombia's relative position as to Ecuador in terms of capacity and cost would determine who bears what duty and not some form of effective control over territory. While it is questionable that Colombia would be in a better position to deliver on healthcare in Ecuador than Ecuador's government, it is certainly in a better position to prevent harmful actions by private actors within its territory. (FP), however, treats these cases alike, even though – when relying on capacity plus least-cost – it should not. It follows that (FP), read as an attempt to apply the least-cost principle, fails. In other words, the most plausible justification of (FP) does not match its results and thus renders it arbitrary on its own terms. It fails to meet desideratum d).

4 The “*De Facto Authority*” View

Samantha Besson argues for a view that makes explicit and seeks to redress the flaws of (FP).⁶³ This account, which I will call “*de facto* authority view” (A), takes jurisdiction to be a threshold criterion for the recognition of human rights and the correlative duties.⁶⁴ She describes jurisdiction as a normative rather than a factual concept, defined as

...‘*de facto* political and legal authority’; that is to say, the practical political and legal authority that is not yet legitimate or justified, but claims to be or, at least, is held to be legitimate by its subjects.⁶⁵

It consists of more than mere power or coercion as it is only present in the case of effective overall control in conjunction with a normative dimension. The latter

⁶¹ See the example of a shooter who injures a person but is far away and a person who has been walking next to the injured where the latter is allocated responsibility to help in the first instance. Wenar, ‘Responsibility and Severe Poverty’ (n 14) 264.

⁶² This is a result of employing the least-cost-principle not only with respect to allocating primary responsibility but secondary responsibility as well. See *ibid* 263-66.

⁶³ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6).

⁶⁴ *Ibid* 862-64.

⁶⁵ *Ibid* 864-65; citing Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995) 215.

consists – as authority – in giving reasons for compliance and thus replacing the original reasons for action.⁶⁶ Thus, (A) must be seen to have the following features. First, it has the potential to tie the exercise of jurisdiction to a legal system consisting of institutions that are themselves rule-governed and claim authority in that they give reasons for action and demand compliance.⁶⁷ Second, it adds a claim to legitimate authority as a necessary condition for power or coercion to count as a meaningful underlying relationship between a duty-bearer and a right-holder.⁶⁸ Offering and indeed emphasising a normative dimension here is an explicit reaction to (FP) and similar views.⁶⁹

Besson further explains that (A) is based on an institutional and political conception of human rights. They are institutional because they require institutions to identify and allocate the resulting duties and because – as a consequence – only institutions can and should be human rights duty bearers.⁷⁰ Human rights are political in the sense that they are constitutive of an equal political status of all that calls for democracy in the face of interdependent stakes.⁷¹ On the face of it, this is not dissimilar from my own view of international legal human rights based on integrity and equality.⁷² However, what is most striking about this conception of human rights is that their egalitarian nature is coupled with an explicitly political status of the individual (rather than, say, a moral one) and then tied to the democratic dimension human rights are said to require.⁷³ Apart from the substance of the account of human rights offered, however, (A) connects the understanding of jurisdiction as a threshold criterion deliberately and openly to what human rights do and are according to the

⁶⁶ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6) 865, again citing Raz (n 65) 212-13. This is how I understand Raz’s account of practical authority. The reasons given by an authority do not only guide the action of its subjects, but replace all other reasons for action with the pronouncements of the authority.

⁶⁷ See Joseph Raz, ‘Why the State?’ (2007) Oxford Legal Studies Research Paper No 73/214 <<https://ssrn.com/abstract=2339522>> accessed 22 September 2017, 6.

⁶⁸ See Raz, *Ethics in the Public Domain* (n 65) 215-16.

⁶⁹ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6) 859, 73-74.

⁷⁰ Ibid 866.

⁷¹ Ibid. This is not a necessary implication of a political conception of human rights but one that is specific to Besson’s account; see Besson, ‘Human Rights and Democracy in a Global Context’ (n 18). For an overview of what a political conception of human rights might imply see Laura Valentini, ‘In What Sense Are Human Rights Political? A Preliminary Exploration’ (2012) 60 *Political Studies* 180.

⁷² See chapter 2, section 3 above.

⁷³ For a detailed account of the view see Samantha Besson, ‘The Egalitarian Dimension of Human Rights’ (2013) 136 *Beiheft, Archiv für Rechts-und Sozialphilosophie* 19.

account. Accordingly, (A) easily meets desideratum b) as it connects the interpretation of jurisdiction to a particular conception of human rights.

While the methodological approach by (A) meets desideratum b), there are a few objections or at least notes of caution that should be raised. In what follows I will engage with two of them. The first problem that (A) encounters is that of desideratum a): plausible guidance. (A) sets a very high threshold for human rights duties to be recognised because it calls not only for effective control or power but effective overall control, that is, control over interdependent stakes. In itself, a high threshold is not a problem: if this is where the most convincing account leads us, then so be it. But in this case, the high threshold leads to powerful counterexamples with regard to extraterritorial application of human rights treaties, which A purports to explain but does not. On a different reading, (A) does not fail to explain these scenarios but renders the proposed criteria meaningless. The second objection regards the connection of Besson's conception of human rights with the interpretation of jurisdiction. I argue that (A) ties jurisdiction to the part of a theory of human rights that is concerned with the justification and specification of the content of the obligations as opposed to the duty bearer and thus fails desideratum c). The same mistake also makes (A) arbitrary on its own terms, causing it to fail on account of desideratum d).

The first objection concerns desideratum a), and thus casts doubt on whether (A) offers plausible guidance. Effective power and overall control are described as constitutive – and thus necessary – elements of jurisdiction.⁷⁴ Effective control is meant to distinguish power that is exercised and felt from power that is only claimed.⁷⁵ Overall control on the other hand signifies that the power must be exercised over “interdependent stakes” rather than punctually in only one matter.⁷⁶ My quarrel is with the second criterion. I worry that – depending on the interpretation of what “interdependent stakes” means – it is either too high a threshold and thus too restrictive, or, alternatively, meaningless. On the reading that would make it too restrictive a criterion exercising overall control over “interdependent stakes” would denote the ability to influence a broad range of situations and issues at the same time.

⁷⁴ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6) 872.

⁷⁵ *Ibid.* In this sense, (A) falls prey to the same error as (FP). Both mistakenly equate power with its exercise. The difference is that (A) actually describes the kind of power that is relevant. It ensues that (A) enables us to distinguish between the jurisdiction – and thus the presence of an obligation – and the violation of that obligation.

⁷⁶ *Ibid.*

This could only reasonably be assumed if a state controls an area that is large enough to deserve the name and – importantly – events and situations that happen to occur in that same area.⁷⁷ Before we turn to the reading that would make the criterion meaningless, an example may illuminate the type of case where this reading is too restrictive.

When one boards the Eurostar train in London, one has to pass an automated ticket control station, which leads one into the closed off part of the terminal. Within this terminal hall, French officials will check travel documents and (again, mostly French) staff of the company that runs the Eurostar will scan any luggage.⁷⁸ Since the people in control are thus French officials as well as staff of a company, the majority of which is held by the state-owned French railways (SNCF),⁷⁹ it would be hard to argue that France does not have jurisdiction over individuals passing through that terminal hall. It would be even harder to argue that, should there be an accident and the French officials were involved in the death of a passenger, that the fact that this takes place on the United Kingdom's (UK) soil would have any impact on French duties generated by the passengers right to life.⁸⁰ But what would be the interdependent stakes controlled by the French in this situation? Is a passport check and the scanning of luggage enough of an operation to justify speech of a broad range of issues? And most importantly, is a closed off part of a terminal building an "area" large enough to liken controlling it to what we would call territorial control? It is difficult to see how the latter questions could be answered in the affirmative if we were to follow (A).

The above example shows how the criterion of overall control strictly applied leads to unsatisfactory results.⁸¹ There is, however, a way out of this when control over

⁷⁷ I understand this to be Besson's interpretation as she cites *Loizidou v Turkey*, App no 15318/89 (ECtHR, Judgment, 18 December 1996) para 62, which concerned the Turkish presence in Northern Cyprus. See *ibid*.

⁷⁸ I am grateful to Douglas Guilfoyle who made this example in a conversation.

⁷⁹ At least this was the case as of 2010: <<https://www.eurostar.com/uk-en/about-eurostar/our-company/behind-the-scenes>> accessed 6 August 2017. SNCF, in turn, is state-owned and has public sector status: <<http://www.sncf.com/en/meet-sncf/serving-the-public>> accessed 22 September 2017.

⁸⁰ For a similar example in that it does not neatly satisfy the criterion of overall control see *Jaloud v The Netherlands*, App no 47708/08 (ECtHR, Judgment, 20 November 2014). The ECtHR found that the Netherlands had jurisdiction over a checkpoint in Iraq manned with Dutch officers but located in an area otherwise controlled by UK armed forces. See further Friederycke Haijer and Cedric Ryngaert, 'Reflections on *Jaloud v. the Netherlands*' 19 *Journal of International Peacekeeping* 174-89; Raible (n 49) and the discussion in chapter 4, section 4.2 below.

⁸¹ In the interpretivist terminology, cases like *Jaloud* (n 80) create a problem of fit for Besson. See generally chapter 2 above, and chapter 4 below.

“interdependent stakes” is read to mean that the potential to do so suffices.⁸² In fact, this seems to be implied by Besson’s analysis of “personal control”, that is, the control and authority of state agents over individuals abroad. In her discussion, she accepts that effective overall control may be exercised over just one individual.⁸³ The implication must be that control over single individuals could at the same time be control over a broad range of interdependent stakes. Unless we rely on the fact that the control is exercised by a state agent and could thus at least potentially be wider than over a single person there is no meaningful way to establish “overall control”. It follows that the more adequate interpretation of “overall control” avoids setting a high threshold but does so at the price of rendering it meaningless as a separate criterion.

The second objection is that the conception of human rights offered to ground jurisdiction is one that concerns the content of human rights but does not justify the allocation of correlating duties. In other words, Besson’s account of jurisdiction follows from her justification of what needs to be done as opposed to who needs to do it. This means (A) does not meet desideratum c), which stipulates the opposite. It is necessary here to take a look at the implications of Besson’s political conception of human rights. She starts with an interest-based account of human rights as moral rights of all against all.⁸⁴ This notion is then tied to equality of individuals understood as equal moral status.⁸⁵ This status, however, is distinctly political because its acknowledgement depends on a fundamental public recognition of equality.⁸⁶ This focus on political equality then leads to a connection of human rights with democracy conceived of as the expression that all individuals recognise and treat each other as equals within a given political community.⁸⁷ As a consequence, political membership (widely conceived) acts as the threshold for the recognition of (international) legal

⁸² This reading would have the advantage that it comes closer to the best understanding of power – namely a potential. However, it still does not fit fully as at least some part of the power needs to be exercised for the potential to impact interdependent stakes to become relevant. For further discussion see chapters 4, and 7 below.

⁸³ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6) 875-76.

⁸⁴ Ibid 866. See on the generally problematic nature of interest-based theories in this regard chapter 2, section 1.2 above.

⁸⁵ Ibid; Besson, ‘The Egalitarian Dimension of Human Rights’ (n 73) 24-27.

⁸⁶ Besson, ‘The Egalitarian Dimension of Human Rights’ (n 73) 30; citing Allen Buchanan, ‘Moral Status and Human Enhancement’ (2009) 37 *Philosophy & Public Affairs* 346, 379; Elizabeth S Anderson, ‘What Is the Point of Equality?’ (1999) 109 *Ethics* 287, 288-89; Jürgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’ (2010) 41 *Metaphilosophy* 464, 472.

⁸⁷ Besson, ‘Human Rights and Democracy in a Global Context’ (n 18) 23; Besson, ‘The Egalitarian Dimension of Human Rights’ (n 73) 31, 35.

human rights⁸⁸ and only public institutions may be duty bearers of human rights.⁸⁹ Exercising jurisdiction thus means exercising overall control and *de facto* political and legal authority because this is the only way it can be connected to a status of specifically political equality.⁹⁰

The requirements of overall control and of *de facto* authority are direct consequences of the account of human rights endorsed. What is problematic here is the following. The emphasis on political membership is clearly influenced by Arendt's idea of a right to have rights⁹¹ and thus seemingly denotes a claim to political inclusion.⁹² Besson reads it differently. She focuses on the idea that international human rights primarily protect a right to membership and not the rights and treatment that come with such a membership once it is recognised.⁹³ However, where one finds insiders, there are – necessarily – outsiders.⁹⁴ In the context of extraterritoriality, Besson translates this accordingly by introducing high thresholds in the form of both “overall control” and “*de facto* authority”.

My doubts begin here. While it certainly makes sense to understand international legal human rights to restrict and channel power held and exercised by public institutions, it is difficult to see why the underlying relationship between states and individuals needed is one that can only exist when said institutions are exercising control over interdependent stakes. What human rights try to alleviate is a power imbalance, which could easily be found when power is held over just a few people or parts of human activity rather than over a number of interdependent stakes.

This part of Besson's conception points to a paradox of the state system, which she is unable to resolve. Inclusion in the form of citizenship is still necessary for the full protection of international human rights. But citizens are by no means the only individuals that can be confronted with a situation where equally respectful treatment

⁸⁸ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6) 872.

⁸⁹ Ibid 866; Besson, ‘The Egalitarian Dimension of Human Rights’ 36. I do not have a quarrel with the outcome of the argument. However, I reach this conclusion for different reasons: see chapter 2, section 3.1 above.

⁹⁰ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 6) 865-66; implicitly Besson, ‘The Egalitarian Dimension of Human Rights’ (n 73) 32.

⁹¹ Samantha Besson, ‘International Human Rights and Political Equality: Some Implications for Global Democracy’ in Eva Erman and Sofia Näsström (eds), *Political Equality in Transnational Democracy* (Palgrave Macmillan 2013) 104-07.

⁹² Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 56-58. But see Besson, ‘Human Rights and Democracy in a Global Context’ (n 18) 27.

⁹³ Besson, ‘International Human Rights and Political Equality’ (n 91) 105-06.

⁹⁴ On this see Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Polity 2011) ch 8.

by a state is warranted but not afforded. This is true for alien residents or refugees on the territory of a state other than their own.⁹⁵ But it is also a trait of extraterritorial state conduct. An account that focuses on pre-existing membership thus means that individuals are denied treatment according to human rights at the very point when they most need it. It follows that jurisdiction should not be viewed through the lens of political membership, let alone democratic inclusion. Extraterritoriality is one of those moments where boundaries are transgressed and ideas of community are not useful. This is as true for fixed (or fixable) political communities as it is for territorial borders. It does not strike me as wrong to connect human rights and democratic requirements, but when the notion of territory fails us – it seems – so does democracy, and for the same reasons at that.

Further, the relationship of human rights with political equality and democracy is important – according to Besson’s account – to ground human rights and in order to specify their content⁹⁶ but is not helpful in specifying the relevant duty bearers.⁹⁷ In other parts of her work, she subscribes to the justificatory primacy of rights over duties.⁹⁸ However, she cannot insist on both this statement and on the fact that her account of human rights (as opposed to duties) is relevant when it comes to interpreting jurisdiction. This means that (A) fails desideratum c), which calls for a connection with the parts of a theory of human rights that justifies the allocation of duties. In addition, by insisting on the inclusive power of human rights on one hand, but translating this into excluding the least empowered, A fails desideratum d). While it does justify its interpretation of jurisdiction, it does so in a way that fails its own terms and is thus arbitrary.

We have seen the advantages of interpreting any threshold criterion for the application of human rights treaties as part and parcel of a theory of human rights above. Current approaches to jurisdiction do not achieve this to a satisfactory level. Surveying them, however, has also to a certain extent revealed what can and should be done next. In what follows, I summarise the results of this exploration and draw

⁹⁵ This has been the focus of democratic inclusion and human rights. See, eg, Benhabib, *The Rights of Others* (n 92).

⁹⁶ Besson, ‘The Egalitarian Dimension of Human Rights’ (n 73) 31-32.

⁹⁷ For a similar critique of Besson’s view see Saladin Meckled-Garcia, ‘Specifying Human Rights’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 313.

⁹⁸ Samantha Besson, ‘The Allocation of Anti-poverty Rights Duties: Our Rights, but Whose Duties?’ in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (Cambridge University Press 2013) 414-15.

conclusions regarding the next steps in developing an account of such a threshold criterion that meets the desiderata outlined above.

5 Conclusion: The Place of Jurisdiction in an Account of Human Rights

First, we can conclude that jurisdiction is treated by both Besson and Milanovic as a necessary link between an individual as a human right holder and a state as a duty bearer. Second, both of the accounts of jurisdiction surveyed suggest that it is connected to a notion of power. Sometimes, this is referred to as power, sometimes as control and sometimes as authority. This means that it is not yet clear what power in this context means. A further observation is that the role of human rights as standards that generate duties and justify their allocation to specific duty bearers has been overlooked in the interpretation of their extraterritorial application. These shortcomings are particularly important to address with regard to the ICESCR because we lack the guidance of treaty wording afforded in other instruments.

Building on the findings of this chapter, I suggest there are two necessary steps when developing an account of jurisdiction that meets the desiderata outlined above. First, we need to take a step back and address power as a concept. This will allow us, second, to reintroduce the values of integrity and equality in order to specify the kind of power that is indeed relevant in establishing the relationship between human rights holders and the respective duty bearers.⁹⁹ In other words, if we are going to treat finding an account of jurisdiction as part of an interpretation of human rights as found in international human rights law,¹⁰⁰ the conceptual analysis is necessary before we can turn to evaluation.

A further tentative result of this inquiry is that our understanding of human rights informs what kind of power we are worried about when we want to use these specific rights to curtail and channel it. My hunch is that it is not the mere infringement of human rights but the power that is attached to it when states – who are powerful in a particular way – do it. Recognising this, allows us to say that territory does not seem to matter a great deal. What matters is power. And it cannot be just any kind of power either: it has to be pervasive political power as a potential.

⁹⁹ See chapter 2, section 3 above.

¹⁰⁰ On interpretation see chapter 1 above.

Chapter 3

Important as the above musings may be, this chapter has not yet demonstrated their adequacy or truth but only justified a path to be taken. I hope to have shown that extraterritoriality takes so much of the usual certainty about human rights out of the equation that it exposes any weaknesses of the accounts deployed to explain it. If the hope is to achieve a coherent framework, jurisdiction can thus only be described within an account of human rights not without it. The following two chapters first analyse the concept of power and, building on the definition, develop an account of jurisdiction that is explicitly part of an account of international legal human rights based on integrity and equality. This allows us to address the normative dimension of jurisdiction as a meaningful link between right-holding individuals and duty-bearing states.

Chapter 4 A Concept of Power as the Basis of Jurisdiction

1 Why A Concept of Power?

Power is the common core of the factual power view and the *de facto* authority view of jurisdiction surveyed in the previous chapter.¹ However, while power seems to be central to both accounts, neither of them offers an interpretation of the term,² or even a definition. This is compounded by the fact that the term is sometimes used interchangeably with authority or control.³ Milanovic, for example, seems to imply interchangeability when he claims that “effective overall control of an area” is a question of fact, of actual physical power that a state has over a territory and its people.⁴ The ECtHR, on whose case law both Milanovic and Besson focus, is as guilty of this, as are commentators. For example, the Court has found that a person is within the jurisdiction of a state party to the ECHR, when the state ‘exercise[s] physical power or control’.⁵

Power also informs the understanding of jurisdiction and similar concepts with regard to extraterritorial obligations stemming from economic and social rights. The Commentary to the Maastricht Principles, for example, sets off its description of jurisdiction as follows: ‘Jurisdiction is essentially an application of state power or authority to act pursuant to or as an expression of sovereignty.’⁶ The quote refers to Principle 9 of the Maastricht Principles, where jurisdiction is not only assimilated with authority, but also, and most strikingly, with the notion of influence.⁷ The idea seems to be that if a state is in a position to exercise decisive influence over a situation best

¹ See chapter 3, sections 3 and 4 above.

² By interpretation I mean the evaluative activity outlined in chapter 1 above as well as its outcome.

³ For an example that assimilates jurisdiction with authority and control at the same time see CESCR, *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (23 June 2017) E./C.12/GC/24, para 27.

⁴ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 27.

⁵ *Al-Skeini v United Kingdom*, App No 55721/07 (ECtHR, Judgment, 7 July 2011) paras 133-136; see also *Öcalan v Turkey*, App No 46221/99 (ECtHR, Judgment, 12 May 2005) para 91.

⁶ Olivier De Schutter and others, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights’ (2012) 34 *Human Rights Quarterly* 1084, 1105.

⁷ Principle 9 (c) reads: “[A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:] situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, *is in a position to exercise decisive influence or to take measures to realize* economic, social and cultural rights extraterritorially, in accordance with international law. (Emphasis my own).

describes the kind of power jurisdiction captures.⁸ In sum, power is an important concept across the spectrum of views on jurisdiction. Yet, it is not usually defined in its own right and instead used interchangeably with notions such as control, authority, and influence. This creates conceptual ambiguity in need of some clarification. Providing such conceptual clarification is the aim of this chapter.

I do not defend a general view of power here. Instead, I address the concept keeping the question of extraterritorial human rights obligations in mind.⁹ The chapter offers a demarcation of the concept of power and shows how conceptual ambiguity contributes to conflation in the evaluative activity of interpreting jurisdiction. That is, I seek to illustrate that conceptual clarity is not important only for its own sake, but because its lack gets in the way of considering the underlying principles, which should be the focus of interpretation.¹⁰ Section 2 clarifies the difference between the power to do something and the power over people. Sections 3, 4, and 5 distinguish power from influence, force, and control, respectively. Each of these sections offers examples from practice and literature on extraterritoriality to illustrate the impact of the conceptual confusion on the interpretation of jurisdiction.

2 Power as a Disposition, Power-to, and Power-over

In the more recent analytical literature¹¹ dealing explicitly with power as a concept, there is surprising consensus on its definition – at least in its general form.¹² It is suggested that the best understanding of power is as follows. ‘The power of a person

⁸ See further section 3.3 below, where Principle 9 is quoted in full and the conflation of power and influence is elaborated upon.

⁹ For recent discussions of power as a concept see generally Peter Morriss, *Power: A Philosophical Analysis* (2nd edn, Manchester University Press 2002); Steven Lukes, *Power: A Radical View* (2nd edn, Palgrave Macmillan 2005).

¹⁰ This is due to its evaluative nature: see chapter 1 above.

¹¹ I am excluding other approaches to analysing power here because incorporating, for example, continental concepts, within a broadly speaking analytical approach is almost impossible. The most prominent absentee is Michel Foucault, who wrote extensively on power, and who would agree with me that there is value in focusing on one type of analysis. On truth and power, for example, he had the following to say: ‘Each society has its own regime of truth, its ‘general politics’ of truth; that is, the types of discourse which it accepts and makes function as true, the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth...’, Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon 1980) 131. To my mind, the same is true for “societies” of scholars, that is, schools of thought. For a discussion of Foucault’s writings on power see Lukes (n 9) 85-107, who places them within the context of power as domination.

¹² Frank Lovett, ‘Power’ in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy*, vol 2 (2nd edn, Blackwell 2012) 711.

or group, in the most general sense, is their *ability*, as given by a particular means in a particular context, to bring about, if desired, future states of the world.’¹³ Many definitions of power include or focus on the fact that power refers to an ability, and (typically) not to an outcome or action.¹⁴ In other words, power is best understood as a dispositional concept, and as such as describing an underlying property of a person or institution as opposed to an event.¹⁵ In relation to states, which are among the important actors for our purposes,¹⁶ this means that power describes their potential – an underlying property – and not particular actions or omissions of its agents. We shall see that understanding power as a dispositional concept is crucial for the present context. It explains both where the current approaches to jurisdiction detailed above go wrong and provides the linchpin for a relational account of human rights.

Further, it is interesting to note that the literature on power distinguishes between power-to and power-over.¹⁷ Power-to is the ability to bring about certain outcomes, to do or not to do something. Power-over implies power-to but focuses not just on the ability to do or not to do something. Instead, it is best utilised to describe social scenarios in which the ability to do something is aimed at changing another agent’s or person’s situation. As such, power-over is usually understood in the sense, which Max Weber relied on to define social power, that is, the ‘probability that one actor within a social relationship will be in a position to carry out his own will despite resistance’.¹⁸ Saying that A has power over B thus means that A is able to change B’s incentives or options. If we further narrow down the reading, power-over means that B’s subordination is the objective of A’s power.¹⁹ While power-to and power-over are best understood not as competing concepts of power but rather as two different aspects of a broader concept, it is important to recognize that power-over is not entirely reducible to power-to.

¹³ Ibid (emphasis my own).

¹⁴ Keith M Dowding, *Rational Choice and Political Power* (Elgar 1991) 48; Morriss (n 9) 19; Brian Barry, ‘Capitalists Rule Ok? Some Puzzles About Power’ (2002) 1 *Politics, Philosophy & Economics* 155, 160. See also Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 52, who focuses on domination, which is a form of power.

¹⁵ Morriss (n 9) 14.

¹⁶ See chapter 2, section 3 above.

¹⁷ For a discussion of competing interpretations and distinctions see Pamela Pansardi, ‘Power To and Power Over: Two Distinct Concepts of Power?’ (2012) 5 *Journal of Political Power* 73, 74-77.

¹⁸ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) 53.

¹⁹ Dowding (n 14) 47-48; Morriss (n 9) xiv, 32-35; Pansardi (n 17).

At this point it would be tempting to say that political power – the kind the next chapter examines and uses to define jurisdiction – only refers to power-over,²⁰ and that, accordingly, the conceptual discussion here should focus exclusively on the latter. However, it is more fruitful to resist this urge and instead to stipulate that we are interested in both power-over and power-to. Of course, the reason why power is interesting in the present context is that its presence and exercise shape individual lives and prospects. But this is not the same as saying that potentially affected individuals and their domination are the purpose of an institution's power, which is the narrow sense of having power over someone.²¹ After all, the idea of human rights as relational standards of treatment that this thesis defends and builds on,²² is important in scenarios where domination is the aim but also when a power to do or omit something just happens to touch upon a right holder's life. What is of interest here is thus how the power of (potential) duty bearers shapes their relationship with right holders; what institutions can make people do or not do, and what impact this has on human lives and interests.

But again, this is not the same as saying that we are only interested in power-over. It only means that it is not useful to reduce power-over to power-to when we evaluate such a context.²³ Equally, it is unhelpful to equate power-over with domination by assuming that power-over is in itself and always morally problematic.²⁴ On the contrary, power in general and political power in particular is pivotal to guaranteeing human rights as standards of treatment based on equality and integrity.²⁵ At the same time, however, international legal human rights are connected to a worry about the potential for arbitrariness that power, in particular power over people, breeds. Accordingly, these categories seem to be more than a matter of convenience.²⁶ Rather, they denote conceptual and normative differences. However, I submit at this point that narrowing down our enquiry to one of these aspects of the general concept of power would obscure things unnecessarily.

²⁰ See Dowding (n 14) 50, who proposes that the move from power-to to power-over is what makes power political; Pansardi (n 17) 81, who claims that in the case of political power power-over and power-to refer to the same social facts. For the discussion of jurisdiction as political power see chapter 5 below.

²¹ Morriss (n 9) 34.

²² For full discussion see chapter 2 above.

²³ Morriss (n 9) xiv; see also Pettit (n 14) ch 2; Lukes (n 9) ch 3.

²⁴ Lukes (n 9) 109.

²⁵ See chapter 2 above.

²⁶ cf Lovett (n 12) 714.

Accordingly, this chapter does not dwell further on the distinction between power-to and power-over. Rather, it compares power with related concepts. It contrasts power with influence, control, and force, building on these contrasts to show why it is indeed power and not one of the other concepts that is most promising to build on in order to understand and make use of jurisdiction to capture the underlying relationship between right holders and duty bearers, and, consequently, extraterritorial human rights obligations of the latter. While the distinctions are made along different criteria, they share and elaborate on one concern: the fact that power is a disposition and that this makes it best suited to form the basis of an understanding of jurisdiction.

3 Influence

3.1 Definition

Contrasting power with influence can and should begin with a look at ordinary language.²⁷ A helpful way of framing the difference is as follows. Influence and power overlap. The significant distinction for our purposes is that power is best understood to denote an ability to bring about desired states of affairs, while influence may describe either the ability to change a situation, the process of changing a situation, or the outcome of such a process.²⁸ In any event, power is best suited to describe a capacity – a disposition – and not an action or an event, while influence may describe a capacity but typically does not. Instead, influence describes the act of affecting something or someone.²⁹ This is synonym with an *exercise* of power but not with its possession, that is, influence only overlaps with the meaning of power where the latter does not describe ability as such but said ability's manifestation.³⁰

Power, on the other hand, means the ability not just to *affect* but to *effect*, that is, accomplish something.³¹ As such, treating power and influence as interchangeable concepts is at least in part an example of what Morriss refers to as the exercise-fallacy: the mistaken idea that power and its exercise are the same.³² In sum, power is, on one hand, an ability and influence is an action or event, and, on the other hand, to have the

²⁷ This paragraph follows the analysis in Morriss (n 9) 8-13.

²⁸ "Influence, n." in *Oxford English Dictionary Online* (OUP, June 2017) <www.oed.com/view/Entry/95519> accessed 22 September 2017.

²⁹ See Morriss (n 9) 29-30.

³⁰ *Ibid* 12-13; Lukes (n 9) 12, 109.

³¹ Morriss (n 9) 29-30

³² *Ibid* 15-17. See also Lukes (n 9) 109.

power to do something means to have the ability to accomplish something and influence means to affect or impact something.

An example of a situation where influence and power are clearly not synonyms is the relationship between academic peers, say the staff and wider research community of a given university department. While conversations about my research with other researchers will almost certainly influence either my work or my thinking, such conversations alone are not a sign of power in any way. Some academics may be more powerful than others for whatever reason, but it is not influencing fellow scholars' research through conversation that makes them so. Conversely, any academic in a group may be powerful without ever influencing any of her fellow scholars' work; for example, because she does not usually take part in conversations about her peers' research.

Influence as an action or event is thus neither necessary nor sufficient to show that someone has power over a situation or an individual.³³ Even where influence can be defined with reference to power it would be the *exercise* of power and not simply *having* power as a disposition. The crucial point here, however, is that power best describes an ability to accomplish or effect something;³⁴ unlike influence, which is better understood to describe the outcome of the exercise of said ability and thus affecting something. What follows elaborates on why the difference between affecting and effecting is important for our purposes, but also substantiates why equating power with its exercise – the “exercise fallacy” – is important to avoid.³⁵

3.2 Advantages of Distinguishing Power and Influence

Why is this distinction important in the context of the extraterritorial application of the ICESCR? The reason is that the conflation is linked to the following crucial mistakes in the scholarship on extraterritoriality to date. First, accounts of human rights, jurisdiction or extraterritoriality that do not distinguish between effecting and affecting a situation – that is, power and influence – close themselves to the possibility that international legal human rights could be about more (or different things) than desired outcomes. As such, equating power with influence is linked to interest-based accounts

³³ See Morriss (n 9) 30-31.

³⁴ Barry (n 14) 160; see also Pettit (n 14) 63.

³⁵ Morriss (n 9) 15-17. See also Barry (n 14) 160; Lukes (n 14) 109. We will come back to this point in section 3.3 below.

of human rights, which are for our purposes flawed.³⁶ And second, the same conflation is also why some authors are unable to distinguish human rights obligations from duties of global justice.³⁷ What follows deals with these points in three steps. First, I draw out the consequences of conflating power and influence in general terms in order to point to the advantages of the distinction. Second, I trace some of the instances of conflation in the literature on extraterritoriality to show how neglect for the differences between power and influence shapes the debate concerning extraterritorial obligations in the ICESCR. Third, I consider two potential objections to the distinction of power and influence.

Views of human rights that treat these rights as identifying desirable outcomes regard those goals or a fulfilment of interests as in themselves grounding corresponding duties.³⁸ How these valuable states of affairs can be achieved, and especially who are the relevant duty bearers who have to bring these goals about, are treated as secondary questions.³⁹ We have seen in chapter 2 above that such views do neither fit nor justify international legal human rights. Treating power and influence as interchangeable concepts is often an indication that assumptions similar to such views are present. In fact, imprecise conceptualisation in this regard contributes to establishing the move from interests to duties without principles. Let me explain.

Saying that *affecting* a valuable state of affairs in any way (influence) is morally and legally speaking the same as *effecting* it (a manifestation of power) means that it is the desirable outcome that defines the human right, not how such a right allocates respective duties. The question of when and how international legal human rights apply outside a given state's territory brings to the fore the conceptual and practical uncertainties that ensue. The issue is not only important in the case of extraterritoriality, however. Rather, the question of what connection between a

³⁶ See chapter 2, section 1.2 above.

³⁷ See chapter 2, section 3.3 for examples and further discussion.

³⁸ Saladin Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (2009) 2 *Ethics & Global Politics* 259, 267; Saladin Meckled-Garcia, 'Giving Up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice, and Imperfect Duties' (2013) 30 *Journal of Applied Philosophy* 73. For further discussion and a defence of why this is a mistake see chapter 2 above.

³⁹ Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (n 38) 267-68; Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996) 161. See also Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244, 248-61, who shows that it is possible to *start* with desirable outcomes as long as one is aware of the primary, relational structure of human rights and hence the importance of the identification of the duty bearer.

potential duty bearer and right holder justifies placing obligations on the former in relation to whom, is the point of human rights.⁴⁰ Limiting the nature of human rights to valuable states of affairs makes such views unable to identify duties and their bearers on their own. While conflating power and influence is not a necessary component of such an account, it is often a contributing factor.

One consequence of the above in the present context is our second point: the inability to distinguish human rights obligations and other types of duties, most notably those stemming from principles of global justice.⁴¹ If influence and power are used interchangeably this leads to a framework for understanding human rights that requires us to recognise every impact a state's actions might have on any individual's situation anywhere. This means that we cannot make any meaningful distinctions in our moral repertoire as long as reasonably important human goods are at stake. This threatens to render human rights standards redundant because they collapse into social (or, on a cosmopolitan view) global justice and thus have nothing to add to these.⁴²

Treating power and influence as equivalent is one of the imprecisions that make the conflation of human rights and global justice seem viable. In turn, this links back to our first point. If human rights are about desirable outcomes and power and influence are not distinguished this paves the ground for a view that ends up claiming that any remotely desirable good from access to sanitation to good governance and international trade deals, as well as any traceable influence on any of the outcomes related to these goods, must necessarily also be a human rights issue.

3.3 The Conflation and Its Consequences: Examples

Let us now turn to the more concrete consequences of conceptual ambiguity with regard to extraterritoriality. As mentioned above, employing the terms power, authority, and influence interchangeably is common in the literature and commentary on the extraterritoriality of economic and social rights. The most prominent example can be found in the Maastricht Principles, and especially Principle 9 on the scope of jurisdiction.⁴³ It reads as follows:

⁴⁰ Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (n 38) 271.

⁴¹ See chapter 2 above, which demonstrates (among other issues) that it is well possible that the ICESCR contains such obligations but that it does not follow that they are structured and justified in the same way as human rights obligations are.

⁴² Meckled-Garcia, 'Giving Up the Goods' (n 38).

⁴³ Aspects of this principle are also discussed in section 1 above. See also CESCR, *General Comment No 24* (n 3) para 28.

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

- a) situations over which it *exercises authority or effective control*, whether or not such control is exercised in accordance with international law;
- b) situations over which *State acts or omissions bring about foreseeable effects on the enjoyment* of economic, social and cultural rights, whether within or outside its territory;
- c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, *is in a position to exercise decisive influence or to take measures to realize* economic, social and cultural rights extraterritorially, in accordance with international law.⁴⁴

The emphasised parts in sections a) and b) point to focus on the description of events rather than dispositions. Authority, control and influence are only mentioned in conjunction with the verb “exercise”. While the principle as such does not mention power, the commentary published alongside it does. The first sentence of the relevant section reads: ‘Jurisdiction is essentially an application of state power or authority to act pursuant to or as an expression of sovereignty.’⁴⁵ Again, this treats power as if it only consisted of its manifestation. Following on from the discussion in chapter 3 of this thesis,⁴⁶ we can now point out why this is a risky, and ultimately unhelpful, strategy.

Principle 9 reduces power to its exercise and thus commits the exercise-fallacy. Any theory of jurisdiction that commits the exercise-fallacy, in other words, focuses on the point in time when power *is exercised* rather than on power’s existence, walks a tightrope because it is ill-equipped to distinguish between having a human rights obligation and violating it.⁴⁷ In certain circumstances, this commits such a view to saying that a state establishes a human rights obligation by violating it.⁴⁸ This is a statement that displays elements of the absurd: one can only violate an obligation once it has been established that the obligation is indeed owed. Jurisdiction as a threshold

⁴⁴ Emphasis my own.

⁴⁵ De Schutter and others (n 6) 1105.

⁴⁶ See chapter 3, section 3 above, where I show that one of the shortcomings of the factual power view of jurisdiction is that it cannot distinguish between the establishment of jurisdiction and the violation of human rights obligations. The exercise-fallacy is part of the reason why.

⁴⁷ For a discussion of the same problem regarding the meaning of jurisdiction in the case law of the ECtHR see Lea Raible, ‘The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers’ [2016] *European Human Rights Law Review* 161, 165-68.

⁴⁸ It is conceivable, of course, that certain conduct could establish jurisdiction and engage or violate a human right simultaneously. However, the principles regulating whether one or the other is the case will almost certainly differ and the two stages must therefore be distinguished carefully. For discussion of the insensitivity of principles to facts see chapter 1, section 3 above.

criterion is about establishing whether or not a particular actor has a specific obligation. Relying on what one perceives to be a violation of the obligation that needs to be established is thus circular and should be avoided.⁴⁹

Further, Principle 9 exhibits a conflation of affecting and effecting. Section a) with its vocabulary of “authority” and “control” suggests that jurisdiction consists in the ability to determine outcomes, that is, to accomplish or effect certain states of affairs. The respective sections in the commentary discuss approaches to jurisdiction prevalent in the debate regarding civil and political rights focusing on the ICCPR and the ECHR.⁵⁰ The treatment of foreseeability in section b) seems to move away from an understanding of jurisdiction as an ability to accomplish something. Instead, it includes instances of “affecting”. This is by no means an accident. On the contrary, section (6) of the commentary shows awareness of the difference between influence as affecting and control (or power) as effecting. It states specifically that the notion of foreseeability was included to go beyond what is in a state’s control.⁵¹ Finally, the commentary concerning section c) makes clear that the term “influence” is employed to include situations where states are required to assist and cooperate internationally.⁵² Overall, the commentary traces how the principle is shaped in order to widen the scope of jurisdiction.

The idea that the ICESCR’s extraterritorial applicability should be as wide as possible is intuitive, given that at first glance it seems to deal with grave issues such as malnutrition, homelessness and global poverty in general. All of these raise serious moral, political, and – by implication – legal questions. However, an account of extraterritorial human rights obligations contained in the ICESCR that does justice to the complexities involved and at the same time offers plausible guidance to adjudicating bodies should distinguish between human rights obligations implicated by poverty and obligations of another kind, specifically distributive justice.⁵³

This thesis deals with human rights obligations and thus develops an account of jurisdiction, which might be relevant for other obligations, but does not need to be.⁵⁴ Speaking of global justice in particular – which is what is usually implied by literature

⁴⁹ See Raible (n 47) 165-66. See also chapter 3, section 3 above.

⁵⁰ De Schutter and others (n 6) 1105-08.

⁵¹ *Ibid* 1108.

⁵² *Ibid* 1109.

⁵³ See chapter 2 above.

⁵⁴ See chapter 2, in particular section 3.3 above.

on extraterritorial obligations stemming from economic and social rights – it is conceivable that an underlying relationship between duty bearers and right holders is either different, or not necessary at all. Nevertheless, it is important to note here that distinguishing power from influence would be useful not only to understand jurisdiction – as it is employed in this chapter – but that it would also be helpful to separate human rights from global justice obligations.

Views that do not distinguish between human rights and global justice also tend to disregard the distinction between power and influence. The following examples show that the latter is a significant factor to establish the former and why this is problematic. Salomon, for example, uses influence on events to explain why states could (and should) be assigned obligations of international cooperation.⁵⁵ Interestingly, she seems aware of the distinction between power and its manifestation when she states that '[o]bligations of international cooperation could be determined on the basis of the relative *power* it wields in international affairs *manifested as* influence over the direction of international trade....'⁵⁶ This awareness fades, however, when she notes that *influence* on international decision making processes could figure on a list of *capacities* designed to allocate obligations of international assistance to certain states rather than others.⁵⁷ This statement is a version of the exercise-fallacy because it equates the outcome or exercise of a capacity – in this case influence on decision making – with the capacity itself. It is not clear if an awareness of the difference between power and influence guides Salomon's analysis. However, a reasonable reading would suggest that the widening of the scope of jurisdiction and – in this case – states' human rights obligations enjoys priority over conceptual and evaluative precision. At least on the method followed here, where principles are established and used to interpret international human rights law, this stance is indefensible because it works from the desired result.

In her earlier work, Salomon employs a view of human rights that characterises the non-fulfilment of certain conditions as human rights violations in order to ascertain

⁵⁵ Margot E Salomon, 'Deprivation, Causation and the Law of International Cooperation' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 280-81.

⁵⁶ *Ibid* 281.

⁵⁷ *Ibid* 283.

that poverty as a phenomenon is a human rights issue.⁵⁸ As part of this account she states that ‘[h]uman rights are concerned primarily with challenging *abuse* of power.’⁵⁹ This further reinforces the tendency – identified above – that a conflation of power and influence often coincides with the exercise-fallacy, and interest-based approaches to human rights. Salomon concludes from the above statement that ‘[i]nternational law has an important contribution to make in addressing the structural obstacles that contribute to world poverty.’⁶⁰ The term ‘structural obstacles’ warrants particular interest here because of the following passage from the same publication:

[The evolution of international law for the protection of human rights] is informed by the search for global equity impeded by *structural deficiencies* in our international arrangements. World poverty reflects *not merely injustice and misfortune, but a violation of international human rights* standards, and therefore its remedying engages the international human rights legal regime.⁶¹

Connecting poverty, human rights and structural obstacles in this way renders Salomon incapable of distinguishing human rights, obligations of global justice or social justice, or – indeed – any kind of duties an agent might have towards individuals.⁶² This is precisely the worry introduced above. And in Salomon’s case the conceptual confusion of power and influence is a significant factor in her maintaining this account. However, this is not the only mistake in her argument. Salomon does not treat interpretation as an evaluative activity relying on principles, which was shown to be necessary in chapter 1, she implicitly invokes an interest-based account of human rights, which we considered and rejected on chapter 2, and she confuses power with influence, which was shown to be a mistake in this chapter. Overall, this renders Salomon’s, and similar approaches indefensible on almost all levels.

A failure to distinguish power from influence may also contribute to the conflation of (obligation-establishing) jurisdiction and state responsibility.⁶³ This is no

⁵⁸ Margot E Salomon, *Global Responsibility for Human Rights* (Oxford University Press 2007) 47-50.

⁵⁹ Ibid 49 (emphasis my own).

⁶⁰ Ibid 50 (emphasis my own).

⁶¹ Ibid 47 (emphasis my own).

⁶² For a similar worry see, interestingly, Sigrun I Skogly, ‘Global Responsibility for Human Rights’ (2009) 29 *Oxford Journal of Legal Studies* 827, 847. On the importance of distinguishing obligations according to the principles that allocate and govern them see the discussion in chapter 2 above.

⁶³ For a distinct, but related, complaint about the misuse of the term responsibility see Samantha Besson, ‘Science without Borders and the Boundaries of Human Rights’ [2015] *European Journal of Human Rights* 462, 469-70.

less of a mistake than the ones detailed regarding Salomon's work. Consider the following example. In a chapter dealing with causality and extraterritorial human rights obligations, Skogly summarises the obstacles to utilising notions of causality in order 'to determine responsibility based on international human rights law'⁶⁴ as follows.

These hurdles can be divided into two separate categories: first, the determination of which acts and omissions actually led to outcomes that may be categorised as human rights violations; and, second, the identification of international legal requirements that make those acts and omissions unlawful. ... The latter requirements based on legal principles concern the problems of linking those acts to actors (States) that have human rights obligations and to the conditions producing negative outcomes such that the State can be held responsible for them (attribution, liability, etc.).⁶⁵

In the same publication she further suggests that in certain situations influence could substitute the notion of effective control when it comes to state responsibility for human rights violations.⁶⁶

There are a number of separate, but related problems with these passages. First, responsibility in the technical sense is not actually *based on* human rights law, as Skogly puts it. Rather, it is based on the law of state responsibility, which concerns secondary obligations of states under international law following the breach of a pre-existing, and in this sense primary, obligation of a state.⁶⁷ Article 2 of the Articles on State Responsibility provides that an internationally wrongful act only exists if an act or omission that is attributable to a state constitutes a breach of an international obligation of that state. The breach of such primary obligations is a prerequisite for the secondary obligations of state responsibility to arise⁶⁸ and one can only breach an obligation one has in the first place.⁶⁹ State responsibility and jurisdiction thus may

⁶⁴ Sigrun I Skogly, 'Causality and Extraterritorial Human Rights Obligations' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 235.

⁶⁵ Ibid 235-36.

⁶⁶ Ibid 249.

⁶⁷ See generally, eg, James Crawford, 'State Responsibility' Max Planck Encyclopedia of Public International Law <<http://www.mpepil.com>> accessed 22 September 2017.

⁶⁸ Article 2 (b) International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (3 August 2001) A/56/83 (ARSIWA).

⁶⁹ For the same argument regarding the ECHR see Raible (n 47) 166.

look similar at first sight (and may even be based on the same factual situation) but the two need to be distinguished meticulously.⁷⁰

Second, Skogly's characterisation of the problems facing the use of causality describes the relationship of human rights obligations and state responsibility the wrong way around. Her way of putting it suggests that it is possible to identify a state's responsibility for an internationally wrongful act before establishing a state's international obligations. This is both legally and logically unsound. It amounts to saying that one can create international obligations by establishing a state's responsibility, which in turn relies on the obligation that is to be established to have already been breached.⁷¹

Third, by concluding that influence should in certain situations replace effective control,⁷² Skogly essentially suggests a fluid understanding of the relationship between effecting and affecting situations. This is precisely the difference that the distinction of power and influence tracks. In Skogly's case it does not contribute to a conflation of human rights duties and other kinds of obligations, as it does in the Maastricht Principles or in Salomon's work. However, the conflation makes her unable to consistently distinguish jurisdiction and state responsibility.

At first glance, Salomon's and Skogly's works proclaim to be dealing with state responsibility as opposed to jurisdiction. We could thus say that criticism of their conceptualisations with regard to jurisdiction is not a fair point. However, a closer look reveals that they do in fact address the *assignment* of human rights duties, not just responsibility for breaches.⁷³ This amounts to identifying threshold criteria for and principles of allocating primary human rights obligations. Interestingly, it seems that arguments dealing with some notion of (state) responsibility and how it might relate to jurisdiction are prone to the conflation of power and influence, which then

⁷⁰ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 4) ch 2; Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 39) 254. For an argument to the contrary see Martin Scheinin, 'Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013).

⁷¹ This is similar, albeit not identical, to the idea that jurisdiction could be established by breaching an obligation, discussed earlier in this section.

⁷² For a detailed discussion of the differences between power and control see section 5 below.

⁷³ Salomon, 'Deprivation, Causation and the Law of International Cooperation' (n 55) 278-88; Skogly, 'Causality and Extraterritorial Human Rights' (n 64) 240-44.

contributes to conflating responsibility with primary obligations.⁷⁴ However, a few authors dealing exclusively with jurisdiction in the area of economic, social and cultural rights also seem to use power and influence interchangeably.⁷⁵ Equally – and perhaps more surprisingly – in some of the case law dealing with jurisdiction in the area of civil and political rights, influence and power are equated or at least used as part of the same spectrum of concepts that are treated similarly.⁷⁶ In this constellation, however, it seems it is even more common to mention control instead of power and to confuse this with influence. As with the exercise-fallacy, we will come back to this point.⁷⁷

So far, this section has established that power and influence are separate concepts and ought to be distinguished. It has outlined the abstract advantages of the distinction and has also tracked some of the instances in which power and influence are conflated in the literature on the extraterritoriality of the ICESCR. We have also seen that the consequences of these confluations are both logically and normatively problematic. Before we move on, it is worthwhile to briefly consider potential objections to the importance of the distinction between power and influence.

3.4 Potential Objections to the Importance of the Distinction

What, if anything, can be said then for relying on influence to describe jurisdiction as a threshold criterion for the application of human rights? The short answer is: not much. However, it is worth investigating if influence might capture something in the realm of socioeconomic rights that power cannot. When this, or something along these lines is claimed, the concern seems to focus on accounting for obligations of states in complex institutional or semi-institutional settings like the global economic order,

⁷⁴ For a further example see André Nollkaemper, ‘Power and Responsibility’ in Adriana Di Stefano (ed), *A Lackland Law? Territory, Effectiveness and Jurisdiction in International and EU Law* (G. Giappichelli 2015).

⁷⁵ Maarten Den Heijer and Rick Lawson, ‘Extraterritorial Human Rights and the Concept of ‘Jurisdiction’’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 191; Cedric Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 204.

⁷⁶ *Ilaşcu and others v Moldova and Russia*, App No 48787/99 (ECtHR, Judgment, 4 July 2004) para 392, where the Court refers to ‘...effective authority, or at the very least decisive influence...’. Power and authority are not usually defined or distinguished in either the case law or the literature, which is why this passage is relevant even though it does not mention power as such: see section 1 above. See also *Al-Skeini* (n 5) para 139.

⁷⁷ See section 4 below.

trade or investments, and their effects.⁷⁸ Raising the issue of individual well-being in these realms is a valid concern. However, there are better ways of dealing with such issues normatively speaking than applying human rights. This can be done through a distinction of human rights and global justice,⁷⁹ an argument to distinguish human rights from (domestic) social justice,⁸⁰ by distinguishing human rights obligations from responsibilities for human rights,⁸¹ or even by suggesting that international law imposes a general duty to consider the interest of foreign stake holders;⁸² to name just a few options. In other words, human rights do not have to carry the burden all by themselves. While it is not necessary to rehash earlier arguments here,⁸³ or defend approaches that are defended elsewhere, it is worth noting that all of these options are preferable to employing influence as a sufficient criterion for the allocation of human rights obligations in the narrow sense of the word.

Further, the importance of the distinction between power and influence introduced here could be challenged by saying that it misses the mark because it fails to recognise that power manifests itself in many different ways. That power manifests itself in different ways is, of course, true. It is thus worth stressing that the emphasis on power as an ability does not translate into discounting power that has actually manifested itself. That is, not every instance of, say, a state influencing the well-being or individuals abroad will also be an instance of power but if there is (the right kind of) power *and* influence this will still establish jurisdiction. My argument is that the focus on the root cause of the influence, that is, the *ability* behind it, actually tracks what worries us about influence more closely than the influence or impact itself.

In sum, distinguishing power from influence and thus limiting the meaning of jurisdiction to some form of ability to effect something has two key advantages. First, conceptualising power as an ability, and explicitly making use of this, maps most closely onto the account of human rights as standards of treatment relied upon in this thesis.⁸⁴ And second, we can start separating what kind of influence we want to use to

⁷⁸ See, eg, Salomon, 'Deprivation, Causation and the Law of International Cooperation' (n 55) 281, 83.

⁷⁹ See chapter 2 above.

⁸⁰ Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?'(n 38).

⁸¹ Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 39).

⁸² Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295.

⁸³ See in particular the discussion in chapter 2 above.

⁸⁴ See chapter 2 above.

establish jurisdiction by relating it to its factual and normative causes. The next step brings us closer to discerning what it means that it is an *ability* we are interested in. The contrasts of power with force and control will shed further light on this.

4 (Use of) Force

The literature on power as a concept is not too concerned with the distinction of power and (the use of) force. It is difficult to speculate why this is the case but I nevertheless submit that a lack of importance is not the reason. In this section I aim to show that the distinction is necessary to refine the account of jurisdiction. First, I sketch how and why notions of force feature in some of the relevant literature and case law. Second, I show that actively distinguishing force and its use from power is indispensable to avoid two fallacies: the exercise-fallacy, which we have seen above, and the vehicle-fallacy, which will be introduced below.⁸⁵ The section concludes with the argument that power is – again – what lurks behind concerns about the use of force.

4.1 Potential Conflations: Enforcement Jurisdiction and Armed Conflict

With regard to extraterritorial human rights obligations. There are two potential contexts for conflation at play. The first relevant area of confusion lies in the different meanings of jurisdiction. The most common meaning in international law denotes a state's legal authority to regulate conduct and public order by means of its domestic legal system.⁸⁶ One aspect of that concept of jurisdiction is the power to *enforce* the laws in said legal system (and to a very limited extent also beyond).⁸⁷ However, this type of jurisdiction is not at all the same in either function or nature as jurisdiction in international human rights law. It is thus misguided to try and connect the two.⁸⁸ On the contrary, Mills suggests thinking of enforcement jurisdiction (as part of prescriptive and adjudicative jurisdiction) as a state's right, whereas jurisdiction in

⁸⁵ See section 4.3 below.

⁸⁶ Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 5-10. See also chapter 6 below.

⁸⁷ *Ibid* 9-10; see also Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 4) 23. At times, prescriptive and enforcement jurisdiction are distinguished and treated as different aspects entirely. See, eg, Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735. For further discussion of different meanings of jurisdiction see chapter 6 below.

⁸⁸ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 4) 26-30, 53; Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857, 268-69.

international human rights law should be understood not only to establish human rights obligations but its exercise itself as a matter of duty.⁸⁹ Furthermore, jurisdiction in the sense of a threshold criterion is not concerned with, and consequently independent of, whether a state's actions are lawful or not.⁹⁰ In any event, force as a concept to grasp jurisdiction in international human rights law obfuscates rather than clarifies the matter. Power, on the other hand, does not share this disadvantage.

The second area of potential confusion is the use of force in international law, particularly in the form of military operation. The ECtHR had to decide a number cases relating to the use of force, that is, military intervention and occupation in other states as well as the aftermath of such events.⁹¹ The use of force thus features prominently in discussions concerning extraterritorial human rights obligations of states. This is not problematic in and of itself but it calls for a couple of careful distinctions. First, we must distinguish between the power to use force and actually making use of it. Conflating the two is an instance of the exercise-fallacy because it assimilates power and its particular manifestation.⁹² Second, the power to use force can be had for many different reasons, and it is problematic to infer that all actors who have the power to use force in a military sense share a similar structure. Conflating the questions as to *whether* an agent, such as a state, has a particular power and as to *why* this is so is an instance of the vehicle-fallacy.⁹³ The advantages of avoiding these two fallacies in this context will be discussed next.

⁸⁹ Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187, in particular 221. See also Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 39) 254, who arrives at the very same conclusion through the argument that a moral right to have human rights necessarily entails a moral duty to have human rights duties. See also chapter 6 below, where the difference of jurisdiction as a right and jurisdiction as a duty is discussed in relation to title to territory.

⁹⁰ See Ralph Wilde, 'Legal Black Hole – Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2004) 26 *Michigan Journal of International Law* 739. See also chapter 3 above.

⁹¹ Without a claim to exhaustiveness examples include the following. Concerning killings during military operations see *Banković v Belgium*, App no 52207/99 (ECtHR, Decision, 12 December 2001); *Issa v Turkey*, App no 31821/96 (ECtHR, Judgment, 30 March 2005). Concerning killings of civilians in various scenarios during occupation see *Isaak v Turkey*, App no 44587/98 (ECtHR, Judgment, 24 June 2008); *Al-Skeini* (n 5); *Jaloud v Netherlands*, App no 47708/08 (ECtHR, Judgment, 20 November 2014). Concerning detention during and/or after armed conflict see *Al-Jedda v United Kingdom*, App no 27021/08 (ECtHR, Judgment, 7 July 2011); *Hassan v United Kingdom*, App no 29750/09 (ECtHR, Judgment, 16 September 2014). Concerning property rights in occupied territory see *Loizidou v Turkey*, App no 15318/89 (ECtHR, Preliminary Objections, 23 March 1995).

⁹² Morriss (n 9) 15-17; Lukes (n 9) 109. See also section 3 above.

⁹³ Morriss (n 9) 18.

4.2 Power and its Exercise in the ECtHR's 'Checkpoint Cases'

In the discussion on influence above, it has been established that a conflation of power and its exercise runs the risk of running together the questions of establishing a human rights obligation and its violation.⁹⁴ This is particularly relevant when it comes to instances of force.⁹⁵ Recent examples that show why distinguishing power and its exercise is crucial are cases where the ECtHR had to decide when a state has jurisdiction over military checkpoints.⁹⁶ In *Jaloud* the Court had to decide whether the Netherlands had jurisdiction over a military checkpoint in Iraq. The UK was the occupying power in the area but the checkpoint was manned by members of the Iraqi Civil Defence Corps (ICDC) and the Dutch armed forces. Azhar Sabah Jaloud was shot by one of the Dutch soldiers and died.⁹⁷ The Court found that the Netherlands had jurisdiction⁹⁸ and that, while the shooting itself fell under art 2 ECHR it was not a violation thereof, but that the lack of an adequate investigation following the incident was.⁹⁹

The ECtHR currently operates with two models of jurisdiction: the personal one and the spatial one.¹⁰⁰ According to the personal model a state has jurisdiction when state agents exercise 'physical power or control' over an individual abroad.¹⁰¹ The spatial model defines jurisdiction as control over an area.¹⁰² The problem with military checkpoints in this regard, is that they cannot really be counted as an area and any physical power or control over individuals is – except for a relatively short time when individuals are passing through the checkpoint – purely hypothetical. In *Jaloud*, both of these problems were brought to the fore by the fact that it was not the occupying power who was present at the checkpoint. That is, the problem with the personal model inherent in the nature of a checkpoint could not be addressed by substituting it with the spatial one, as this – according to the Court – requires effective

⁹⁴ See section 3 above.

⁹⁵ See Nollkaemper (n 74) 27-28 for an explicit conflation of the two concepts in relation to jurisdiction in international human rights law.

⁹⁶ *Jaloud* (n 91); *Pisari v Moldova and Russia*, App no 42139/12 (ECtHR, Judgment, 19 October 2015). The discussion here is partly based on Raible (n 47).

⁹⁷ *Jaloud* (n 91) paras 12-13.

⁹⁸ *Ibid* paras 139-153.

⁹⁹ *Ibid* paras 226-228.

¹⁰⁰ These models were set out extensively in *Al-Skeini* (n 5) paras 133-139.

¹⁰¹ *Ibid* paras 133-136.

¹⁰² *Ibid* paras 138.

overall control, which the UK had but the Netherlands did not. Instead of addressing these issues the Court simply remained silent on which model it was applying.¹⁰³

How could a distinction between power and its exercise be helpful here? Jurisdiction is a criterion that needs to be met in order to say that the ECHR is applicable and that a state has the requisite obligations in a given situation. It is thus logically prior to any question of whether or not such obligations have been violated. Accordingly, it is (logically, rather than politically or strategically) correct to reject the concept of “cause and effect”-jurisdiction, which holds that any violation of a human right proves that the violating actor must have had jurisdiction.¹⁰⁴ This is wrong because it is circular to say that one can create obligations by violating them. It needs to be established that one has an obligation first and only this fact makes it logically possible to violate it.

However, if we rely on the use of force as exercise of power – a gunshot, for example – to establish jurisdiction *and* the violation of an obligation, it is difficult, if not impossible, to distinguish the two. This is, however, what the Court’s formulation of “exercising physical power or control” implies. The fact that the conduct that established jurisdiction – assuming control over the ICDC members¹⁰⁵ – and the conduct that established the violation of article 2 – failure to investigate¹⁰⁶ – were not the same in this particular case cannot detract from this state of affairs. It only means that the Court happened to get it right; but for the wrong reasons. Keeping power as a potential separate from the use of force as an exercise of such a potential, would assure that we do not fall prey to such a fallacy in the future – even where the sets of facts cannot be distinguished.¹⁰⁷

¹⁰³ *Jaloud* (n 91) paras 149-153, in particular 152.

¹⁰⁴ (Seemingly) in favour: Den Heijer and Lawson (n 75) 182. Against: *Banković* (n 91) para 75; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 4) 173-209, in particular 187; Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 88) 868, where she argues against understanding jurisdiction as mere capability. For a defence of “cause-and-effect”-jurisdiction in relation to negative obligations that makes use of the distinction of power and its exercise see generally Yuval Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 *Law & Ethics of Human Rights* 47, and in particular 66.

¹⁰⁵ *Jaloud* (n 91) paras 139-153.

¹⁰⁶ *Ibid* paras 183-228. The only reason for this was the complaint made and not the facts of the case as such.

¹⁰⁷ This point is distinct from the ones made above concerning power and influence. However, they share a concern for human rights as a relational concept that ultimately depends on values regulating certain kinds of relationships rather than the importance of interests.

The distinction between power and force tracks the difference between a potential and its manifestation. This section has established that a failure to distinguish the two is an instance of the exercise-fallacy and that it is detrimental to the understanding of jurisdiction. Furthermore, distinguishing between the use of force and power draws attention to the fact that not every power needs to manifest itself in the resort to force. That is, not only can power be had without being exercised but it also need not consist in the potential to use force. A power to do something is a potential. But without specification of what the power is to do, it can be any sort of potential, capacity or ability. Whether the potential to use force should be considered part of political power – the kind I argue we should be interested in – is another matter and thus needs to be examined independently.¹⁰⁸ Below, I argue that a potential to use force is often, but not necessarily, part of political power and any appeal to an inherent or necessary connection should be approached with caution.¹⁰⁹ In what follows, this section considers why the conflation is problematic even before considering the political specification of power.

4.3 Power and Properties: The Vehicle-fallacy

As established above, power may be any sort of capacity and there is thus no need to conceptually link it to force. This lack of necessary connection is best framed and illuminated by the vehicle-fallacy.¹¹⁰ Morriss defines it as equating the question of whether an agent has the power to do something with the question of why that is the case or which property makes the agent powerful in the relevant sense.¹¹¹ In our case, this means that equating power with the resource that happens to make an actor powerful – military force being a case in point. Power is a disposition, not a resource.¹¹² Of course, one might say that it is always important to know about resources because they tell us where the power really lies.¹¹³ I do not deny or contest this in any way. The argument here is only that equating power and force makes understanding jurisdiction difficult. Consider the following.

Relying on force to identify the power that lies at its root is problematic because it obscures the real question at stake. This is because it invites us to skip a

¹⁰⁸ See chapter 5 below.

¹⁰⁹ See section 5; and chapter 5, sections 3.1 and 3.3 below.

¹¹⁰ Morriss (n 9) 18.

¹¹¹ *Ibid* 18-19.

¹¹² *Ibid* 19.

¹¹³ *Ibid* 18-19.

step. For example, it may well be possible for an actor to use force, but not be in the position similar to a state, let alone one that owes human rights obligations to an individual – think only of Hart’s gunman.¹¹⁴ When viewed through the framework of the vehicle-fallacy, it becomes clear that the equation of force with power creates assumptions while obscuring both said assumptions and the reasons why they are made. For example, it forecloses any inquiry into what *kind* of power distinguishes a use of force relevant to human rights from ordinary brute force where it would not be appropriate to apply human rights law. Saying that the distinction at work here is between force used by a state as opposed to a non-state actor¹¹⁵ misses the mark. Of course, international human rights law including the ICESCR apply primarily to states and it is sometimes (correctly) claimed that this is because they presuppose something akin to a Westphalian system.¹¹⁶ But in the present context this replaces one obscuring strategy with another one because in itself this point does not provide a justification why states matter or why it should be force as opposed to something else that establishes jurisdiction. The reason is that none of these statements are normative propositions that are insensitive to facts.¹¹⁷

To spin the table: there is nothing inherent in the concept of force as a resource that would make a state’s access to it better, worse, or even different from similar access by a non-state actor. Why force ensues different treatment in terms of human rights law depending on who is exercising it can only be meaningfully answered by tracking the root cause of such different treatment. Exploring the role of power as a distinguishing factor allows for this to be addressed.

To sum up, there are two contexts where power and (the use of) force are potentially conflated. First, power in relation to jurisdiction in international human rights law could be confused with another definition of jurisdiction in international law: enforcement jurisdiction stemming from rules on delimitation of the reach of domestic legal systems. Second, the use of military force could be conflated with the power behind such force. In particular, the second conflation is an instance of the vehicle-fallacy and thus obscures crucial questions of potential. Our final step in this chapter is to consider the difference between power and control.

¹¹⁴ HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 17-25.

¹¹⁵ On non-state actors and their potential obligations see chapter 5, section 5 below.

¹¹⁶ Nehal Bhuta, ‘The Frontiers of Extraterritoriality – Human Rights Law as Global Law’ in Nehal Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016).

¹¹⁷ On this, see chapter 1 above.

5 Control

The literature and case-law on extraterritorial human rights obligations relies heavily on a notion of control, which is sometimes mentioned on its own, but often also as “power or control”.¹¹⁸ The potential implications are the following. It either means that it is enough that a state has either power or control over a given area or person in order to establish jurisdiction. It could also mean that power and control are – in the given context – essentially the same. Since this formula is often found under the heading of an “effective control test”¹¹⁹ it is more likely the latter, which is why this section focuses on the conflation rather than seeing the two concepts as alternatives. The section shows that the two are distinct and that this matters for an account of jurisdiction. I proceed by considering examples of the conceptual conflation and the consequences in the doctrine. I then show that power and control, in the sense that the latter is used, overlap a great deal but only if and when one already knows what kind of power this statement applies to. Next, the section outlines the key questions the equation of the concepts obscures. It concludes with the argument that the conflation of power and control foreshadows considerations of what makes power *political*. It thus sheds light on why the discussion in the following chapter is an important next step.

On the face of it – and especially after what we have established so far – one would expect the conflation between power as such and control to be yet another instance of the exercise-fallacy. And this is indeed the case at times. For example, the commentary to the Maastricht Principles includes the following:

[E]xtraterritorial obligations arise when a state exercises control, power, or authority over people or situations located outside its sovereign territory in a way that could have an impact on the enjoyment of human rights by those people or in such situations.¹²⁰

The same publication further takes the following stance with regard to the situation of unspecified right holders – as is the case in the ICESCR: ‘It may be

¹¹⁸ See, eg, Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant* (26 May 2004) CCPR/C/21/Rev.1/Add.13 para 10; *Al-Skeini* (n 5) para 136; Orna Ben-Naftali and Yuval Shany, ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (2004) 37 *Israel Law Review* 17; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 4) 137, 56; Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 88) 865; De Schutter and others (n 6) 1090, 102; Besson, ‘Science without Borders and the Boundaries of Human Rights’ (n 63) 469.

¹¹⁹ On the perils of the use of “effective” as well as its origin in notions of title to territory see chapter 6 below.

¹²⁰ De Schutter and others (n 6) 1090.

presumed that such obligations are always owed, at least to those persons whose enjoyment of the human rights referred to in that instrument are within a state's control, power, or authority to ensure.¹²¹ Both of these quotes represent instances of the exercise-fallacy.

However, other instances see ambiguous statements as to the exact meaning or relationship of power and control instead. Milanovic, for example, is not entirely clear about the relationship of the two concepts when – in relation to jurisdiction and belligerent occupation and the respective thresholds to be met – he states that

[i]n all but the most exceptional of cases, the two thresholds should be the same, so long as it is borne in mind that effective control implies the power of the state not only to affect the human rights of the population, but also to secure them, ...¹²²

The claim here seems to be that (effective) control involves a power to do something specific. Whether the power is imagined as held only, exercised, or both, remains unclear. The same is true for his discussion of the UK Court of Appeal's judgment in *Al-Skeini*,¹²³ where it was held that in the context of the UK's occupation of Iraq physical custody of a person constitutes jurisdiction, while killing an individual does not.¹²⁴ He asks: 'Why, after all, should the state's power to kill an individual not be considered as an exercise of the state's control over that individual? Is not killing, in fact, the ultimate form of control?'¹²⁵ Again, power and control seem to be related, but it is not made explicit how and why. To be clear, none of this is to say that Milanovic's analysis is without merit, let alone wrong. I am only arguing that the relationship between control and power, which constitutes which, and in what way, is left ambiguous.

Finally, a common conflation involves control on one hand and the *exercise* of power on the other. The ECtHR in *Al-Skeini* – referring to the personal model – puts it thusly: 'What is decisive in such cases is the *exercise of physical power or control* over the person in question.'¹²⁶ This statement could be read in two ways. Either the Court means to equate the "exercise of physical power" with "control" or it means to

¹²¹ Ibid 1102.

¹²² Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 4) 147.

¹²³ *R (on the application of Al-Skeini and Others) v Secretary of State for Defence*, [2005] EWCA Civ 1609, [2005] All ER (D) 337.

¹²⁴ Ibid para 110 (per Brooke LJ).

¹²⁵ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 4) 190 (footnotes omitted).

¹²⁶ *Al-Skeini* (n 5) para 136 (emphasis my own).

say that power and control are interchangeable in this context. Given the fact that there is only one verb present (exercise), it is likely that the latter interpretation is correct. The upshot is that the Court does not show awareness of the exercise-fallacy. In fact, it is more likely to indicate the opposite.¹²⁷

However, we could tweak the reading of this passage to make sense of both power as a disposition and the relationship with a concept of control. This charitable reading goes something like this. The ECtHR is really talking about power as opposed to control. The reference to control merely specifies the result of the exercise of the kind of power the Court has in mind. On this reading, the Court is saying that the relevant kind of power – if and when it is exercised – results in control. It is thus possible to say that the Court is trying to deal with a fundamental problem of power as a dispositional concept: a disposition that is neither declared nor exercised is, as such, not observable.¹²⁸ Approximating power with its exercise and the exercise with control could be read as forming part of a – admittedly very rough – solution.

To illuminate why the Court may have chosen this particular solution, it is useful to further specify the nature of power. Power has been described, depending on the context, as a disposition, capacity, potential or ability. The most general of these descriptions is that of the disposition. However, power usually refers to a conditional disposition, that is, a disposition that can be activated more or less at will of the agent who holds it, as opposed to a disposition that frequently manifests itself.¹²⁹ For a useful contrast, think of addiction. A gambler or alcoholic is prone to gambling or drinking and, as such, disposed. But to say that they have a power to gamble or to drink does not really capture the fact of their addiction, and that it is the reason why they do in fact gamble and drink regularly.¹³⁰ The same is true in the present context. A state's power sparks our interest not because they happen to do something frequently but because they can do something if and when they wish to do it.

The latter is most closely related to power as ability, which is best defined as a conditional disposition that depends on the actor in question activating it.¹³¹ Keeping this aspect in mind, captures the following. What is interesting and potentially

¹²⁷ Raible (n 47) 165-66.

¹²⁸ Ibid.

¹²⁹ Morriss (n 9) 24.

¹³⁰ This can be described as the difference between a habitual disposition and a (proper) conditional disposition. Ibid 22-24.

¹³¹ Ibid 25.

worrisome in relation to human rights is not the fact that states do something if the right sort of conditions prevail, but that they can activate a disposition *when they choose to do so*.¹³² Take the example regarding the use of force. The part about the use of force that is interesting (but not sufficient) with regard to establishing jurisdiction is not that states use force frequently. It is rather the fact that they *can* do so, and not by accident but *if and when they choose* and to advance their own ends. This means that – among other things – the kind of power we are interested in is an ability in this sense.

However, if the aim is to explain why the exercise of a (not yet specified) power is expressed as control this is not the end of it. Control is the outcome of a particular set of powers that both guide and restrict. As such, it points to an additional feature of abilities in the sense employed here: the fact that an ability is linked to the power-holder's intentions.¹³³ Power in the sense of ability is 'something we can do when we want.'¹³⁴ We can now interpret the ECtHR's mentioning of power and control in another way. Control is the outcome of a specific ability the exercise of which depends in part on the power-holder's intentions. One cannot control something by accident.¹³⁵ In addition, control also usually involves at least in part a substitution of one actor's intentions for those of another actor. This does not mean that power is always an ability or that it always depends on intentions. But it does mean that the kind of power that is of interest when jurisdiction in international human rights law is in question does.¹³⁶

The way in which power and control are used is further interesting and important because of the problem it points to. The need to equate the dispositional concept of power with notions that are very close in meaning but describe events exposes a central problem with any disposition; namely the fact that it is hypothetical.¹³⁷ This tension crystallises in what Morriss calls the distinction of ability and ableness.¹³⁸ An ability in this sense describes a disposition in the abstract, that is, without taking into account the conditions necessary for the ability to realise itself. Ableness, on the other hand, does account for the conditions necessary for an ability

¹³² In addition to the choice, the timing seems also relevant. See *ibid* 24, 25, 27.

¹³³ *Ibid* 25-28.

¹³⁴ *Ibid* 27.

¹³⁵ Although it is possible to find oneself in a position of control by accident. However, this would then not be the result of a power as specified here, even though it may vest one with new powers.

¹³⁶ See further chapter 5 below.

¹³⁷ Morriss (n 9) 80.

¹³⁸ *Ibid* 80-85.

to instantiate. For example, if someone has the ability to read but needs glasses to do so, they are only actually able (in the sense of ableness) to read when they have access to their glasses. Saying “I cannot read the paper because I do not have my glasses” implies the ability to read and outlines the circumstances that must be met to constitute the opportunity to do so. Ableness is ability coupled with the presence of opportunity.¹³⁹

When we are interested in power in the political realm, we are – to my mind – interested in power as ableness. That is, the discussion is about what actors – such as public institutions – can do in actuality as opposed to what they could do if they had the necessary means. States, for example, are only powerful in the sense we are concerned about if they have an ability to do something coupled with the opportunity to do it. If state A could have the ability to influence an international body if only it had the resources to do it, said state is not able to influence the international body in the relevant sense. The important point to take away is that we are not just interested in abilities as a quality of a particular agent but also in the position that is needed for the ability to actualize itself.¹⁴⁰

Even given all this, it is useful to separate the power or ability to control from control as an outcome for a number of reasons. First, and obviously, it prevents the exercise-fallacy and with it the conflation of establishing jurisdiction and the violation of a right. Second, basing an account of jurisdiction on an ability rather than its exercise or the lack of the exercise tackles the difficulty of establishing jurisdiction in cases where an alleged human rights violation is the result of an omission. This is because the existence of the relevant ability does not rely on any acts taking place. Third, it allows for a distinction of means and ends. States do not just control areas, people or situations. Instead, they have an ability or a set of abilities as means at the outset. When this is coupled with intentions (for example, to control something or someone), they have to choose to activate said abilities in order to further these intentions.

Actual control is the result of this string of conditions being met. It is, in other words an end and the abilities are the means. Understanding the relationship between power and control allows us to specify which step is the one that captures jurisdiction as a relationship between potential duty bearers and the respective right holders. I

¹³⁹ Ibid 80.

¹⁴⁰ Ibid 81, 83.

argue that the relevant step to establish jurisdiction is actually the set of abilities at the outset – as opposed to control – for the following reason. It allows us to make international legal human rights relevant before any decision as to the activation of abilities or power has been made. This is the only way to incorporate the importance of potential into an account of human rights. This is a crucial insight and we will come back to this point.¹⁴¹

For now, however, it is sufficient to note that power and control can and should be distinguished as the former is a means and the latter is an end. Further, it is not to be taken lightly that scholars and courts so often refer to power and control as interchangeable in the context of jurisdiction. However, the framework introduced here allows us to say a little more as to why and to conclude that the relevant kind of power is not just a power but an ability that depends on being activated by the actor who has the ability, and, in addition, ties into the actor's intentions. All of this implies that one of the hallmarks of jurisdiction is that it depends on a kind of power that, when exercised, usually results in control over people and territory. But there is a difference between equating the two and using control as evidence of the potential at the root of said control.¹⁴²

Finally, it should be noted that linking power (the ableness) with control (the manifestation of said ableness) does not say anything about the concept of power but rather gives a substantive account of what kind of power it is we are interested in. It is substantive, rather than conceptual.¹⁴³ This is because power on an abstract level leaves opportunities implicit but when we are interested in power in order to define jurisdiction an actor's opportunities may be more important than their abilities and need to be accounted for.¹⁴⁴ This is best done by developing a substantive account of power, which is the next step in the argument and will be taken up in chapter 5 below.

¹⁴¹ See chapter 5 below.

¹⁴² With regard to a similar relationship of functional jurisdiction and territorial or personal control as shorthand for jurisdiction see Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 88) 863, 76; Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 39) 254.

¹⁴³ Peter Morriss, 'A Response to Pamela Pansardi' (2012) 5 *Journal of Political Power* 91, 93.

¹⁴⁴ Pansardi (n 17) 78-79.

6 Conclusion

The overarching theme of this chapter has been that power is a dispositional concept and why introducing conceptual precision based on this finding is helpful to refine our account of jurisdiction. Conflating power and influence lies at the root of the inability to distinguish between human rights, global justice, and other duties to take stake holders' interests into account. Equating power with the use force has been shown to be an instance of both the vehicle- and the exercise-fallacies. Finally, the distinction of power and control is helpful primarily because it draws our attention to the fact that a substantive account of the relevant kind of power is needed. The point to take away from this is not least that power as an ability is not observable and that we thus need to find out what kind of power we are concerned about and, building on this insight, which observable proxies best mirror its existence.

The chapter also highlighted that utilising power instead of influence, force or control when defining jurisdiction has several advantages. First, it ties more neatly into a relational, non-outcome based approach to human rights, such as the one defended in chapter 2 above. Second, it allows us to differentiate effectively between establishing jurisdiction, which is necessary in order to generate human rights obligations, and the violation of these obligations. And third, power makes it more obvious than other concepts that human rights matter not only when potential duty bearers choose to activate their abilities but before they do as well.

In addition to these advantages, there is a deeper concern power can address. Explicitly conceptualising power of public institutions over individuals as *power* not only captures but emphasizes that the potential as opposed to its manifestation is what is decisive. Power has the advantage that it allows for taking into account that *potentials* in the human rights context are relevant before they manifest themselves and regardless of the means employed. If it were not a potential we are worried about, we would have to say that in a state where, for example, the right to an adequate standard of living, has not been violated in decades, this right does no longer exist. This is not something international human rights law chimes in with easily. After all, human rights and the corresponding obligations exist regardless of whether they are violated or honoured.

The chapter narrowed the meaning of “power” from an (unqualified) disposition or potential to an ableness (understood as ability plus opportunity), the

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exercise of which results in control. However, the concept of power alone does not solve the question of how to justify the allocation of human rights obligations to a particular duty bearer. Rather, it needs to be built upon and further specified if it is to serve as a marker of the relationship between right holders and duty bearers. In a next step, we need to move from the conceptual basis we built in this chapter to a substantive notion of the relevant kind of power, based on a reintroduction of the values of integrity and equality.¹⁴⁵ Accordingly, the next chapter proceeds with an exploration of the relevant kind of power, that is, of what I call political power. It completes our journey to justifying the allocation of human rights obligations by supplying an interpretation of jurisdiction.

¹⁴⁵ See chapter 2 above.

Chapter 5 Jurisdiction as Political Power

1 Jurisdiction between Facts and Principles

What marks the role of the state in relation to an individual so it is both necessary and justified to apply international legal human rights to the relationship determined by this role? In this chapter, we are looking for criteria to determine the normative context in which international human rights apply. In chapter 2 we have seen, that there are many contexts in which human rights claims operate, and that international human rights law is one such context.¹ How to interpret human rights in each context depends on the values and principles that guide and justify the context. If jurisdiction is to outline a relevant normative context for international legal human rights, it will inevitably be shaped by the values of integrity and equality.² I argue that political power, defined as the power of public institutions to transform individual powers, coupled with an outcome of control of human activities through the application of rules,³ captures the essence of that role. The reason is that institutions that hold this kind of power, and are able to produce this outcome through these means are also able to guarantee equality.

Before we take up this task, a few preliminary remarks on how this chapter builds on the previous arguments are warranted. Power and its relationship with notions of jurisdiction and human rights is the common core of the “factual power view”⁴ and the “*de facto* authority view”⁵ outlined in chapter 3. Chapter 4, in turn, clarified power as a concept and defended the view that it is indeed power, as opposed to influence, force, or control, that should form the conceptual core of jurisdiction; at least when we are concerned with defining a threshold criterion to apply international legal human rights. The question now is how to build on the conceptual insights. It is time to take a closer look at what kind of power marks the requisite, pre-existing

¹ See chapter 2, section 2 above.

² See chapter 2. The main point is this: there are many contexts in which human rights claims operate, and international human rights law is one such context. How to interpret human rights in each context depends on the values and principles that guide and justify the context. If jurisdiction is to outline a relevant normative context for international legal human rights, it will be shaped by the values of integrity and equality. We will come back to this point throughout this chapter.

³ For a defence of this definition see section 3 below.

⁴ See chapter 3, section 3 above.

⁵ See chapter 3, section 4 above.

relationship between a right holder and the respective duty bearer that justifies the allocation of human rights obligations to the latter.

In chapter 2, I defended the view that human rights in the context of international human rights law track the values of integrity and equality.⁶ Because they are legal rights, they track integrity, which generates a principle of consistent treatment of individuals by governments and public institutions more widely.⁷ Equality in the sense of equal respect and concern for each individual, on the other hand, substantiates that human rights provide reasons for and standards of treatment.⁸ This treatment is to extend equal respect and concern to individuals. What does this mean for the allocation of human rights obligations? In chapter 2, I sketched that the values of integrity and equality do not only individuate human rights in international law, they also justify the allocation of a type of burden – namely human rights obligations – to particular agents. Jurisdiction, in turn, is nothing other than an – admittedly unfortunate – term for the role of the duty bearer in relation to the right holder, for their relationship which justifies the allocation of rights and obligations to the respective agents. Accordingly, what integrity and equality make of jurisdiction will justify the allocation of obligations and, as such, determine when a state owes human rights obligations to an individual, including individuals abroad.

Here, it is useful to come back to the insights on the nature of interpretation gained in chapter 1. What guides, which facts are important for interpretation, is a normative principle justifying their relevance or lack thereof. This principle will be insensitive to facts in the sense that certain facts obtaining determine its applicability rather than its truth.⁹ Human rights in international human rights law need to be interpreted to be applied and thus this insight applies to them as much as it does to any international treaty. It follows that, if a conception of jurisdiction is to act as a threshold criterion for the application of international legal human rights it must be *a set of facts made relevant by a normative principle*.¹⁰ Accordingly, this chapter takes up two tasks. First, it defends the principle underpinning jurisdiction. And second, it describes the set of facts that must prevail in order for the principle to trigger human rights

⁶ Chapter 2, section 3 above.

⁷ Chapter 2, section 3.1 above.

⁸ Chapter 2, section 3.2 above.

⁹ See generally, chapter 1 above.

¹⁰ See the desiderata for an account of jurisdiction drawn up in chapter 3, section 2 above. All of them are aspects of this insight.

obligations, as it were. The first task, namely identifying the principle underpinning jurisdiction, is an elaboration of the account of human rights I defended in chapter 2. The second task, in turn, builds on the conceptual footwork undertaken in chapter 4. Note that the second task is rival to what is usually undertaken in doctrinal scholarship,¹¹ while the first one is no less important but usually only implied.¹²

Section 2 of this chapter restates and elaborates the principles justifying the allocation of duties defended above. This, in turn, will inform section 3, where I argue that jurisdiction is best understood as political power. I set out why I call this kind of power political, who may have political power, and over and through what political power is usually held. These arguments build on the conceptual clarifications reached in chapter 4, but move from the conceptual to the substantive. Section 4 considers whether a concept of coercion would have captured the facts of jurisdiction better than political power and argues that this is not the case. Section 5 sketches, but does not defend, some of the implications of the account of jurisdiction for human rights obligations of non-state actors. Finally, section 6 checks if the account defended here meets the desiderata for accounts of jurisdiction established in chapter 3 above.¹³

2 The Principles behind Jurisdiction: Integrity and Equality¹⁴

Dworkin argued that states and their governments which exercise collective coercion have a general obligation to improve their own legitimacy.¹⁵ Building on this argument I put forward the suggestion that international human rights law as a system tracks the value of integrity because its overall concern is consistent treatment of individuals. That is, a coercive institution's – a state's – general obligation to improve its legitimacy, which is relevant for international law generally, takes a specific form once it has ratified relevant human rights treaties, such as the ICESCR. The form it takes is an obligation of principled and consistent treatment of individuals in line with past

¹¹ See, eg, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 53, where he states that jurisdiction in human rights treaties refers to a kind of power a state exercises and that this power is a question of fact.

¹² See *ibid* 19, where the heading of the chapter reads 'From Compromise to Principle'. Incidentally it is the same chapter from which the quote above is taken. For further discussion of the problem of implied values and principles see chapter 1, section 2 above.

¹³ See chapter 3, section 2 above.

¹⁴ This discussion draws on chapter 2, sections 3.1 and 3.2 above.

¹⁵ Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2, 16-17.

political decisions. That is, the overall concern here is akin to a commitment to the rule of law and non-discrimination.

I further argued that human rights in international human rights law, that is, international legal human rights, are governed by the value of human dignity. Dignity here generates a liberty principle and an equality principle. The liberty principle derives from the responsibility of each individual to identify value in their life and live it accordingly. For Dworkin, this principle excludes deep paternalism, because there are decisions that individuals necessarily need to make for themselves. Equality, on the other hand, generates a principle of intrinsic value. That is, as soon as a human life has begun, it matters how this life goes. No life, and thus no individual, is worth less than others. Accordingly, equality generates a principle to treat individuals with equal respect and concern. Rights deriving from this principle are, for example, strong protections against discrimination. This is because discrimination rests on the premise that some individuals are worth less than others. It thus violates the principle of intrinsic value.

How do these principles justify the allocation of arising obligations? Let us begin with integrity. As stated above, on my modification of Dworkin's account it derives from a standing obligation to improve legitimacy and takes on its specific form once a state ratifies human rights treaties. This means the principles informed by integrity, such as consistent treatment of individuals, would apply, in the first instance to actors who claim to use legitimate collective coercion.¹⁶ The paradigmatic example are states. Dworkin, writing about international law, oscillates between the terms "government" and "state".¹⁷ When he is addressing integrity within a community, human, or political rights, he mostly refers to government as the agent against whom these rights can be claimed.¹⁸ While both "state" and "government" are intuitive ways of framing this, I see no reason why we should not extend integrity to be allocating obligations to public institutions more generally. The important point here is that public institutions are not only powerful but claim to be legitimately so.¹⁹ They are

¹⁶ As we will see, and has been made clear in the title of the chapter, I do not think coercion is the best way of describing the relevant feature of institutions. Instead, I make the case for emphasizing political power in section 3 below, and argue against relying on coercion in section 4.

¹⁷ See, eg, Dworkin (n 15) 17: 'If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction.'

¹⁸ See, eg, Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 331-32.

¹⁹ In this sense, I am in agreement with Besson that a claim to legitimacy is vital. See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights

also primary in the sense that public institutions, particularly branches of government, provide the basis for collective coercion without the need for further political decision making, which may remove it from all other agents: the legal system.

So far, we know that integrity justifies allocating human rights obligations to public institutions and what it is about them – their claim to legitimacy and the obligation to improve it – that makes this true. This does not yet answer the question at the heart of extraterritoriality, however: why one set of institutions – one state –, as opposed to another one, should bear a particular obligation. Human rights in international human rights law provide an avenue for justification. It is here, where human dignity, and in particular the principle of intrinsic value becomes relevant. Of course, an equal moral status – or intrinsic value of each human life – is a concern that does not only permeate the public sphere and political morality, but interpersonal morality too. And in the latter sphere, it may generate principles of justified, or even required, partiality.²⁰ The same is not true, however, in the political relationship between individuals and public institutions. Public institutions do not have recourse to the same reasons for partiality as individuals do. This is because they are in a position to mediate individual duties in a way that guarantees equality in the sense of intrinsic value. Put differently, the principle of intrinsic value justifies the allocation of burdens to public institutions that are in a position to guarantee an individual's equality.²¹ What set of features are apt to capture this position of a public institution? I turn now to my account of jurisdiction as political power to answer this question, outlining the set of facts and elaborating on the principles underpinning their relevance as I go.

3 The Facts: Jurisdiction as Political Power

This section makes the case that the holding of political power over a certain area of activity of a particular individual is the best understanding of jurisdiction. That is, I argue that political power, defined as the power of public institutions to transform

Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857, 865. However, I read her to include it in the facts that make jurisdiction rather than the principles.

²⁰ As one of my supervisors put it in conversation: if one has the same concern for a stranger as for one's mother, one is not a good a person, but a moral monster. For an argument on how to reconcile partiality and equality in the political sphere see Thomas Nagel, *Equality and Partiality* (Oxford University Press 1995).

²¹ This is not the same as capacity to affect an individual's wellbeing as criticised in chapters 2 and 3 because it does not *justify* the allocation of burdens on its own, but is the result of such a justification relying on the principle of intrinsic value.

individual powers with an outcome of control of human activities through the application of rules, is the fact made relevant by the principles of consistent treatment and intrinsic value restated above. Thus, this section seeks to answer the following question: Why is political power the best understanding of jurisdiction, that is, the decisive feature of the relationship between states and individuals that underlies human rights? This section does not, nor does it need to, establish a general theory of political power.²² It builds on the concept of power introduced in chapter 4 above in order to arrive at an improved understanding of threshold criteria for human rights obligations. It is in this sense that the meaning of power needs to be qualified further and, as such, the discussion here is a move from the conceptual to the substantive.²³

3.1 Political Power: A Definition

In the introduction to this chapter I defined political power as the power of public institutions to transform individual powers with an outcome of control of human activities through the application of rules. Political power is the ability (or ableness)²⁴ of an institution to determine how individual's powers are transformed.²⁵ The exercise of this power results in non-exclusive control over human activities which is (at least in part) achieved through the application of rules. The first part of the definition refers to political power in the true sense of the word, that is, the potential to determine how individual powers are transformed. The second part further defines political power in terms of the outcome of its exercise and part of the vehicle used to achieve said outcome. Given that the conceptual clarifications above emphasised the exercise- and vehicle-fallacies this may seem surprising. However, keeping outcomes and vehicle in mind is a way of integrating observable proxies into the definition of an otherwise unobservable potential. This is important because the fact that power is a potential and cannot easily be translated into observable facts has had a detrimental impact on

²² There are other purposes imaginable and the definition and defence of what makes power political and what turns on it will vary with those purposes. One example of a concern different from our's is the literature on non-domination, which – broadly speaking – analyses the relationship of power and freedom, particularly in the political sphere. See, eg, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999); Ian Shapiro, 'On Non-domination' (2012) 62 *University of Toronto Law Journal* 293.

²³ See Peter Morriss, 'A Response to Pamela Pansardi' (2012) 5 *Journal of Political Power* 91, 91-93.

²⁴ Ableness here means ability plus opportunity: see chapter 4, section 5 above.

²⁵ Peter Morriss, *Power: A Philosophical Analysis* (2nd edn, Manchester University Press 2002) 45.

theories of jurisdiction, as well as the ECtHR's case law.²⁶ As we will see, it is vital to include the stages before the potential is exercised. The conceptual footwork carried out above is not moot. On the contrary it is what enables us to keep political power – the root of the relationship we are interested in – and evidence suggesting its existence separate.

Political power is constitutive of and necessary for public institutions, it affects individuals because it provides the very framework for them to pursue their lives in equality, and it is virtually unavoidable. As such, institutions with political power provide the necessary backdrop against which the equal moral status of individuals – which is the value underpinning human rights – can be safeguarded. However, the same public institutions are also a threat to this status precisely because they hold political power.²⁷ On the other hand, and as we have seen above, they do not owe duties to all individuals everywhere but merely to those individuals, whose equality they are able to guarantee.²⁸

The following sub-sections defend the definition of political power. First, I analyse the abstract definition of political power posited by Morriss in order to show that political power is best understood as the power of institutions to determine how individual powers are transformed. I show that interaction between institutions and individuals is the realm where rights, including human rights, are necessary and that this is a further reason – in addition to the value of integrity – why institutions rather than individuals should be understood to have political power. Second, I explain that the outcome of the exercise of political power is control, albeit not necessarily exclusive control, over areas of human activities as opposed to individuals or territory as such and that this is achieved through the application of rules. The reason for this is that human rights do not track whether outcomes are wrong but whether treatment of individuals within specified areas of human activities is guided by reasons that violate the individuals' equal moral status.²⁹ This means that public institutions only bear

²⁶ See Lea Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers' [2016] *European Human Rights Law Review* 161. See also chapter 4, sections 4.2 and 5 above.

²⁷ James W Nickel, *Making Sense of Human Rights* (2nd edn, Balckwell 2007) 39; Samantha Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (2011) 4 *Ethics & Global Politics* 19, 24.

²⁸ See section 2 above.

²⁹ See, eg, Saladin Meckled-Garcia, 'Giving Up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice, and Imperfect Duties' (2013) 30 *Journal of Applied Philosophy* 73, 83-85. See also section 2, and chapter 2, section 3 above.

human rights obligations in relation to those individuals, whose activities they control in the relevant sense. That is, it is this control, achieved in a particular way that puts the institution in a position to guarantee equality.

3.2 Political Power and Public Institutions

Morriss does not think that it is particularly important³⁰ to distinguish political power from other sorts of power but nevertheless states the following. He maintains that the adjective is not redundant because political power is a subcategory of power in general.³¹ He further posits (as opposed to defends) that political power in the widest sense of the word refers to ‘the power to determine how power is transformed’³². This is to be understood against the background that political power arises when cooperation is institutionalised. Public institutions, such as the state, are power-transformers in the sense that they mediate an individual’s power to accomplish something. The transformation is from individual powers to do one set of things into the power to do another set of things.³³ Morriss does not draw any distinctions relating to this definition but in my view his statement describes two kinds of power: the power of an individual to determine how such institutional power mediators work, and the power of the mediating institutions to then actually transform the individual powers. Both of these could be called political power and the latter is obviously dependent on the former, especially in democratic settings.³⁴

However, the individual power is not what concerns us here. First, it does not matter how the workings of a given state are determined if the concern is to analyse what kind of power in relation to an individual is an appropriate setting for the application of human rights. The power to mediate powers is what human rights respond to. It is irrelevant how a given public institution got this power in the first place. Saying that human rights flow from democratic order – and thus from individual

³⁰ Morriss, *Power* (n 25) 45.

³¹ *Ibid.*

³² *Ibid* 45-46.

³³ *Ibid* 45.

³⁴ Running these two powers together is at the root of arguments that base human rights on a right to membership and – accordingly – democracy. See, eg, Samantha Besson, ‘The Egalitarian Dimension of Human Rights’ (2013) 136 *Beiheft, Archiv für Rechts-und Sozialphilosophie* 19; but see Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Polity 2011) 77-93.

rather than institutional power – is problematic because it entails that human rights are not suited to generate obligations in a less than perfectly democratic context.³⁵

The risk of having one's equal moral status ignored or trampled upon in a political setting relates to what the institutions themselves can do, not the individuals. Arguably, human rights need to be more apt to generate obligations in less than perfectly democratic settings precisely because the limited individual power to determine processes may increase the potential harm institutional political power can do. In my view, this also explains why discharging human rights obligations by public institutions might be seen as necessary (though maybe not sufficient) to establish legitimacy while the opposite is not true. It is precisely not the case that legitimate institutions have somehow more or more stringent human rights obligations towards individuals than illegitimate ones.³⁶ Recall that the value of integrity tracked by international human rights law is generated by the value of legitimacy. However, it does not stem from the fact of legitimacy, but rather from the general obligation of coercive institutions to improve their legitimacy.³⁷ What has been achieved, or not, on the way to legitimacy has no impact on the justificatory power of integrity whatsoever.

The upshot of this understanding of political power is that it is necessarily held by institutions instead of individuals. Of course, we are still left with people acting, choosing and deciding. However, when they act as a member of an institution they do not act as individuals but in their function. It is the latter that gives them the power we are interested in in two senses. First, it is the institution and the individual's membership thereof that provides them with access to resources.³⁸

³⁵ Saladin Meckled-Garcia, 'What Comes First, Democracy or Human Rights?' (2014) 17 *Critical Review of International Social and Political Philosophy* 681, 682. But see Besson, 'Human Rights and Democracy in a Global Context' (n 27). Pogge's view that individuals can violate human rights is problematic for the same reason. The values of integrity and equality do not justify the allocation of obligations to specific individuals. For Pogge's statement of his view, see Thomas Pogge, *World Poverty and Human Rights* (Polity 2008) 54-56.

³⁶ This should not be understood as an endorsement of what is conventionally referred to as 'political' accounts of human rights that make respect for human rights a criterion to be met in order not to be subject to external intervention and – as such – a criterion for external legitimacy. Variations of this view can be found in, eg, John Rawls, *The Law of Peoples* (Harvard University Press 1999); Charles R Beitz, *The Human Rights* (Oxford University Press 2009) 109, 15-17. For further discussion on what it means to say that human rights are political see Laura Valentini, 'In What Sense Are Human Rights Political? A Preliminary Exploration' (2012) 60 *Political Studies* 180. On the difference between external and internal legitimacy see Michael Walzer, 'The Moral Standing of States: A Response to Four Critics' (1980) 9 *Philosophy & Public Affairs* 209, 214-16.

³⁷ See section 2 above.

³⁸ This is analogous to what Morriss calls the power of positions. See Morriss, *Power* (n 25) 107-08.

Second, institutions – in particular states and their administration – are organised collectives that may be acting only through their agents but invest those actors with power. The reason is that the institution itself settles ways of coordination. Groups can be powerless despite high numbers of members and theoretically sufficient abilities to achieve their goal.³⁹ Such groups have the required abilities to achieve their goal but their members do either not know how to choose to combine their abilities or they have no reason to believe that a sufficiently high number of members will also pull their weight – so to speak.⁴⁰ Providing fixed and known ways of coordination between group members – as institutions do – turns groups that are powerless despite high numbers and theoretically sufficient abilities of each member into powerful ones. Put differently, the institution is the reason why the members know what each of them has to do to accomplish a certain aim. It is thus sensible to speak of the power of the institution rather than its members.

This take on institutions and institutional power is not alien to international law. On the contrary, the rules on attribution of conduct to states can be explained with recourse to the model developed here. Consider article 4 of the Articles on Responsibilities of States for Internationally Wrongful Acts.⁴¹ It reads:

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

This expresses the same view on institutional power and individuals acting for institutions and in their function as members. Of course, jurisdiction and state responsibility are distinct concepts. The former is concerned with establishing obligations, while the latter describes secondary obligations that come into play only when primary duties (such as the ones established by jurisdiction) are breached.⁴² In addition, the fact that article 4 above seems to focus on institutional power understood

³⁹ Frank Lovett, 'Power' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy*, vol 2 (2nd edn, Blackwell 2012) 714.

⁴⁰ The latter is Morriss' s definition of epistemic power: Morriss, *Power* (n 25) 52-56. For an example, consider the passengers on a train unable to stop a robbery of the train even though they outnumber the bandits: *ibid* 111-12.

⁴¹ See generally ARSIWA.

⁴² See chapter 4, section 3.3 above.

in the same way as I advocate here, does not mean that a form of institutional power is the best way to understand jurisdiction in international human rights law. Instead, integrity and equality justify that jurisdiction must be a form of institutional power. However, the look at the law of state responsibility does show that the account developed here fits well with public international law, which adds to the account's attractiveness.

States are examples of an institution that serves to overcome collective action problems such as the ones described above. Through their public institutions, they determine how to transform the powers not only of the members of the group that takes part in everyday government but all individuals that are subject to its political power. Determining how these powers are transformed is paradigmatically done relying on an institution that does not fit the description provided here because it does not have members as such: the domestic legal system. There is a lot to be said about the relationship between international human rights law and domestic legal systems⁴³ but the interest here is rather narrower than that. An aspect of this debate worth noting is that international human rights law does indeed presume the existence of states and – with them – domestic legal systems, and it relies on these institutions.⁴⁴

All major human rights treaties mention states and their governments as addressees and their political focus is evident throughout the relevant instruments.⁴⁵ The ICESCR, for example, also explicitly refers to the 'adoption of legislative measures' in its article 2(1) as a means to discharging obligations under the instrument. This is the only kind of action that is singled out among the general obligation which is to discharge the obligations 'by all appropriate means'. Of course, this does not show that the argument presented here is correct. It does mean, however, that the present definition of political power fits with the focus of human rights treaties and the practice of international human rights law.⁴⁶

⁴³ On the relationship between international and domestic human rights see, eg, Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749; Besson, 'Human Rights and Democracy in a Global Context' (n 27).

⁴⁴ See generally chapter 2 above. See also Nehal Bhuta, 'The Frontiers of Extraterritoriality – Human Rights Law as Global Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016). I agree with his diagnosis but not with the conclusion he draws that jurisdiction should be understood to mean essentially the same as sovereignty. See further section 5, and chapter 6 below.

⁴⁵ See generally Nickel (n 27).

⁴⁶ It would thus appear to track the values of salience as well as integrity. On salience see Dworkin, 'A New Philosophy for International Law' (n 15) 19-22. On the value of integrity in international human rights law see chapter 2, section 3.1 above.

Instead of relying on a (potentially accidental) fit with the practice, and in addition to the justificatory work done by integrity and equality, it is further possible and useful to approach the role of institutions from a different perspective. If in the context of who bears human rights duties we were to speak of political power as power of individuals we would have to say something about interpersonal relationships. These, however, are ideally not only, or even mainly, governed by individual rights but rather by affection.⁴⁷ But affections have their limits and it is in this case that public institutional structures governed by rights are a necessary fall-back.⁴⁸ That rights are in this sense impersonal is precisely the hallmark of their role when it comes to regulating social relationships. Rights (including human rights) make relationships beyond the personal realm possible. Individual rights are thus the best way to make it safe for individuals to interact with institutions as the latter cannot rely on affection.

Human rights, as we have seen, are fundamentally a safeguard of each individual's equal moral status and as such they have an even stronger attachment to the public or political setting. This is because the intrinsic value of each human life can be respected in interpersonal relationships but neither recognised nor guaranteed. Thus, human rights depend on the institutional context. And in order to define the *relevant* institutional context – and who owes obligations to whom – political power can be relied upon as a necessary link between right holders and institutional duty bearers. In sum, political power needs to be linked to institutions for two reasons: the nature of rights generally because they only become important once affection fails, and the nature of human rights because public institutions are the only agents potentially in a position to guarantee (rather than just respect) equality.

3.3 Is a Ship an Area? Or: Power Over Human Activities and Through the Application of Rules

Political power as I understand it is held by public institutions, the paradigmatic example being states. However, states have a set of different powers that could adequately be called political. Accordingly, we need to know which kind of political power determines jurisdiction. I suggest to specify jurisdiction in terms of what

⁴⁷ This and the following argument are inspired by Jeremy Waldron, 'When Justice Replaces Affection: The Need for Rights' (1988) 11 *Harvard Journal of Law & Public Policy* 625, 634-37, even though it describes welfare rights in a way that I would tend to call social justice rather than human rights.

⁴⁸ *Ibid* 638-39.

political power is held over, and what the means are through which it is exercised. Having clarified that power is a disposition, we can add these specifications without falling into the traps of the exercise- and vehicle-fallacies.⁴⁹ That is, we can specify that jurisdiction is constituted by political power and add that the power must be over something in particular without equating power with its exercise, and we can also say that political power – in order to constitute jurisdiction – needs to rely on certain vehicles or resources. Drawing on the values of integrity and equality, I will defend the view that jurisdiction is constituted by political power over areas of human activities – as preliminarily defined by the international human rights instruments – not individuals or territory as such, and that it is achieved at least in part through the application of – mostly, but not necessarily – legal principles and rules. To be clear, this is a major upset in the debate about jurisdiction – especially as regards the ICESCR – and is aimed at changing the discussion’s terms. I will address and defend the specifications in turn.

The problem of what (or who) exactly needs to be within a state’s jurisdiction has received some attention in the debate on the meaning of jurisdiction in the ECHR and the ICCPR. The debate here is in most cases dominated by two assumptions. First, it is usually asserted that this question should be answered in terms of what should be under the control of a state. Having discussed the difference between power and control above,⁵⁰ I will not dwell on the distinction and its problems here. The second assumption is that jurisdiction either means power over a person or power over an area. This section focuses on the assumption that it must be either of these alternatives. I argue that this is a false dichotomy. Focusing on the concept of political power, and the values of integrity, equality and – in this case to an extent – liberty, allows us to pursue a third way. I suggest that to establish jurisdiction, it is sufficient that certain areas of an individual’s activity are under the control of a state, as long as this control is rooted in political power, that is, power to transform powers by an institution. The way it is rooted in political power, I argue, is the making, choosing, and applying of mostly legal rules and principles by the institution that holds the power.

The prominence of the dichotomy between the personal and the spatial models of jurisdiction is, I believe, a historical accident as opposed to conceptual or normative necessity. Take some of the leading cases decided by the ECtHR. So far, the focus has

⁴⁹ See chapter 4, in particular sections 3 and 4 above.

⁵⁰ See chapter 4, section 5 above.

been squarely on occupation,⁵¹ which necessarily involves control over territory, or torture,⁵² detention,⁵³ and killings,⁵⁴ which all require a high degree of control over individuals. This explains the prominence of accounts trying to distinguish the personal and spatial model of jurisdiction.⁵⁵ All of this is to say that, until recently, it must have seemed as if there was no great need for conceptual clarification. However, this is no longer true.⁵⁶

The ECtHR had to decide cases where the question which state has jurisdiction over a military checkpoint, when these checkpoints are either manned by forces from a different state than the occupying power,⁵⁷ or when the personnel is affiliated with different armed forces to begin with.⁵⁸ Here, neither of the models seems helpful.⁵⁹ On one hand, the area controlled by armed personnel at a checkpoint is both small, easily moved around, and hardly deserves to be considered territory in a meaningful way. On the other hand, people passing through a checkpoint are only in the control of the state agents for a very short time and a limited purpose. Consequently, neither of the models usually relied upon by the Court tell us how to establish jurisdiction. Yet, the Court found that the relevant individuals were owed human rights obligations by the states providing the soldiers in question anyway.⁶⁰

While I happen to believe that the judgments in *Jaloud* and *Pisari* are correct, the question of whether that is so, is beside the point. What is important for us, is that the Court was ambivalent regarding the distinction of the models of jurisdiction. In *Jaloud*, where it discussed the applicable principles at length, the ECtHR did not

⁵¹ As in *Loizidou v Turkey*, App No 15318/89 (ECtHR, Judgment, 23 March 1995).

⁵² As in *Al-Skeini and Others v The United Kingdom*, App No 55721/07 (ECtHR, Judgment, 7 July 2011).

⁵³ As in *Öcalan v Turkey*, App no 46221/99, (ECtHR, Judgment, 12 May 2005).

⁵⁴ As in *Al-Skeini* (n 52).

⁵⁵ For discussions of the difference see, eg, Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) ch 4; Raible (n 26) 163. For a rejection of the idea that there are models of jurisdiction and that, instead, jurisdiction is always functional rather than personal or territorial see Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 19) 863-66.

⁵⁶ In addition to the cases discussed immediately below, clarification might have benefitted (and may still do) the case law regarding the right to privacy in the digital sphere: Lea Raible, 'Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office: Victim Status, Extraterritoriality and the Search for Principled Reasoning' (2017) 80 *Modern Law Review* 510.

⁵⁷ *Jaloud v Netherlands*, App no 47708/08 (ECtHR, Judgment, 20 November 2014). See further chapter 4, section 4.2 above.

⁵⁸ *Pisari v Moldova and Russia*, App no 42139/12 (ECtHR, Judgment, 19 October 2015).

⁵⁹ I have argued elsewhere that the Court oscillates between the two models chiefly because they were never meaningfully separate, and that the checkpoint cases should be thought of as a radical departure from the previous case-law, remedying many of its flaws: Raible, 'The Extraterritoriality of the ECHR' (n 26).

⁶⁰ *Jaloud* (n 57) paras 137-153; *Pisari* (n 58) para 33.

actually say on which of the models its finding on jurisdiction rested.⁶¹ The reason for this, I suggest, is that the Court must have recognised (if perhaps only intuitively) that neither of the models nor their distinction were helpful to determine who has jurisdiction in hard cases.⁶² Scholarly debate suggests the same. As long as “the control over what”-debate focuses on models of jurisdiction, we are left with asking questions along the following lines. When an Iraqi civilian is shot by a Dutch soldier, does it make a difference that the area of the checkpoint where this occurred was small? Or when a private email is accessed, does it make a difference whether a state agent has done so remotely, or by stealing the phone it was on?⁶³ Or, to put it bluntly, is a ship an area? And does it matter how big the ship is?⁶⁴ Of course it is not. And, of course, it does not. And yet, with regard to jurisdiction, ships are easy cases as they are by default considered to be subject of the jurisdiction of the flag state.

To make the futility of such debate even more obvious, consider the following examples regarding socioeconomic rights. Is it necessary for a state to have power over all economic policies of a given territory in order to be considered a duty bearer of, say, the human right to an adequate standard of living as enshrined in article 11 ICESCR? Or does it need to determine and sign off on the curricula of all schools in order to be considered a duty bearer of the right to education as found in article 13 of the ICESCR? And which model of jurisdiction would be suitable here? Unlike in most cases decided and discussed in the area of civil and political rights, there is no clearly visible control at play here. Instead, these rights relate to a much more abstract decision-making power and it might be easy to identify the wrong if a child does not receive an education, or only part of it. But it is much more difficult to identify the wronging and who is doing it. The facts are complex, the causal chains long, and what this means for extraterritorial human rights obligations of states is not obvious. If the facts are so complex, however, it becomes necessary to know which events, spaces or people exactly need to be under the power of a state in order to assign obligations based on these rights.

⁶¹ *Jaloud* (n 57) paras 137-153.

⁶² Raible, ‘The Extraterritoriality of the ECHR’ (n 26) 164-65.

⁶³ See the scenarios analysed in Marko Milanovic, ‘Human Rights Treaties and Foreign Surveillance: Privacy in a Digital Age’ (2015) 56 *Harvard International Law Journal* 81, 120-30.

⁶⁴ For a discussion of ships and aircraft in the case law of the ECtHR see Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 11) 160-70, who, I think, agrees with me that these discussions diminish debates about extraterritoriality. See *ibid* 129-35, 51.

The solution for this problem, I argue, is to abandon talk of models of jurisdiction altogether and instead focus on political power as the root of control exercised by states. We should be addressing what features of states we are worried about when we apply human rights law, that is, what values underpin human rights in international human rights law.⁶⁵ This brings us back to integrity and equality. Let me explain how I think we should go about describing jurisdiction, before moving on to what I believe are the key objections to this view in the next section.

Provisions in human rights treaties, including the ICESCR, specify or at least roughly suggest areas of human activity or existence that are deemed to be central. Whether they are indeed central would have to be justified as human rights by recourse to the principles of ethical responsibility and equal concern and respect,⁶⁶ but let us assume for discussion's sake that they are.⁶⁷ Integrity and equality then justify that a state, which has control over these areas of activity is to extend principled treatment, as well as equal respect and concern *in these areas of activity and existence*. Equal respect and concern can and must be extended even in limited areas, as long as the control impacting these areas stems from political power. The reason is that as soon as a state has political power, which leads to control through the application of rules it is in a position to guarantee equality of individuals, at least with regard to the areas of activity in question. This control does not have to amount to much, and may never manifest itself. The essence, then, is this: if the political power is over an area of existence and of the kind that a public institution is able to transform powers of individuals in this area, then the institution must extend equal concern and respect to the affected individuals in this area of activity or existence.

Consider digital surveillance as an example.⁶⁸ Imagine a private email, sent by Thelma, who happens to be in the Netherlands, to Louise, who happens to be in the UK. The UK's Government Communications Headquarters intercepts, stores, and later analyses the content of said email. Let us assume that this is an interference with the

⁶⁵ On the role of values for the interpretation of international law see chapter 1 above.

⁶⁶ See Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 32; Kai Möller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2017), (12) *Law & Ethics of Human Rights* (forthcoming), LSE Legal Studies Working Paper No 11/2017 <<https://ssrn.com/abstract=2981003>> accessed 22 September 2017, 4.

⁶⁷ In any case we could turn to Dworkin's principle of salience here: Dworkin, 'A New Philosophy for International Law' (n 15) 19-22. See also chapter 2, section 3 above.

⁶⁸ See generally Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 63); Raible, 'Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office' (n 56). For a discussion of further examples that focus on economic and social rights see chapter 7 below.

right to privacy as enshrined in article 8 ECHR. By intercepting the communication based on its laws, backed up by the fact that the UK Government is a public institution, the UK gained control over an aspect of Thelma's and Louise's private lives. Does it matter that Louise was, at the time of receiving the email in the UK, while Thelma was not? Does it mean that the UK interfered with Louise's private life more than with Thelma's? I believe the answer to both of these questions is: no. What matters instead, is that the UK had political power over a human activity – communicating through emails – that resulted in control. This puts the UK in a position to extend equal respect and concern to Thelma as much as Louise. Framing the question of control as concerning areas of activity and existence thus offers an account of what needs to be under the control of a state. The answer is: human activity or existence, or areas thereof, as defined in a human right in international human rights law and applicable to the state in question.

But how do we plausibly establish a link to *political* power as a potential? I suggest that the making, choice, and application of rules and principles to the individuals in a given situation allows us to answer this question. Compare, for example, the facts in *Banković*⁶⁹ with the facts in *Jaloud*.⁷⁰ The former involved an airstrike with civilian casualties in Belgrade, while the latter concerned a shooting at a checkpoint in occupied Iraq.⁷¹ These cases are different in the following sense. The pilots in *Banković* may have acted in accordance with the laws applicable to them. However, the ensuing principles and rules were not meant to be applied to the individuals on the ground, let alone to the areas of activity and existence protected by the right to life in article 2 ECHR. In *Jaloud*, on the other hand, the very purpose of the checkpoint where the shooting occurred was to apply the relevant rules to individuals passing through. Thus, tracing the rules, who chooses and applies them to whom, allows us to distinguish political power from raw power, occasionally manifested in brute force. To reiterate a point made throughout this thesis, the fact that the ECtHR distinguished these cases does not make my argument correct. What makes it so is the reliance on the principles of integrity and equality, which justify the

⁶⁹ *Banković v Belgium*, App no 52207/99 (ECtHR, Decision, 12 December 2001).

⁷⁰ The discussion here draws substantially on Raible, 'The Extraterritoriality of the ECHR' (n 26) 167.

⁷¹ For further discussion of *Jaloud* (n 57) see also chapter 4, section 4.2.

allocation of obligations to particular public institutions (but not others) as outlined in chapter 2 and section 2 of this chapter.

The above suggests the following criteria for evaluating whether a set of public institutions has political power over an individual in a way that justifies the allocation of human rights obligations. First, there needs to be a potential for control (physical or otherwise) over an area of human activity or existence. The human activity that is subject to the institution's power is one that either is an important and urgent individual interest as outlined by the treaties or that closely links to one. For example, in the case of the right to an adequate standard of living, the potential for control would have to have direct effects on an individual's ability to feed themselves. This potential is relevant regardless of whether it is present for one individual, an entire population, or anything in between. The political nexus – I suggest – is created by a capacity of the public institutions to apply principles and rules of their choice. These rules may be legal ones, and often will be, but not necessarily so.

4 Political Power and Coercion

At this point, one might wonder why I rely on a conception of political power rather than coercion, given that Dworkin,⁷² along with many other liberal-egalitarian political philosophers, gives the coercive nature of states and their governments as the reason why their exercise of power requires justification in order to be legitimate. The argument against employing coercion as the relevant feature of states for our purposes has two stages. First, I show the occurrence of coercion, as it is defined in recent accounts, is neither necessary nor sufficient to establish jurisdiction. And second, I sketch my suspicion that arguments about the legitimacy of governments – of which my account of jurisdiction may be regarded one – are, ultimately, concerned with the *potential* of coercion, and thus with coercive *power* and the risk of its turning arbitrary, not coercion as such.

The recent debates about the nature of coercion began with an essay by Robert Nozick.⁷³ And to date, perhaps the most influential take is Wertheimer's.⁷⁴ Let me outline a couple of issues discussed in this debate to illustrate why I think they are not

⁷² See, eg, Dworkin, *Justice for Hedgehogs* (n 18) 319-21; Dworkin, 'A New Philosophy for International Law' (n 15) 16.

⁷³ Robert Nozick, 'Coercion' in Sidney Morgenbesser, Patrick Suppes and Morton White (eds), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St. Martin's Press 1969).

⁷⁴ Alan Wertheimer, *Coercion* (Princeton University Press 1987).

especially on point for our purposes, as important as they may be. Nozick's definition involves a coercer, who threatens the coercee in order to keep them from performing and action.⁷⁵ Points of disagreement in the ensuing debate include whether the coercer can only coerce through threats or whether offers can also be coercive.⁷⁶ Further, there is the question whether coercion is morally suspicious only when it succeeds.⁷⁷ Finally, there is also disagreement about whether successful coercion is only coercion if it makes the coercee worse off than they ought to have been, and whether to employ a moralised baseline or not.⁷⁸ The aim of these debates is to establish what should be included in the category of coercion, and, for the most part, how the coercee is affected.⁷⁹ However, if we were interested in coercion, we would be more concerned with the coercer, or rather, what it is about the coercer that makes them so.

Is an actual, and – on some accounts – successful instance of coercion necessary to justify the allocation of human rights obligations? I think not. To illustrate this, imagine a state, with the potential to coerce, yet it comprises a fully just society, and all its members are peaceful. Accordingly, this state never makes use of its power to coerce. I argue that in this instance, allocating obligations generated by human rights in international human rights law to the state is still justified. In other words, instances of coercion may well be morally suspicious, in particular if they emanate from an institutional background. But it is the *potential* to coerce that justifies the allocation of duties because it is the potential to coerce that puts the institution in a position to guarantee equality. We do not have to wait for instances of coercion to justify allocating burdens.

But perhaps coercion, when it does occur and is successful, is sufficient to justify the allocation of burdens and thus to establish jurisdiction? Again, I do not think it is. We would not say, for instance, that a thug threatening to take our wallet or else, is in a position to guarantee equality. If the instance of coercion does not originate from the right kind of power, it does not say anything about the justification of human

⁷⁵ Nozick (n 73). See also the summary in Scott Anderson, 'Coercion' Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N Zalta (ed) <<https://plato.stanford.edu/archives/sum2015/entries/coercion/>> accessed 1 August 2017.

⁷⁶ See Wertheimer (n 74) ch 12-13.

⁷⁷ Nozick's definition, at least, includes coercion's success as one of its features: Nozick (n 73) 441-45.

⁷⁸ Wertheimer (n 74) ch 12. See also Scott Anderson, 'Of Theories of Coercion, Two Axes, and the Importance of the Coercer' (2008) 5 *Journal of Moral Philosophy* 394, 403-04.

⁷⁹ See generally Anderson, 'Of Theories of Coercion, Two Axes, and the Importance of the Coercer' (n 78).

rights obligations. In sum, *instances* of coercion are neither necessary nor sufficient to justify the allocation of duties. Instead, what we are interested in, is the background against which coercion happens.

This brings us back to power and the fact that it captures a potential.⁸⁰ Political legitimacy is best understood to be concerned with the justification of power that may (but does not need to) be used to coerce, not discrete instances of coercion. Dworkin, for example, when he briefly describes what he takes to be the key insight of post-enlightenment political philosophy, resorts to a language of power, rather than coercion.⁸¹ We might think this is surprising because he too, at times, singles out coercion.⁸² However, after the discussion immediately above, I suggest it becomes less so. Justification, after all, is necessary even for the potential to coerce. For example, if a state claims to be entitled to punish thieves by imprisoning them, the imprisonment as a measure to stop them from stealing again, would on most accounts be included as an instance of coercion. While imprisonment is morally suspicious and thus in need of justification, the *power* to imprison is in need of justification before anyone is punished. It follows that conceptualising jurisdiction as political power does not rest on neglecting coercion, but on a specification of the point of political philosophy more broadly.

5 Actors Beyond the State

So far, this chapter, as well as the study as a whole, focused on human rights from the perspective of justification of duties and their allocation. The equality-based account employed and defended here means that states and their public institutions are the paradigmatic bearers of obligations.⁸³ The reason for this is that they are in a position to guarantee equality in virtue of their political power.⁸⁴ However, human rights scholarship has increasingly sought to identify obligations of actors beyond the state.⁸⁵

⁸⁰ See on the importance of power as a dispositional concept more generally chapter 4.

⁸¹ See Dworkin, 'A New Philosophy for International Law' (n 15) 16, where he argues that the Westphalian system (in the historical sense) led to new questions about the legitimacy of political power.

⁸² See, eg, Ronald Dworkin, *Law's Empire* (Hart 1986) 190-95, where he connects legitimacy with the law's authority and, crucially for our purposes, the 'justification of official coercion'.

⁸³ See chapter 2 above.

⁸⁴ See sections 2 and 3 above.

⁸⁵ See generally, eg, Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press 2006); John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819; Manisuli Ssenyonjo, 'The

It is therefore warranted to say something about the implications – and lack of implications – of my view.

Let me first distinguish two questions that are relevant and sometimes raised together in this area, not only, but particularly with regard to extraterritoriality. First, there is the question whether a state can or should be held responsible under international law for acts or omissions that contravene its obligations but are committed by non-state actors, such as multinational corporations or terrorist organisations.⁸⁶ This is not a question of obligations of non-state actors. Instead, it is primarily a debate about attribution of acts to states for the purposes of articles 4 to 11 ARSIWA. This is not the same as establishing whether a state, or any other actor, has a primary obligation in international law and, while I acknowledge its importance, I will not discuss it further. Second, there is the question of whether non-state actors ranging from private individuals, to international organisations, multinational corporations, or armed groups, have obligations generated by international legal human rights. In other words, there is a debate on how to determine and allocate human rights obligations of non-state actors, if there are any. This is the same question that extraterritoriality throws up and it is thus important to address it here. Space prevents me from going into too much detail, but I will sketch the main implications of my account of human rights, and I will flag potential disagreement with other treatments of this question.

Because I see human rights in international human rights law as particular reasons for action, I have been focusing on justifying the allocation of burdens arising in relation to these rights. For the allocation of human rights obligations proper, the equality-based approach demands that only institutions that are in a position to guarantee equality can be the bearers of such duties. While the state is the paradigmatic example of such an institution, nothing in my account prevents it from providing a justification for allocating burdens to non-state institutions. However, in order to place human rights obligations on such actors, we must show that they are in a relevantly similar position to a state with regard to the value of equality. In other words, they

Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?' (2008) 12 *The International Journal of Human Rights* 725.

⁸⁶ On the former see, eg, Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598. On the latter see, eg, Kimberley N Trapp, *State Responsibility for International Terrorism* (Oxford University Press 2011) in particular ch 2.

must also be in a position to guarantee equality with respect to the aspect of human existence they exercise control over and apply their rules to.

This is not a low threshold, but I nevertheless think that there are scenarios where non-state actors may well meet it. We could think, for example, of a large corporation headquartered in Europe, setting up vast cocoa plantations in West Africa, and thus becoming a quasi-ruler of the land where these plantations are the only source of employment and income for local residents. This would be especially true if they were also running a Special Economic Zone, or if this corporation were to a degree exempt from local laws.⁸⁷ In any event, my account is as applicable to non-state actors as it is to states because it focuses on the features of states that make them duty bearers according to an equality-based justification, as opposed to the fact that they are states.

Turning now to potential disagreements with others, I will describe, but not defend them. My most prominent disagreement is with Clapham, who argues that the application of human rights of everyone to everyone should be seen as the default.⁸⁸ Thus, it would seem, that our disagreement is not really about non-state actors but about the nature of human rights in international human rights law. I suspect that his view is closely related to interest-based accounts, such as the ones I criticise throughout this study.⁸⁹ However, Clapham only makes his point implicitly, by explaining that human rights are, fundamentally, about the protection of human dignity against any sort of attack.⁹⁰ This further implies that his view places burdens on whoever happens to be in a position to further an outcome deemed desirable. My quarrel with this position is not like any of the objections Clapham himself considers.⁹¹ That is, I am not worried about trivialising human rights, legal (or any other kind of) impossibility, or that applying human rights duties to non-state actors may inappropriately legitimise the power such actors wield. Instead, I am worried that this view is not apt to provide a justification for the allocation of burdens arising from human rights – be it on states or non-state actors.⁹²

This leaves me with sketching who I do not disagree with. It has been suggested that there might be a difference between human rights obligations proper and

⁸⁷ See further chapter 7, section 3 below.

⁸⁸ Clapham (n 85) 58.

⁸⁹ See in particular chapter 2, section 1.2 above.

⁹⁰ Clapham (n 85) 538-45.

⁹¹ *Ibid* ch 1.

⁹² See chapter 2, sections 1.2, 2 and 3 above.

responsibilities for human rights.⁹³ To my mind, these arguments do not concern state responsibility in a technical sense. Instead, the argument is that human rights obligations and responsibilities differ in content, and that the former are owed to specific right holders, while the latter are not.⁹⁴ That human rights obligations can only be justifiably allocated to ‘institutions of jurisdiction’, whereas responsibilities can be allocated to a wider range of agents, including, to an extent, non-state actors.⁹⁵ I have no quarrel with such a view, and even if I did, this study would not be the place to search for ammunition against it. This thesis focuses on human rights in international human rights law as picked out by the values of integrity and equality. In doing so, it explicitly leaves space for other types of provisions to be found in international human rights law,⁹⁶ or, indeed, in international law more broadly. It is further entirely plausible that, in addition to directed obligations of distributive justice, international human rights law also contains wider responsibilities, the allocation of which is justified based on different values and principles. In sum, and even though my account of jurisdiction as political power points to states as paradigmatic duty bearers, it does not exclude the possibility of either human rights obligations or responsibilities for human rights being placed on non-state actors.

6 Conclusion: Meeting the Desiderata

Building on the concept of power as a potential, I have argued that it is political power that establishes jurisdiction. Political power is the power to transform individual powers. The exercise of this power results in non-exclusive control over aspects of human activity or existence and the vehicle through which this power is manifested, is the choice and application of rules. Because political power needs to put the holder in a position to guarantee equality of these individuals, it is normally held by public institutions. In sum, jurisdiction as political power identifies as the bearer of human rights duties the institution (or institutions) that has (or have) the power to determine

⁹³ Samantha Besson, ‘The Bearers of Human Rights’ Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?’ (2015) 32 *Social Philosophy and Policy* 244. See also David Miller, ‘Distributing Responsibilities’ (2001) 9 *Journal of Political Philosophy* 453; David Miller, ‘The Responsibility to Protect Human Rights’ in Lukas H. Meyer (ed), *Legitimacy, Justice and Public International Law* (Cambridge University Press 2009).

⁹⁴ Besson, ‘The Bearers of Human Rights’ Duties and Responsibilities for Human Rights’ (n 93) 261-65.

⁹⁵ *Ibid* 267.

⁹⁶ Chapter 2, section 3.3 above.

how individual powers are transformed, exercise control over an aspect of the right holder's existence and do so through the application of rules.

One final question with regard to my account of jurisdiction remains to be answered: Does my account meet the desiderata established in chapter 3? In a nutshell, an account of jurisdiction needs to provide plausible guidance, locate jurisdiction within the nature of human rights (within the given context), justify the allocation of human rights obligations to a specific duty bearer, and it should be internally consistent so as not to be arbitrary.⁹⁷ Each of these desiderata is an aspect of what makes an account of jurisdiction principled. However, they are formulated in a way that makes it possible for an account that does not rely on interpretivism to meet them. My account starts from first principles. Political power describes the relevant facts and thus provides plausible guidance, even when it is applied to a new set of facts. I demonstrated this by outlining how it could solve the puzzle of extraterritorial surveillance. Integrity and equality inform the nature of human rights, and they are also the values that justify the allocation of duties to a specific duty bearer. Finally, my account cannot but be internally consistent because all of its steps depend on the same principles and what they entail.

This study has so far focused on the justification of the allocation of human rights obligations to specific duty bearers. I argued that – contrary to the approach of the vast majority of doctrinal scholarship on the matter – this is the actual question at the heart of extraterritoriality. Given that this study set out to determine the ICESCR's *extraterritorial* scope of application, however, there should also be some consideration of the role of territory. Specifically, it is worth elaborating how to understand the relationship between title to territory and jurisdiction in international human rights law. The next chapter takes up this task as a final step in my argument on extraterritorial human rights obligations.

⁹⁷ Chapter 3, section 2 above.

Chapter 6 Title to Territory and Jurisdiction: Three and a Half Models for a Fraught Relationship

The bulk of this study has analysed the meaning(s) of jurisdiction. The result of the account defended here is that jurisdiction as political power of a public institution over an area of human existence is the relationship between a right holder and a duty bearer that justifies the allocation of obligations to the latter. However, we explored this relationship for a reason: the issue of extraterritoriality. You may therefore ask: what about territory? And rightly so.

The relationship between territory and jurisdiction, whether there is or should be one as a matter of international law has gained less attention than the issue of jurisdiction on its own. This is true even though there are quite a few instances suggesting that underlying assumptions about this relationship are actually important. Consider the following – admittedly rather miscellaneous, but nevertheless interesting – examples, some of which were mentioned above to make different points.

Different human rights instruments make reference to both territory and jurisdiction in different combinations. The ICCPR, for example mentions both concepts in its article 2, which provides that ‘[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.’¹ The plain wording would mean that a state needs to hold title over territory and to exercise jurisdiction at the same time in order for the ICCPR to apply. The HRC, however, has interpreted this formulation disjunctively: it found that ‘and’ actually means ‘or’.² The ICESCR, as we have seen more than once, does not mention either of the concepts in its provision on general state obligations. The relevant article 2 instead addresses international assistance and cooperation.³ The ECHR, choosing yet another way, relies

¹ Emphasis my own.

² Human Rights Committee, *General Comment 31: Nature of the General Legal Obligations on States Parties of the Covenant* (26 May 2004) CCPR/C/21/Rev./Add.13 paras 10-11. For an analysis of the drafting history of the provision see Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 92-105.

³ On the implications for extraterritoriality see Gondek (n 2) 316-28; Sigrun I Skogly and Mark Gibney, ‘Transnational Human Rights Obligations’ (2010) 24 *Human Rights Quarterly* 781, 790-91; Olivier De Schutter and others, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights’ (2012) 34 *Human Rights Quarterly* 1084; Margot E Salomon, ‘Deprivation, Causation and the Law of International Cooperation’ in Langford M and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013). More generally see: Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A*

on jurisdiction alone to demarcate its application. Article 1 of the ECHR reads as follows: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ An analysis of the ECHR, however, shows why jurisdiction was chosen and notions of nationality were not. The use of the term “residents” was discussed but dismissed. The reason was to prevent the move from one problematic limitation of the reach of fundamental rights – nationals – to another one – residents.⁴ Neither the Convention nor the *travaux préparatoires* address whether territory was also perceived to be problematic, perhaps as an extension of notions of nationality.

This short, and certainly not exhaustive list of examples illustrates two important aspects of the area that shape this chapter. First, they exemplify that the relationship between a state’s title to territory and its jurisdiction is frequently invoked, but rarely expressly addressed. Second, the examples point in very different directions. The ICCPR (but not the HRC’s interpretation) seems to suggest that territory and jurisdiction are cumulative, suggesting that they are – at core – different. The ICESCR, on the other hand, invokes neither of the concepts as relevant while its drafters thought that territory takes it all, as it were. There are instances where both the ECtHR and academic commentators insist that jurisdiction is ‘primarily territorial’, which would mean that jurisdiction is both logically and normatively connected to national territory.⁵ At the same time, the same Court and the same authors also claim that jurisdiction in international human rights law is the very exception of territoriality, implying that jurisdiction does not only flow from territory, but at the same time constitutes a principle that justifies its exceptions.⁶ This is a peculiar connection of claims, as they cannot both be true at the same time. The fact that it is prevalent suggests that assumptions about the relationship between title to territory and the

Perspective on its Development (Clarendon Press 1995) 144-50; Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 370-77. See also chapter 1, section 1 above.

⁴ See Gondek (n 2) 84-92.

⁵ See, eg, *Banković v Belgium*, App No 52207/99, (ECtHR, Decision, 12 December 2001) para 59; Vassilis P Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2014) 36 *Michigan Journal of International Law* 129, 129-30; Michal Gondek, ‘Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?’ (2005) 52 *Netherlands International Law Review* 349, 360.

⁶ *Banković* (n 5) para 67; Tzevelekos (n 5) 142-43; Gondek ‘Extraterritorial Application of The European Convention on Human Rights’ (n 5) 359, 70.

meaning of jurisdiction are what lies at the heart of a lot of the confusion surrounding extraterritoriality.

The starting point of this chapter is thus that all of this could benefit from some organisation. I aim here to say something general about jurisdiction and title to territory, whether jurisdiction is understood as political power or not.⁷ To this end, I start by looking at what international law has to say about jurisdiction, as understood in international human rights law, and territory, respectively. The unsurprising, yet important, conclusion of the survey in section 1 of this chapter is that the two concepts serve different normative purposes underpinned by different values, and that they are thus not the same and should be treated accordingly. Section 2 introduces three primary models to organise the relationship of these clearly different legal concepts: the approximation model, the differentiation model, and the separation model. It further suggests to look at one secondary – or, as the title suggests, half – model relating to evidence of jurisdiction. Sections 3, 4, and 5 look at the three main models – approximation, differentiation, and separation – in turn. Each of them is evaluated against its fit with the relational nature of human rights.⁸ Section 6 addresses the half model and argues that it is secondary only in the sense that it does not address jurisdiction and territory in the first step of the application of human rights: the establishment of obligations. I further argue, however, that precisely because of this, our half model is the most promising. Section 7 concludes.

1 Jurisdiction and Territory in International Law

Both jurisdiction and territory make appearances in public international law in general and in international human rights law in particular. In line with the topic of the thesis, I only consider the meaning of jurisdiction through the particular lens of international human rights law. At this point it is useful, however, to emphasise again that there are many meanings of jurisdiction in international law.⁹ The one that is of interest here is the threshold criterion that must be met by a state in relation to an individual in order

⁷ Political power is my account: see chapters 4 and 5 above.

⁸ For a justification of the method see section 3 below.

⁹ On this point, and jurisdiction in international law generally see, eg, Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice* 735; Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187; Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed, Oxford University Press 2015). See also chapter 1, section 1, and chapter 4, section 4.2.

for human rights obligations to arise in the first place.¹⁰ In the context of general public international law this is a rather peculiar, if not marginal meaning of the term.¹¹ It is important that this chapter should not be taken to address any of the other, more prevalent meanings.

Territory will be considered in the context of the norms of international law that regulate title over territory by states.¹² Again, a note of caution is warranted: this chapter only describes the relevant legal regime and draws some conclusions on its implications and effects. It does not, therefore, systematically evaluate the legal concept of title against any justifications of territorial rights.¹³ That is, I do not interpret the law in any meaningful way.¹⁴ After outlining both of these areas, the section concludes that the concepts of territory and jurisdiction in the relevant sense have very different purposes. They should thus be distinguished meticulously and any postulated relationship of these concepts needs to be approached with conceptual care.

1.1 Jurisdiction and International Human Rights Law

As we have seen throughout this thesis, much like the relationship between territory and jurisdiction, the one between jurisdiction and international human rights law is a fraught one.¹⁵ I have shown that the different accounts of jurisdiction adopted by different authors or judicial bodies depend at least in part on assumptions about the values informing international human rights.¹⁶ An additional reason for disagreement

¹⁰ See, eg, Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857.

¹¹ Most works dealing with jurisdiction in general terms omit it entirely. See Mills (n 9) 194, fn 22; Ryngaert, *Jurisdiction in International Law* (n 9) 20.

¹² On title to territory in international law see generally Malcolm N Shaw (ed), *Title to Territory* (Ashgate 2005); James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006); Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 352-85.

¹³ Others have done so much more stringently and persuasively than I could. See, eg, David Miller, 'Territorial Rights: Concept and Justification' (2012) 60 *Political Studies* 252; Fernando R. Tesón, 'The Mystery of Territory' (2015) 32 *Social Philosophy and Policy* 25; Laura Lo Coco, 'The Grounds of Territory' (PhD thesis, King's College London 2016).

¹⁴ At least not according to my understanding of interpretation. See chapter 1 above.

¹⁵ There are about as many interpretations of the precise criteria of jurisdiction in this regard as there are judicial bodies and authors. See, eg, the different takes in Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 *Baltic Yearbook of International Law* 183; Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521; Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20 *European Journal of International Law* 1223; Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011); Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 10); De Schutter and others (n 3). For in depth discussions see chapters 3, 4, and 5 above.

¹⁶ See chapter 1, section 2, and chapter 3, sections 3 and 4 above.

between these views seems to be that jurisdiction has many meanings.¹⁷ In international (as opposed to domestic) law alone it can refer to the competence of a court, or that of a state. It can mean the right of a state to enact domestic laws or to enforce them.¹⁸ Because jurisdiction means so many different things, there are numerous potential distinctions to be drawn out. However, the crucial one in the current context is this: jurisdiction as traditionally conceived of in international law is a question of *right*,¹⁹ whereas jurisdiction in international human rights law is a question of *duty*.²⁰ This distinction is important regardless of what precise stance one takes on the meaning of jurisdiction. In other words, one does not need to agree with me that jurisdiction in international human rights law is best understood as political power in order to accept that it is, without exception, about the allocation of obligations as opposed to rights of states.

This powerful thought requires some unpacking. In the context of international human rights law, it is helpful to think of jurisdictional clauses as a matter of duty in one sense in particular. Whenever jurisdiction features in international human rights treaties, it is best thought of as a threshold criterion.²¹ That is, a state must have jurisdiction (whatever it is precisely) over an individual (or a situation or area connected with it) if that individual is to have human rights against that state and the state to incur the respective human rights obligations.²² When a state has jurisdiction according to, say, the ECHR or the ICCPR, human rights obligations arise regardless

¹⁷ For an outline of potential interpretations and the confusion they have sown in international human rights law see Milanovic, *Extraterritorial Application of Human Rights Treaties* (n15) 19-41.

¹⁸ Ryngaert (n 9) 9-10.

¹⁹ See, eg, Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (3rd edn, Oxford University Press 2010) 309-10; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 204-06, 456-57; Ryngaert (n 9).

²⁰ I owe this line of thought to Mills (n 9). The *rights* in question are, for example, the right to regulate with authority, matters that do or could also fall within another state's sovereignty. It is important to bear in mind, however, that Mills's brilliant piece deals with the duty to *exercise* jurisdiction, for example, through courts, but not with the role of jurisdiction in justifying international human rights obligations in the first place. For the same distinction see Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 15) 53, 118; see also Gondek 'Extraterritorial Application of The European Convention on Human Rights' (n 5) 369-70. Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244, 253 on the other hand, defends the view that the *exercise of jurisdiction* is a duty in and of itself.

²¹ Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Bankovic"' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 125; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 15) 19; Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 10) 862. See also chapter 3, section 2 above.

²² Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 10) 862-63. See also chapters 2, 3, and 5 above.

of whether that state had a right to do or omit what it did. It follows that in this particular context, it is irrelevant whether a state acts lawfully or whether it respects the sovereignty of other states in ‘exercising’²³ its jurisdiction.²⁴ In addition, if and when a state’s relationship with an individual meets the criteria of jurisdiction, it does not have any discretion in the matter of accepting its human rights obligations. As the argument unfolds, we will see that this distinction between jurisdiction as a question of right and jurisdiction as a question of duty is crucial.

In sum, jurisdiction in international human rights law is a matter of duty in the sense that its sets out criteria (whatever those may be), that, when met, justify the allocation of human rights obligations to a state who owes them to an individual. Accordingly, it is crucial at the very beginning of an inquiry into human rights violations: whether or not there was an obligation to be violated depends on whether the state in question had jurisdiction. This is because no one, not even a state, can violate an obligation it does not have.²⁵ While not always spelled out in this fashion, and to put the language of justification to one side for the moment, jurisdiction in international human rights law has the function and purpose to trigger obligations of states towards individuals.²⁶ As we will see after the discussion of territory that is to follow, it is precisely this purpose that makes tracing the relationship with territory more complicated than is sometimes acknowledged.

1.2 Title to Territory in Public International Law

For our purposes, a brief and selective outline of the international law of territory suffices.²⁷ The essential areas of interest are the following: the definition of a state, states’ territorial integrity, acquisition and loss of territory, and territory as a source of sovereignty. Traditionally, international law defines states as its subjects to consist of

²³ This phrasing is common but misleading. It suggests that a state is exercising a right or power when this need not necessarily be true. In my view, jurisdiction in international human rights law does not depend on whether it is *exercised* or not: Lea Raible, ‘The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers’ [2016] *European Human Rights Law Review* 161, 166. See also chapter 4, section 4.2 above.

²⁴ Contra: *Banković* (n 5) para 59. See further Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 15) 39-41.

²⁵ On the relevance of this point see Raible (n 23) 166

²⁶ It could, and probably should, be argued that jurisdiction is thus an unfortunate choice of term for the purposes of international human rights law. However, it seems it is what we are left with for now.

²⁷ This is a simplified account in order to keep distractions from the purpose of this chapter to a minimum. For more on territory in international law see Shaw, *Title to Territory* (n 12); Crawford, *The Creation of States in International Law* (n 12); Crawford, *Brownlie’s Principles of Public International Law* (n 19) 203-52; Shaw, *International Law* (n 12) 352-400.

a defined territory with a permanent population ruled by an independent government.²⁸ According to this, states are essentially territorial entities.²⁹ Even though there are doubts as to how important territory really is as a separate criterion of statehood, ‘a certain coherent territory effectively governed’ remains central.³⁰ When it comes to acquisition and transfer of territory of states international law treats it not unlike property.³¹ States can acquire territory either originally or derivatively. Original acquisition occurs when a state occupies territory, that is, when it wields relatively uncontested and effective jurisdictional powers³² in a particular territory.³³ States acquire territory derivatively through cession. The reason for a cession can be a sale or a political decision by the ceding state. However, in both cases the derivatively acquired title is only valid if the title of the ceding state was valid as well. The upshot is that title, understood as ‘the validity of claims to territorial sovereignty against other states’,³⁴ is crucial in any case.³⁵ This last statement illustrates that the notion of title to territory is intimately linked to sovereignty, as title comprises its ‘essence’.³⁶

The concept of title in international law favours the status quo.³⁷ This is evident in a number of principles, some of which should be highlighted here. First among them is the centrality of a valid title and the fact that consistent use of a territory and effective exercise of state functions therein are almost always decisive in determining such title.³⁸ Another one is the fact that international law contains a principle, referred to by the UN Charter in its article 2(4), which upholds the territorial integrity of (existing)

²⁸ Article 1 of the Montevideo Convention on the Rights and Duties of States (signed 26 December 1933) 165 LNTS 19.

²⁹ See Crawford, *The Creation of States in International Law* (n 12) 46-52; Tesón (n 13) 28. The opposite, however, is not true. International law recognises categories of territories that do not form part of a state in this sense. See generally Crawford, *Brownlie’s Principles of Public International Law* (n 19) 203.

³⁰ Crawford, *The Creation of States in International Law* (n 12) 52

³¹ Crawford, *Brownlie’s Principles of Public International Law* (n 19) 216, but see the note of caution 204; Tesón (n 13) 28.

³² Note that this is precisely *not* the prevailing meaning of jurisdiction in international human rights law.

³³ Shaw, *International Law* (n 12) 363-72; Tesón (n 13) 28.

³⁴ Crawford, *Brownlie’s Principles of Public International Law* (n 19) 212.

³⁵ *Ibid* 216-17.

³⁶ Shaw, *International Law* (n 12) 354.

³⁷ Tesón (n 13) 29.

³⁸ Shaw, *Title to Territory* (n 12) xxiii-xxiv; Tesón (n 13) 29.

states.³⁹ The principle is particularly important in discussions about secessions.⁴⁰ Further evidence of the importance of territorial integrity is that coerced territorial transfers, such as conquests, while prohibited today, were (and are) the source of valid title to territory if they occurred before 1928, when the Kellogg-Briand Pact⁴¹ was signed.⁴²

The fact that international law concerning territory favours the status quo by focusing on historical effectiveness⁴³ is a consequence of its purpose. It performs the important function of creating and upholding international stability. In doing so, international law in practice avoids the crucial questions of legitimacy and acts as a workable arbiter in case of territorial disputes.⁴⁴ The focus on effectiveness and the status quo might be morally flawed,⁴⁵ but make sense in light of the purpose of this area of law. To put it in interpretive terms,⁴⁶ the value that picks out the relevant principles in this area of law is stability in a statist system, as opposed to, say, a moral concern for individuals or fair distribution of resources.

Contrast this short analysis with what was said about jurisdiction in international human rights law by revisiting the distinction between jurisdiction as a right and jurisdiction as a trigger of duty. Title to territory is about the validity of claims by a particular state. It is related to the conception of jurisdiction as powers and rights of states, dependent as it is on their effective exercise. However, jurisdiction in this sense has little to no obvious resemblance to jurisdiction as it is and should be understood in international human rights law. One could say that either or both of these legal conceptions of jurisdiction are impractical or otherwise flawed. However, I want to argue that this is a moot point. The opposing conceptions are simply a consequence of the purpose of each area of law: they are picked out by different values, which is

³⁹ See further Mark W Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force' (2001) 55 *International Organization* 215. On the acquisition of territory by newly creating/ed states see generally Crawford, *The Creation of States in International Law* (n 12); see also Shaw, *International Law* (n 12) 355-58.

⁴⁰ Lea Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177.

⁴¹ Formally known as General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928) 94 LNTS 57.

⁴² See Crawford, *Brownlie's Principles of Public International Law* (n 19) 216.

⁴³ To my mind, it is in light of this no coincidence that Crawford treats effectiveness as the decisive feature of statehood as such: Crawford, *The Creation of States in International Law* (n 12) 37-95.

⁴⁴ Tesón (n 13) 28-29.

⁴⁵ As a consequence, many philosophical justifications of territorial rights find themselves in opposition to international law. See, eg, *ibid* 30-31; and generally Lo Coco (n 13).

⁴⁶ On the method see chapter 1, section 3, and chapter 2, section 2.

why differing results should not surprise us. The international law on territory, as we have seen, is based on the value of stability by upholding exclusive claims. The point of jurisdiction in international human rights law, on the other hand, is to act as a threshold criterion for human rights obligations.⁴⁷ On my account, the values informing jurisdiction are integrity and equality. However, and regardless of its precise interpretation, the value underpinning jurisdiction must be related to the justification of human rights obligations and their allocation.

None of this is to say *a priori* that title to territory and jurisdiction in international human rights law have nothing to do with each other. However, their very different purposes call for a careful analysis of potential relationships and for criteria to arbitrate between different models. And I suggest that any theory of the relationship of title to territory and jurisdiction should take into account their underlying values. The next section organises existing claims about the relationship of jurisdiction and territory into three primary and one secondary or half model and introduces a method of evaluation.

2 Three and a Half Models

2.1 Models

The introduction to this chapter surveyed a few examples of claims about or relating to the relationship of territory and jurisdiction. We have reached the stage of organising these claims into models for this relationship. In what follows, I distinguish three primary ones. The approximation model defends that jurisdiction in international human rights law is for all intents and purposes a mirror of title over territory. The differentiation model claims that the criteria of jurisdiction depend on whether the relevant situation is found within or outside of the territory of the state, whose jurisdiction is in question. The separation model maintains that jurisdiction in international human rights law and title to territory are conceptually entirely separate and that similarities – if any – are a coincidence. Finally, the secondary, half model says that title to territory creates a rebuttable presumption in favour of the existence of jurisdiction.

Why then three and half model, instead of four or just three? The answer is that the models introduced fall into two categories. The three primary models address the

⁴⁷ See chapter 4, section 1, and chapter 5 above.

stage of the establishment and allocation of the human rights obligations of a state. They represent positions along the spectrum of how much title to territory impacts the meaning of jurisdiction, conceptually speaking. Put differently, these models are claims about how the concept of title affects the criteria making up the meaning of jurisdiction in international human rights law.⁴⁸ An example of such a claim is that, depending on whether or not an alleged human rights violation takes place within or outside a state's territory, different thresholds should apply. These models serve as organising tools for the exploration of the following questions: should title to territory and its requirements influence the meaning of jurisdiction as a trigger for human rights obligations? And, if so, why and how?

The same is not true for the secondary, half model that will be discussed below: it affects a different stage in the analysis. In other words, it does not serve to analyse whether title and the trigger of obligations have anything in common. Instead, it impacts upon what title to territory as a fact and as a legal concept has to say about how to establish jurisdiction in practical terms. This half model concerns the standards of proof and relevant evidence in proceedings where jurisdiction needs to be established. The half model does not affect the truth or viability of the primary models and can thus be held in conjunction with any of the primary ones.

2.2 Method of Evaluation

Finally, a note on the method of evaluation is warranted. In order to analyse, which of the primary models is preferable, we need to know what makes a model of the relationship of jurisdiction and title to territory successful. For the primary models, at least, an evaluation has to be connected to an account of human rights.⁴⁹ The reason is that these models concern the stage of establishing human rights obligations of states in the first place. Human rights, as we have seen, are relational in two senses: they are normative relationships between a right holder and a duty bearer, but they are also

⁴⁸ It would be perfectly possible to investigate the opposite perspective where one would ask how much the concept of title to territory in international law can or should be influenced by jurisdiction in international human rights law. However, this is neither the point of this thesis, nor of this chapter.

⁴⁹ This is true regardless of which particular account one favours. Authors who disagree on the nature and function of international human rights also disagree on the precise meaning of jurisdiction. Contrast, eg, the accounts in Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 15) with Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 10). See further chapter 4, on the desiderata for an account of jurisdiction, and chapter 5 for a theory of jurisdiction as political power.

dependent on a pre-existing relationship between the two.⁵⁰ The latter relationship is what justifies the allocation of the arising obligations to a particular duty bearer (or duty bearers).⁵¹ When we consider the meaning of jurisdiction in international human rights law and how the law on title to territory should influence it we are concerned with characterising that pre-existing relationship.⁵² Regardless of what theory of human rights one thinks is preferable, it is necessary to allocate human rights obligations, and to justify this allocation. This is what the interpretation of jurisdiction is about. For this reason, the models introduced here, are evaluated against their fit with the relational nature of human rights. That is, a good model of the relationship of jurisdiction and territory will fit with the reason why the interpretation of jurisdiction is so central. The better the model fits, the more successful I submit it is.

3 The Approximation Model

An approximation of jurisdiction to title to territory is most clearly visible where the claim is that jurisdiction is ‘primarily territorial’.⁵³ This assertion rarely stands alone, however. Sometimes it goes hand in hand with the idea that jurisdiction, as a consequence of its territoriality, cannot mean anything other than effective control over territory and that this is true for extraterritorial jurisdiction as well.⁵⁴ It is also sometimes linked with the claim that jurisdiction must be limited by the sovereign rights of other states.⁵⁵ The upshot of these propositions is that jurisdiction in international human rights law, even if it is conceptualised as a threshold criterion for the treaties’ application, is essentially and necessarily inspired by the criteria usually thought to establish title to territory. Put differently, the consequence of these claims is that jurisdiction as a threshold criterion should be a close approximation of the criteria generally used to establish title to territory. What follows unpacks the claim that jurisdiction is best understood as an approximation of the title-inspired criterion

⁵⁰ See chapters 2, 4 and 5 above.

⁵¹ On the importance of the duty bearer see, eg, Besson, ‘The Bearers of Human Rights’ Duties and Responsibilities for Human Rights’ (n 20).

⁵² I have argued in chapters 3 to 5 that jurisdiction is best understood as political power. See also Raible (n 23) 166-68. However, the *purpose* of jurisdiction remains the same regardless of which particular interpretation one prefers, and it is this purpose that is decisive.

⁵³ (In)famously coined in *Banković* (n 5) para 59. See further Ralph Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’ (2007) 40 *Israel Law Review* 503; Miller (n 15); Tzevelekos (n 5).

⁵⁴ See generally Tzevelekos (n 5).

⁵⁵ *Banković* (n 5) para 59.

of effective control over territory and that jurisdiction as an approximation of title needs to be exclusive.

Consider, first, the problem of effective control over territory as a criterion for jurisdiction. The ECtHR introduced it in *Banković v Belgium*, however it was (and remains) alive and well in later judgments, such as *Al-Skeini v United Kingdom*.⁵⁶ The *Banković* decision concerned the applications of individuals whose relatives were killed in the bombing of a radio and television station in Belgrade. The ECtHR found their case inadmissible because – among other reasons – the states who carried out the aerial attack lacked effective control over the territory in question.⁵⁷ The basic idea of this model of extraterritoriality is that one of the instances where a state party to the ECHR incurs human rights obligations towards individuals abroad is the case of effective control over territory.⁵⁸ This interpretation of jurisdiction has been heavily criticised by scholars for a range of different reasons. Milanovic is not entirely opposed, but nevertheless suggests that it should not apply to negative human rights obligations;⁵⁹ at least in part because the effective control criterion produces arbitrary results.⁶⁰ Tzevelekos goes further and argues that the criterion does not only produce arbitrary outcomes, but also lacks a basis in the Convention as it can only be traced to the law of state responsibility.⁶¹ Shany considers the criterion as developed in *Banković* arbitrary because it does not seem to follow from any cogent normative principles to speak of.⁶² In sum, the criticism so far is that effective control over territory as an interpretation of jurisdiction in international human rights law is not satisfactory in terms of the outcomes it entails.

To complement these criticisms, I want to draw attention to the implicit use of the approximation model this interpretation of jurisdiction represents. Constructing jurisdiction in international human rights law as effective control over territory starts

⁵⁶ *Al-Skeini v United Kingdom*, App no 55721/07 (ECtHR, Judgment, 7 July 2011) paras 138-140. See also Marko Milanovic, ‘Al-Skeini and Al-Jedda in Strasbourg’ (2012) 23 *European Journal of International Law* 121.

⁵⁷ *Banković* (n 5) para 75.

⁵⁸ This spatial model is just one of the concepts the Court currently operates with. The other one is the personal model, where authority over individuals is decisive. However, I have argued elsewhere that these were never meaningfully separate and that the Court has recently confirmed this, albeit implicitly. See Raible (n 23).

⁵⁹ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 15) 209-22.

⁶⁰ *Ibid* 170-72.

⁶¹ For a summary of his view see Tzevelekos (n 5) 133-34.

⁶² Yuval Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 *Law & Ethics of Human Rights* 47, 60.

with the assumption that jurisdiction is a virtual extension of title to territory.⁶³ This is apparent in the first step of this type of analysis, namely the claim that jurisdiction is primarily territorial.⁶⁴ The upshot of this starting point is twofold. First, it assumes – wrongly⁶⁵ – that jurisdiction in international human rights law is a question of right, that is, of what a state has the international legal authority to do. This cluster of meanings of jurisdiction is connected to title to territory in a particular way: they are perceived to flow from it because territory is both a precondition and a source of sovereignty and jurisdiction is a particular subset of sovereign rights.⁶⁶ This first misunderstanding about the nature of jurisdiction leads to the second one, which is to derive the criteria to establish jurisdiction from those establishing title to territory. In other words, the next step is to mirror the test used to establish original title to territory – that is – habitual and effective control and exercise of jurisdictional functions.⁶⁷

Additionally, there is the idea that jurisdiction in international human rights law is both limited by and limiting the sovereignty of other states.⁶⁸ This claim builds on the misunderstanding of jurisdiction as a right as opposed to a question of duty in a different way: it could only possibly limit or even displace the rights of other states if it is a right itself. The connection of this claim to the notion of title to territory is that it strives to mirror not only the criteria to be met for original acquisition of territory but also the purpose of the legal regime governing them. Even if the claims to territory are usually relative and in disputes title is awarded to whichever state has the better or best claim, the very purpose of the notion of title is that – once awarded or accepted – it is exclusive.⁶⁹ The purpose is to maintain stability in a statist order. The question thus becomes: should this purpose, which is almost entirely foreign to international human rights law, influence our understanding of jurisdiction as a threshold criterion to apply it?

⁶³ This is in addition to the ubiquitous conflation of jurisdiction and state responsibility. Some aspects of this problem are discussed in section 7 below. See further Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 15) 41-52. For an example of this conflation see Jane M Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v. Netherlands*' (2015) 62 *Netherlands International Law Review* 407.

⁶⁴ *Banković* (n 5) para 59; Gondek 'The Extraterritorial Application of the European Convention on Human Rights' (n 5) 360; Tzevelekos (n 5) 129-30.

⁶⁵ See section 1.1 above.

⁶⁶ Crawford, *Brownlie's Principles of Public International Law* (n 19) 204; Shaw, *International Law* (n 12) 352-54.

⁶⁷ Crawford, *Brownlie's Principles of Public International Law* (n 19) 225-26; Shaw, *International Law* (n 12) 363-72.

⁶⁸ *Banković* (n 5) para 59.

⁶⁹ Shaw, *International Law* (n 129) 354-55.

Put differently, we can now ask how the approximation model fares when tested against our criterion of evaluation. I argue that it does not fulfil the criterion because it does not take into account the crucial difference between the exercise of jurisdiction as a right and the use of jurisdiction as a trigger for the application of a duty.⁷⁰ This means, in turn, that it does not fit a relational account of human rights. The reason for the lack of fit is that the approximation model is unable to treat jurisdiction as a threshold criterion for the application of human rights, let alone the justification of the allocation of ensuing obligations. In terms of reasoning, the law of territory cannot serve as an inspiration to characterise a relationship between a state and individuals. This is why Besson is right when she notes that jurisdiction is not territorial but functional.⁷¹

None of this is to say that an interpretation of jurisdiction in international human rights law cannot ever rely on a notion of control: as we have seen this is perfectly plausible.⁷² It does mean, however, that in reaching this conclusion, the idea that jurisdiction is an extension of territory obscures rather than clarifies what we ought to think about. The essence of title, as it were, cannot and should not be introduced into the interpretation of jurisdiction. The verdict on the approximation model is thus that it fails our evaluation and that we should look elsewhere when seeking to elucidate the meaning of jurisdiction.

4 The Differentiation Model

The differentiation model maintains that jurisdiction as found in international human rights law should be determined with reference to different criteria depending on whether or not the state has title to the territory where the alleged human rights violation takes place. Versions of the differentiation model include the idea that title to territory makes up for criteria of jurisdiction that are not fulfilled; for example, a lack in actual power by the state over a situation.⁷³ The differentiation model could also result in the claim that as long as a state has title to a particular territory, it does not need jurisdiction in order for its human rights obligations to arise. Finally, it could translate into the claim that title always results in jurisdiction, regardless of whether

⁷⁰ See section 2.1 above.

⁷¹ Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 10) 863.

⁷² See chapter 4, section 5; and chapter 5 above.

⁷³ For an argument to that effect see Kjetil Mujezinović Larsen, 'Territorial Non-Application' of the European Convention on Human Rights' (2009) 78 *Nordic Journal of International Law* 73.

the latter's criteria are met or not, while the same is not true extraterritorially. This section unpacks these claims and their consequences for the interpretation of jurisdiction before evaluating them against the criteria established above.

Traces of such claims are most prominently found in the ECtHR judgments in *Ilaşcu v Moldova and Russia*⁷⁴ and *Catan v Moldova and Russia*.⁷⁵ In both cases, the Court had to determine who had jurisdiction in Transdniestria for the purposes of applying the ECHR. As a consequence of the conflict between Russia and Moldova following the dissolution of the USSR, Transdniestria declared itself the Moldavian Republic of Transdniestria (MRT). However, the status of the territory remains unresolved. The MRT is not recognised as a state and Moldova maintains that the MRT is part of Moldovan territory.⁷⁶ At the same time, the ECtHR considered it established that the MRT is under the effective authority of Russia.⁷⁷ As the MRT is not party to the ECHR, the Court had to decide whether it was Moldova or Russia that had jurisdiction over the applicants, which in both cases alleged their human rights were violated in the MRT.⁷⁸

The ECtHR found that Russia had jurisdiction because of its effective authority within the MRT,⁷⁹ which fits well with the case law discussed in section 3 above. However, the Court also held that Moldova retained jurisdiction for the purposes of certain human rights obligations towards individuals in the MRT even though it lacked effective control over the territory.⁸⁰ Here is what the Court had to say about the latter finding in *Ilaşcu*:

On the basis of all the material in its possession, the Court considers that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, namely that part which is under the effective control of the "MRT". ... However, 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.⁸¹

⁷⁴ App No 48787/99 (ECtHR, Judgment, 8 July 2004).

⁷⁵ App No 43370/04 (ECtHR, Judgment, 19 October 2012).

⁷⁶ *Ilaşcu* (n 74) paras 2, 322-330.

⁷⁷ *Ibid* paras 386-394.

⁷⁸ *Ibid* para 2: *Catan* (n 75) para 3.

⁷⁹ *Ilaşcu* (n 74) paras 386-394.

⁸⁰ *Ibid* paras 33-335.

⁸¹ *Ibid* paras 330-331.

Admittedly, in the light of this chapter's purpose and particularly from the viewpoint of public international law, this quote does not make a lot of sense. After all, whether or not a particular government is considered legitimate, that is, whether a government as opposed to a state is recognised, has no necessary bearing on title to territory.⁸² What the Court may have meant to say instead becomes clearer upon consulting the relevant passages in *Catan*, however:

Although Moldova has no effective control over the acts of the "MRT" in Transdniestria, the fact that the region is recognised under public international law as part of Moldova's territory gives rise to an obligation, under Article 1 of the Convention...⁸³

Again, the choice of words is unfortunate because it invites conflation of the notion of title with the concept of recognition of states.⁸⁴ Nevertheless, in my view the most sensible interpretation of this latter statement is that the ECtHR means to say the following. Moldova has, as a matter of international law, title to the territory of the MRT and retains jurisdiction and human rights obligations towards its population, albeit only a subset, as a direct consequence of this fact.

This means that Moldova's title to the territory comprising the MRT in the view of the Court made up in part for what Moldova lacked in actual control. In turn, this implies that as long as a state has title, the requirements for jurisdiction under the ECHR may be reduced or altered.⁸⁵ A further implication is that the concrete meaning of jurisdiction and its criteria actually differ depending on whether the state to be held accountable has title to the territory in question. In other words, the differentiation model differentiates between the criteria of jurisdiction within the territory a state has title to and the criteria of jurisdiction outside of it.

How does the model fare in the context of the interpretation of jurisdiction when tested against our evaluative criterion of fit with the relational nature of human rights? The main problem the differentiation model faces is the assumption that the relationship between individuals and states that allocates human rights duties is characterised by the state's relationship with a particular territory. Much like the approximation model, the differentiation model conceptualises jurisdiction as a form

⁸² For a summary on recognition of governments see Shaw, *International Law* (n 12) 328-32.

⁸³ *Catan* (n 75) para 110, citing *Ilaşcu* (n 74).

⁸⁴ On recognition of states see Crawford, *The Creation of States in International Law* (n 12) ch 1; Shaw, *International Law* (n 12) 321-28; Jure Vidmar, 'Explaining the Legal Effects of Recognition' (2012) 61 *International and Comparative Law Quarterly* 361.

⁸⁵ See also Mujezinović Larsen (n 73).

or upshot of territory.⁸⁶ It is only possible to claim that title makes up for whatever one lacks in jurisdiction if one also assumes that their criteria overlap and – importantly – have the same purpose.⁸⁷ At this point, it becomes clear that title to territory has not yet been deployed to interpret jurisdiction in line with relational accounts of human rights. This would only be successful if one could first establish that title to territory is a vital part of the state's relationship with individuals that justifies human rights.⁸⁸ In sum, the differentiation model does not fit well with the relational nature of human rights for much the same reasons as the approximation model. Thus, the model fails and – along with the conclusions in *Ilaşcu* and *Catan* – should be rejected.⁸⁹

To sum up, the differentiation model and the approximation model both fail for similar underlying reasons. The problem with both of these accounts is that they confuse jurisdiction as a right with jurisdiction as a trigger of duties. The approximation model does so more openly and consistently than the differentiation model. However, both allow title to territory to largely dictate the criteria of jurisdiction without establishing that it captures something about the pre-existing relationship between states and individuals necessary for human rights to apply. In other words, they fail to account for the purpose of jurisdiction and, ultimately, they cement rather than lift the confusion surrounding jurisdiction. This leaves us with the separation model, which will be considered next.

5 The Separation Model

The separation model maintains that jurisdiction in international human rights law and title to territory should be conceptually separate and that similarities – if any – are little more than a coincidence. This means that title to territory does not and should not impact criteria of jurisdiction. It follows that a state, which has title to a particular territory does not necessarily have jurisdiction. And even if the criteria for both of these concepts are similar, the reason is not that title impacts the interpretation of jurisdiction. Say, for example, jurisdiction is interpreted to mean effective control over

⁸⁶ See *ibid* 76-78, where he conflates jurisdiction as a right and jurisdiction as an issue of duty, while arguing overall, for what I would call the differentiation model. Cf Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 15) 118.

⁸⁷ On the differing purposes of the two legal concepts see section 2 above.

⁸⁸ This is, I believe, a faithful extension of the view in Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 10) 860.

⁸⁹ Similar, but for different reasons: Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 15) 118.

an area.⁹⁰ In a paradigmatic instance of a state, this would mean that it has jurisdiction over the entire territory it has title to and in addition to that over any area it controls effectively through whatever means.⁹¹ As long as the *reason* for the adoption of these criteria is tailored to the purpose of each area of law and the results arrived at independently, this would still be an instance of the separation model.

The last paragraph already implies that in terms of result, instances of the separation model are widespread. For example, the HRC in *Lopez Burgos* has been very forthcoming in basing the meaning of jurisdiction on a state's relationship with an individual, leaving the notion of territory or title out of the equation.⁹² This fits perfectly well with its disjunctive interpretation of article 2 ICCPR.⁹³ Even *Al-Skeini* – the ECtHR's (still) leading case on the principles of jurisdiction – can be interpreted to be arrived at independently of territory. This is true not only of the spatial model mentioned above, but also of the personal model of jurisdiction, which is based on control over an individual instead of territory.⁹⁴

However, the Court still kicks off its statement of principles of jurisdiction with what it refers to as '[t]he territorial principle'.⁹⁵ This principle perpetuates the idea that jurisdiction in the ECHR flows from territory. In other words, the ECtHR reaches results that are disconnected from the substance of its reasoning. While I have argued elsewhere that a charitable interpretation of the ECtHR's judgments and decision on extraterritoriality may remedy some of their flaws,⁹⁶ I submit that the lack of well discernible, adequate reasoning is an indication of a serious problem with the case law.⁹⁷ In particular, it means that (implicit) use of the approximation and differentiation models, and thus the failure to meet the success criteria postulated here, lingers on. The numerous inconsistencies in human rights adjudication this causes are

⁹⁰ This is not the only way it can or has been interpreted. But the ECtHR continues to hold that it is relevant: *Al-Skeini* (n 56) paras 130-139.

⁹¹ Examples include *Loizidou v Turkey*, App no 15318/89 (ECtHR, Judgment (Preliminary Objections), 23 March 1995) paras 60-64; *Al-Skeini* (n 56) paras 130-139.

⁹² *Lopez Burgos v Uruguay*, Communication No 52/1979 (29 July 1981) CCPR/C/13/D/52/1979, paras 12.2 and 12.3.

⁹³ Section 1 above.

⁹⁴ *Al-Skeini* (n 56) paras 133-137.

⁹⁵ *Ibid* para 130.

⁹⁶ See generally Raible (n 23).

⁹⁷ On the consequences of a lack of principled reasoning see Lea Raible, 'Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office: Victim Status, Extraterritoriality and the Search for Principled Reasoning' (2017) 80 *Modern Law Review* 510, 520-24.

a steep price to pay for the use of a seemingly comforting phrase such as the ‘territorial principle’.

Among the authors defending what I call the separation model, Besson is the clearest in her reasons for adopting it. She notes:

The relational nature of jurisdiction between a subject and the authority needs to be stressed, as it corresponds to the relational nature of human rights between a right-holder and a duty-bearer. Article 1 ECHR situates human rights within a relationship of jurisdiction and makes them dependent on it: jurisdiction both requires the recognition of human rights normatively (jurisdiction as normative trigger of human rights) and provides the conditions for the corresponding duties to be feasible (jurisdiction as practical condition of human rights). Jurisdiction amounts, therefore, at once to a normative threshold and a practical condition for human rights.⁹⁸

I read this passage to mean that jurisdiction as a threshold criterion captures the relational nature of human rights as a particular category of norms.⁹⁹ It thus has everything to do with the nature and function of international legal human rights and precisely nothing with whether or not a state has title to territory. Accordingly, she argues next that jurisdiction should be understood as a functional criterion with a territorial dimension.¹⁰⁰ Put differently, the territorial dimension of jurisdiction is a consequence of the function of jurisdiction as described above, not the other way around. Finally, Besson also expressly rejects the differentiation model by saying that ‘... there are no reasons ... why jurisdiction should be conceived differently depending on whether it applies inside or outside the territory of a state party.’¹⁰¹

Turning to evaluating the separation model, I argue that it satisfies our criterion of fit with the relational understanding of human rights. In its clearest form, the model is premised on the idea that the relational nature of human rights as opposed to other considerations should inform the meaning of jurisdiction. This means that the separation model focuses on the allocation of human rights obligations according to a state’s relationship with the individual in question, not the territory the individual is found in. It follows that the separation model accounts well for the crucial connection

⁹⁸ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 10) 863.

⁹⁹ This interpretation is also faithful, I believe, to her work on the nature of human rights more generally. See, eg, Samantha Besson, ‘Human Rights and Democracy in a Global Context: Decoupling and Recoupling’ (2011) 4 *Ethics & Global Politics* 19.

¹⁰⁰ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 10) 863.

¹⁰¹ *Ibid* 866.

of the relational nature of human right and the allocation of obligations. It does so precisely by eliminating the confusing link with title to territory. It follows that the separation model fits well with the relational nature of human rights postulated above. The result of this evaluation further elucidates the issues with the approximation and the differentiation models: it seems that title to territory, conceptually speaking, has too little in common with jurisdiction in international human rights law to contribute to the latter's interpretation. In fact, after the evaluation of all three models using title in this way appears to be an attempt to square the circle.

6 Half a Model: Title to Territory as a Rebuttable Presumption of Jurisdiction

We have established above that the separation model best accounts for what the relationship of title to territory and jurisdiction should be at the stage of defining jurisdiction. This does not say anything yet about the relationship of the two concepts in other respects. After all, defining jurisdiction only addresses one step we have to take when establishing extraterritorial human rights obligations in international law. In this section, I discuss a possibility to relate title to territory and jurisdiction in international human rights law on a different level: title to territory and its function as evidence for jurisdiction. I hope to show that this way of looking at the relationship is not only more promising conceptually but also offers at least some explanation as to why territorial notions discussed above linger on in case law and scholarship.

Once jurisdiction is defined – regardless of the details of this interpretation – courts that have to establish whether or not a state had or has it need to rely on evidence in order to do so. While the definition of jurisdiction takes logical priority over evidence to establish it in practice, the question of what counts as proof of jurisdiction and who needs to supply such proof is practically speaking no less important. This stage of the analysis and the role title to territory could play here is thus well worth a look. I argue that Besson is right in suggesting that title to territory should entail a presumption of jurisdiction of the state that has title and that such a presumption must be rebuttable. However, I take issue with her argument that the ECtHR already supports such a reading and the justification of this presumption that traces jurisdiction to its (alleged) territorial nature. In what follows I take up these points in turn.

In her seminal article on the extraterritorial application of the ECHR, Besson suggests that '[j]urisdiction is presumed over people situated on the official territory

of the state party.’¹⁰² As noted above, public international law does not usually refer to ‘national’ territory or ‘official’ territory of states.¹⁰³ What is at issue here, it seems, is title to territory even if this is not spelled out as such. Looking at this argument employing the concept of title is further justified by the fact that Besson traces its origins to the ‘international division of labour between territorial states.’¹⁰⁴ In favour of her argument she cites the ECtHR in *Al-Skeini* where the Court states that ‘[j]urisdiction is presumed to be exercised normally throughout the State’s territory.’¹⁰⁵ Besson reads this quote with an emphasis on ‘presumed’.¹⁰⁶ However, I argue that another reading, emphasising ‘normally’ and ‘throughout’ is more plausible.

In the relevant paragraph, the Court first holds that jurisdictional competence is primarily territorial, followed by the above statement that the exercise of jurisdiction is presumed throughout national territory and finally by a statement holding that exercising jurisdiction extraterritorially is only possible in exceptional cases.¹⁰⁷ Taking into account this context, it seems likely that the ECtHR means the above statement to be read with an emphasis on ‘normally’ or even ‘throughout’ rather than ‘presumed’.¹⁰⁸ Such a (rebuttable) presumption could only be regarded as the main message of this paragraph if it were followed by a statement that it is exceptional for a state *not to exercise jurisdiction* within its territory. However, instead of this, the Court distinguishes territorial from extraterritorial jurisdiction, establishing the former as the normal case and the latter as the exceptional one. The ECtHR’s attitude to title to territory as a presumption of jurisdiction is thus at best uncertain. The Court does not say anything about this presumption being rebuttable either. That is, the topic of this paragraph in *Al-Skeini* – in line with the arguments in this chapter – is the essentially territorial origin of jurisdiction rather than questions of evidence.

This can be further illustrated with reference to a partly dissenting opinion in *Ilaşcu*.¹⁰⁹ Judge Bratza clearly spells out that he interprets the Court’s case law to

¹⁰² Ibid 876.

¹⁰³ See sections 1.2 and 4 above.

¹⁰⁴ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 10) 876.

¹⁰⁵ *Al-Skeini* (n 56) para 131.

¹⁰⁶ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 10) 876, fn 94.

¹⁰⁷ *Al-Skeini* (n 56) para 131.

¹⁰⁸ Ibid.

¹⁰⁹ *Ilaşcu* (n 74), Partly Dissenting Opinion of Judge Bratza.

establish a presumption of jurisdiction of the state within its territory.¹¹⁰ He first notes the essentially territorial nature of jurisdiction and continues:

Conversely, the presumption that persons within the territory of a State are within its “jurisdiction” for Convention purposes is a rebuttable one and, exceptionally, the responsibility of a State will not be engaged in respect of acts in breach of the Convention which occur within its territory.¹¹¹

There is no case law cited as a reference for this idea. In other words, the reading of the ECtHR’s case law as establishing a rebuttable presumption of jurisdiction within the territory of a state seems to originate in the dissent as opposed to the judgment.

Judge Bratza’s dissent goes further. He suggests that the presumption has to be a rebuttable one. He goes on to argue that this is the reason why he disagrees with the majority’s conclusion that Moldova has jurisdiction in a part of its territory where the usual criteria of jurisdiction (as established by the ECtHR) are not met.¹¹² The Judge rejects the conclusions in *Ilaşcu* for much the same reasons as are outlined regarding the differentiation model.¹¹³ The Court, on the other hand, confirmed the finding of *Ilaşcu* in *Catan*.¹¹⁴ It is thus in my view not correct to say that the ECtHR supports the idea that title to territory forms the ground of a presumption of jurisdiction. Rather, this interpretation of the relationship between title and jurisdiction suggests a reading of both *Ilaşcu* and *Catan* that is not shared by the Court.

Besson puts forward a further reason to support the idea that title to territory should form the base of a rebuttable presumption of jurisdiction. She argues that ‘[t]his presumption stems from international law and the international division of labour between territorial states that entrenches their domestic-law jurisdiction on that territory.’¹¹⁵ However, this is virtually the same as saying that jurisdiction in international human rights law is a question of right rather than duty.¹¹⁶ This view has been criticised earlier in this chapter and also sits uneasily with Besson’s claim that jurisdiction is a trigger of human rights duties.¹¹⁷

¹¹⁰ Ibid para 3.

¹¹¹ Ibid para 3.

¹¹² Ibid para 8.

¹¹³ See section 4 above.

¹¹⁴ *Catan* (n 75) para 110.

¹¹⁵ Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 10) 876

¹¹⁶ See section 1.1 above.

¹¹⁷ See section 1.1 above; see also Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 10).

None of this is to say that Besson's suggestion is not helpful. As stated above, it is the most promising way to conceptualise the relationship between title to territory and jurisdiction in international human rights law. However, as both of her arguments in favour of this idea fail, it is necessary to put forward an alternative defence. I concur with Besson's suggestion that title to territory is useful as shorthand for the kind of power relationship that characterises jurisdiction.¹¹⁸ The reason is not that jurisdiction ultimately stems from territory conceptually speaking. Rather, linking title to territory and a presumption of jurisdiction captures the observation that the territorial state acting on its territory is the paradigmatic instance of jurisdiction as understood in international human rights law.

Again, the exact interpretation of jurisdiction does not impact the truth of this statement: it is true whether one prefers a notion of effective control – be it over territory or individuals,¹¹⁹ *de facto* authority,¹²⁰ or political power.¹²¹ That title to territory is such an important part of the paradigm is not conceptually necessary for the interpretation of jurisdiction. It is necessary, however, to understand why international human rights law imposes obligations on states the way it does. In other words, the presumption of jurisdiction is an expression of international human rights law's connections with public institutions.¹²²

Finally, a word about why the presumption of jurisdiction has to be a rebuttable one is in order. As established above, title entrenches the status quo with the aim of stability.¹²³ This makes it an excellent expression of the paradigmatic, reasonably well functioning and stable state. At the same time, however, title is ill-suited as a concept to react to changes, or reality, on the ground. This means that title may not always coincide with jurisdiction. The best examples for this problem have already been discussed above: they can be found in the cases of *Ilaşcu* and *Catan*.¹²⁴ Due to its essence of effectiveness title to territory is often a good indication of which state holds

¹¹⁸ Ibid 863, 74, 76; Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 20) 254; Samantha Besson, 'Science without Borders and the Boundaries of Human Rights' [2015] *European Journal of Human Rights* 462, 469.

¹¹⁹ See chapter 3, section 3 above.

¹²⁰ See chapter 3, section 4 above.

¹²¹ See chapter 5 above.

¹²² See chapter 2, sections 2 and 3, and chapter 5 above.

¹²³ See section 1.2 above.

¹²⁴ See section 5 above.

political authority,¹²⁵ effective control over an area,¹²⁶ or political power,¹²⁷ respectively. However, this is not always true, and cases where it is not need to be met with a degree of flexibility.

Expressing a similar concern, the ECtHR in *Cyprus v Turkey* found that Cyprus's inability to exercise any form of authority or control in Northern Cyprus would lead to a gap in the system of human rights protection.¹²⁸ In his dissenting opinion in *Ilaşcu*, Judge Bratza concludes that this is a pronouncement of the idea that there is a presumption of jurisdiction, and in particular a rebuttable one.¹²⁹ This is not necessarily so, however. A more accurate articulation of the idea would refer to the fact that this is the flip side to title's tendency and purpose to preserve the status quo. This prevents title from fully coinciding with jurisdiction in every case, which is why the presumption of jurisdiction based on title to territory needs to be rebuttable. Ultimately, it also links back to the fundamental difference between title to territory and jurisdiction introduced above in section 1: the difference between a right and a duty, which necessitates different conceptions of the two.

In sum, a rebuttable presumption of jurisdiction emanating from title to territory is a promising way of modelling the relationship between the two concepts. Importantly, it allows us to introduce the concern for stability that title provides in establishing jurisdiction without requiring that the concepts converge. In addition, this half model takes advantage of the conceptual differences rather than shying away from them. Finally, and perhaps more importantly than it seems at first, a rebuttable presumption makes sense of the term 'extraterritoriality'. It suggests that the difference between territorial and extraterritorial applications of international human rights law in fact lies with a question of evidence and standard of proof rather than the definition of jurisdiction. If taken seriously, this allows for an approach to the meaning of jurisdiction that is less fraught with terminological difficulties than is currently the case.

¹²⁵ Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 10) 864-66. See also chapter 3, section 4 above.

¹²⁶ See, eg, *Al-Skeini* (n 56) paras 138-140.

¹²⁷ See chapter 5 above.

¹²⁸ *Cyprus v Turkey*, App No 25781/94 (ECtHR, Judgment, 10 May 2001) para 78.

¹²⁹ *Ilaşcu* (n 74) partly dissenting opinion of Judge Bratza, para 3.

7 Conclusion

The present chapter analysed the potential relationship of two concepts: title to territory and jurisdiction in international human rights law. After considering a few examples pertaining to their potential connection, the chapter defined each of the concepts in line with their purpose. Jurisdiction was found to be a threshold criterion that triggers human rights obligations of states towards particular individuals and title described as a set of claims to territory that – at their heart – are designed to uphold minimal stability. Next, the chapter introduced three models of the relationship and evaluated them in light of their fit with the relational nature of human rights as found in international human rights law. The result of the evaluation was that the approximation and differentiation models – that is, those that maintain title's influence on the interpretation of jurisdiction in various degrees – fail the success criterion, while the separation model satisfies it.

Based on the separation model for the meaning of jurisdiction, the chapter further argued that a more promising way to conceptualise the relationship is to treat title to territory as the basis for a rebuttable presumption of jurisdiction. Going forward this concept is not only helpful from a practical perspective. On the contrary, it also explains where the territorial notions often relied upon by the ECtHR as well as scholars are useful when read the right way.

The most important finding of this chapter, however, is that title to territory cannot and ought not inform the meaning of jurisdiction in international human rights law. This is significant as the implicit use of territorial conceptions of jurisdiction linger on in the reasoning of authors and, particularly, the ECtHR even when the outcomes of their reasoning align with the separation model. In light of this, it is safe to say that much of what plagues the approaches taken by the ECtHR is based on assumptions stemming from these models lingering on. The conflation of the various models introduced here means that the Court keeps falling back on notions such as that jurisdiction is 'primarily territorial' and thus has never fully arrived at an interpretation of jurisdiction that pays sufficient attention to the distinction between jurisdiction as right and jurisdiction as duty stressed above. Finally, this means that a structured and coherent discussion of the relationship of title and jurisdiction was overdue and should be taken on board by adjudicating bodies, including, for our purposes, the CESCR.

Chapter 6

After the discussions of jurisdiction in international human rights law, what it means, and its relationship to title to territory, it is now time to apply the theories developed. The following, and final, chapter of this study looks in depth at three scenarios focusing again on the extraterritoriality of the ICESCR: bilateral cooperation in education, Special Economic Zones, and agricultural export subsidies. The application illuminates how jurisdiction as political power, kept separate from notions of title, differs from previous approaches to extraterritoriality and why it is superior.

Chapter 7 Connecting the Dots: Case Studies

1 Introduction

This chapter discusses three case studies where extraterritorial human rights obligations, particularly those emanating from the ICESCR, are a relevant consideration. It considers bilateral cooperation in higher education between Ireland and Bahrain regarding the training of surgeons,¹ the involvement of Chinese companies in the Lekki Free Trade Zone in Nigeria,² and the (unintended) effects on small-scale farmers of EU agricultural subsidies of sugar production.³ The aim of this chapter is to draw out where the account of extraterritoriality in the area of economic and social rights and the theory of jurisdiction as political power developed in this thesis differ from and improve upon the existing literature and case law.

Chapters 1 through 6 have explored and established a theory of extraterritorial human rights obligations, particularly in the area of economic and social rights. The essence of that theory is as follows. There are several kinds of obligations found in the ICESCR: obligations of social justice, obligations of global justice and human rights obligations proper, that is, duties generated by human rights as found in international law. The latter should be understood to require treatment of individuals by public institutions as mandated by the values of integrity and equality.⁴ This needs to be kept in mind if an examination of extraterritorial application of the ICESCR is to illuminate extraterritorial human rights obligations generally, which is one of the major aims of this thesis.

The present study focuses on obligations in the ICESCR that are actual human rights obligations. Building on this, the thesis develops the following argument. First, jurisdiction is a necessary threshold to be met if a state is to have human rights obligations towards an individual.⁵ Second, given the nature of international legal human rights, the best understanding of jurisdiction is as political power exercised

¹ Gearóid Ó Cuinn and Sigrun Skogly, 'Understanding human rights obligations of states engaged in public activity overseas: the case of transnational education' (2016) 20 *The International Journal of Human Rights* 761.

² Fons Coomans and Rolf Künnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012) 94-102

³ See Wouter Vandenhole, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy' (2007) 76 *Nordic Journal of International Law* 73.

⁴ See the discussion in chapter 2, sections 2 and 3 above.

⁵ See chapter 3 above.

through the choice and application of rules, and with a result of control, even if non-exclusive.⁶ And third, regardless of whether this approach to jurisdiction is followed or not, the concept has to be kept separate from title to territory.⁷

The approach defended here differs from and significantly improves upon existing accounts of both extraterritorial human rights obligations in the area economic and social rights and theories of jurisdiction developed mostly in the context of international human rights instruments on civil and political rights. Some of the differences have been discussed along the way.⁸ However, so far, I have not considered the practical ramifications of this theory of extraterritoriality in full. This chapter takes up this task. Further, the stated purpose of this thesis is to make a contribution to the conceptual understanding of extraterritoriality. A discussion of case studies, existing approaches and where they fail to provide plausible guidance, as well as how my theory of jurisdiction as political power remedies these failures, is the necessary final step.

It is in the light of this aim that the case studies were chosen. They should thus not be taken to offer an exhaustive account of situations where extraterritoriality is relevant. On the contrary, it should be noted that there are numerous other cases that give rise to different aspects of the problem. Highly relevant examples that will not be discussed in depth here include, but are not limited to, the implications of armed conflicts for economic and social rights,⁹ foreign direct investment broadly speaking,¹⁰ energy transits,¹¹ and (comprehensive) economic sanctions.¹² However, the fact that such situations are not discussed here should not be taken as an indication on their importance, or indeed, lack thereof. Rather, the case studies have been chosen because,

⁶ See chapters 4 and 5 above.

⁷ See chapter 6 above.

⁸ See, in particular, chapter 1 on the nature of the enquiry; chapter 3 for a discussion of why previous accounts of jurisdiction are unsatisfactory; and chapter 4 on conceptual confluences concerning the reliance on power.

⁹ See on socioeconomic rights in armed conflict – albeit without the explicit consideration of extraterritoriality – generally Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health Related Issues in Non-international Armed Conflicts* (Martinus Nijhoff 2013).

¹⁰ For examples involving Bilateral Investment Treaties see Coomans and Künnemann (n 2) 39-61.

¹¹ On the extraterritorial application of international human rights law as it relates to the interruption of energy flows as countermeasures under international law see Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Oxford University Press 2015) 237-44.

¹² See CESCR, *General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social, and Cultural Rights* (12 December 1997) E/C.12/1997/8; Matthew Craven, 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

as we will see, they illuminate differences of reasoning and results between the approach developed and defended in this thesis and the existing literature particularly well. In other words, I sacrifice exhaustiveness on the altar of illustrative analysis.

The case studies in this chapter are employed to illuminate when the theory of extraterritoriality developed here yields different results from existing accounts, why this is the case, and what makes it a superior account. Every case study comprises the following parts:

- 1) a summary of the relevant facts as they are available and documented,
- 2) a (non-exhaustive) list of human rights provisions that are or might be implicated by these facts,¹³
- 3) the analysis of extraterritorial human rights obligations in these scenarios that have been put forward so far, and
- 4) my analysis along with how and why it differs from and improves upon the above.

In what follows, the case studies are considered according to this structure. First, the chapter addresses bilateral cooperation in higher education between Ireland and Bahrain. Second, we look at the implications of state-owned Chinese firms being involved in free trade zones in Nigeria, utilizing the case of the Lekki Free Trade Zone. Third, the chapter explores extraterritorial human rights obligations of states following from EU agricultural subsidies.

In addition to being particularly illustrative, the case studies represent different degrees of intent and state involvement regarding extraterritoriality. The first case study addresses the bilateral cooperation in education of Ireland, with Bahrain, where the former provides training for aspiring surgeons. This is a purposeful, fully considered policy where extraterritoriality is implied from the outset, and because medical training is publicly supervised education, a necessity. The second case study concerns the establishment of the Lekki Free Zone in Nigeria. This is a Special Economic Zone, set up and run by a joint venture with significant Chinese shareholders. Here, extraterritoriality is implied, but mediated by the fact that the Chinese state is not as such involved but nevertheless provides the background

¹³ On my account, it is possible that not all aspects of all provisions discussed would be understood to be human rights as found in international law. However, the parts of the provisions that track equality and integrity will be. Clear examples are rights not to be discriminated against: see chapter 2 above.

structures necessary for the shareholders to operate. In addition, a study of this case sheds light on what would make non-state actors the bearers of human rights obligations.¹⁴ The third case study addresses export subsidies for agricultural goods. These are policies that produce extraterritorial effects, which are not usually intended in themselves by the state adopting the policy. As we have seen, export subsidies are an example employed by advocates of the view that the extraterritorial application of the ICESCR essentially consists in realising cosmopolitan global justice.¹⁵ Discussing it here as a case study not only illustrates how my account of extraterritoriality clarifies such situations, but also brings the arguments developed in this thesis full circle.

2 Bilateral Cooperation in Higher Education

2.1 Factual Background¹⁶

In 2003, Ireland and Bahrain concluded a bilateral agreement that allowed the ‘Royal College of Surgeons in Ireland’ to operate a branch campus in Bahrain, where it administers medical education. The curriculum offered and all examinations are the same as in Ireland. Accordingly, any students who complete the training are awarded Irish medical degrees. In addition to its degree awarding powers, the Royal College of Surgeons in Bahrain is subject to public oversight by the Irish Medical Council. The latter is the authority responsible for accrediting and monitoring medical education programmes in Ireland and those leading to Irish degrees, even if operated and delivered in third countries. The teaching facilities operated by the Royal College of Surgeons in Bahrain are mainly on a purpose-built campus, but training is also conducted in teaching hospitals and medical centres elsewhere.

In 2011, during a period that is commonly referred to as the Arab Spring, Bahrain was one of the countries that experienced sustained protests and unrest. In a move to quash the protests, Bahrain declared a state of national emergency and drew on its military to forcefully disband the crowds. This led to numerous injuries and at least 35 deaths among the protesters as well as other parts of the population.¹⁷ Injured people sought medical attention in some of the same hospitals that were used by the

¹⁴ See further chapter 2, section 3.3; and chapter 5, section 5 above.

¹⁵ See Introduction above.

¹⁶ Unless otherwise stated this summary is based on Ó Cuinn and Skogly (n 1) 766-67, 69-70.

¹⁷ On deaths during or in the aftermath of the protests see Bahrain Independent Commission of Inquiry (BICI), ‘Report of the Bahrain Independent Commission of Inquiry’, (December 2011) <<http://www.bici.org.bh/BICIREportEN.pdf>> accessed 22 September 2017, paras 848-1075.

Royal College of Surgeons to deliver clinical training and experience to its students. In the immediate aftermath of the Arab Spring these hospitals were taken over by the Bahraini authorities and used to interrogate and in some cases torture protesters.¹⁸ There were reports that medical treatment was withheld from individuals due to their political views.¹⁹ In addition, security services attacked and arrested medical staff at the training hospitals. Some of the medical personnel have been tortured after being arrested and some of the arrests carried out at the hospitals were found to be unlawful.²⁰

In 2013 and 2014, Ireland carried out an evaluation of the facilities in Bahrain, which included considering evidence by human rights organizations as well as site visits.²¹ Even though numerous sources establishing the facts canvassed above were brought to the attention of the Irish Medical Council, the authority proceeded with the accreditation of the medical education provided in Bahrain.²²

The question is whether, following these events, Ireland can be said to have violated human rights obligations to individuals in Bahrain, given that it was overseeing medical training in the hospitals where these interrogations took place. Reflecting the purpose of this thesis, and unlike Ó Cuinn and Skogly, who focus on the ECHR,²³ this section addresses Ireland's extraterritorial human rights obligations broadly, taking into account the ECHR, as well as the ICCPR and, in particular, the ICESCR.²⁴ As shown in previous chapters, Ireland can only violate its human rights obligations if it actually owes such duties towards individuals in Bahrain. The most relevant question thus becomes, whether Ireland's operating medical training facilities in Bahrain constitutes jurisdiction, and in relation to which individuals and for which human rights this is the case.

2.2 Human Rights Provisions

Potentially implicated international human rights provisions include the prohibition of torture, the right to the highest attainable standard of health, and the right to

¹⁸ See *ibid* paras 674-809.

¹⁹ Ó Cuinn and Skogly (n 1) 766.

²⁰ BICI (n 17) para 847.

²¹ Ó Cuinn and Skogly (n 1) 771.

²² *Ibid* 770-72.

²³ *Ibid* 762.

²⁴ As established above, jurisdiction depends on the values underpinning human rights in international human rights law. To the extent that these instruments contain such provisions, jurisdiction as a relationship that justifies the allocation of duties will be the same. See chapter 2 above.

education.²⁵ The right to be free from torture can be found in article 3 of the ECHR, which reads ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ In addition, the ICCPR in its article 7 prohibits torture, cruel, inhuman or degrading treatment and further explicitly states that ‘no one shall be subjected without his free consent to medical or scientific experimentation.’ This is relevant in the present case study because of the aforementioned conduct of Bahraini authorities on the premises of relevant hospitals.

The right to the highest attainable standard of physical and mental health is enshrined in article 12 of the ICESCR. In particular, article 12(d) provides that the steps to be taken by states include ‘[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness.’ With regard to access to treatment it is important to note that this applies not only to sickness but also to accidents and – thus – emergency care in the event of injury.²⁶ As with all rights contained in the ICESCR, the provision of emergency treatment must not be discriminatory.²⁷ One of the prohibited reasons to take into account in this regard is a person’s political opinion, which includes the expression or non-expression of such opinions.²⁸ The right to health and this latter prohibited ground of discrimination are relevant because the facts above suggest that injured protesters were prevented from accessing emergency medical treatment on the basis of the fact that they took part in the demonstrations. Given the political nature of the Arab Spring movement,²⁹ it seems reasonable to conclude that the criterion of being a protester in these circumstances stands in as a proxy for an individual’s political opinion and the expression thereof.

The right to education can be found in the ICESCR’s article 13 and article 2 of Protocol 1 to the ECHR. Article 13(2)(c) states that ‘[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.’ For the purposes of the present case study, it is useful to restrict the enquiry into the right to education to this

²⁵ Further, there is an argument to be made to include the right to freedom of expression, which will not be discussed here for reasons of space and because the same reasoning as in the case of the prohibition of torture applies. See Ó Cuinn and Skogly (n 1) 772-73.

²⁶ CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health* (11 August 2000) E/C.12/2000/4 para 16; John Tobin, *The Right to Health in International Law* (Oxford University Press 2012) 293, fn 57.

²⁷ Article 2(2) ICESCR; see further CESCR, *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights*, 2 July 2009, UN Doc E/C.12/GC/20.

²⁸ CESCR, *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights* (2 July 2009) E/C.12/GC/20 para 23.

²⁹ On the nature and shape of the movement in Bahrain see generally BICI (n 17).

latter provision on higher education. After all, it is not the general Bahraini or Irish systems of education that are of interest here, but instead the provision of medical training by an Irish body in Bahrain. The ICESCR's provision on higher education allows for students' capacity, that is, their relevant expertise and experience, to be taken into account at the point of access.³⁰ However, the word 'equally' as well as the general prohibition of discrimination discussed above mean that access to higher education must not depend on arbitrary criteria such as political opinion, social origin, or gender.³¹ In terms of non-discrimination and access to existing education institutions, article 2 Protocol 1 ECHR imposes equivalent obligations.³²

2.3 Previous Analysis

As there are several influential approaches to extraterritoriality and jurisdiction it is worth sketching what reasoning and results they would yield if applied to the cooperation between Ireland and Bahrain. I will discuss Besson's approach first, followed by Milanovic's and the ECtHR's. A summary of Ó Cuinn and Skogly's findings concludes.

The logical inference of Besson's theory is that Ireland's administering of medical education would not trigger jurisdiction as found in article 1 of the ECHR.³³ Her view of jurisdiction defines it as *de facto* legal and political authority, which, according to her, requires effective overall control over interdependent stakes and the giving of reasons for compliance.³⁴ The normative aspect of jurisdiction, that is, the giving of reasons and request for compliance, would be satisfied by the fact that Ireland is not only providing education but also regulating it.³⁵ However, Ireland lacks overall control over 'a large number of interdependent stakes', which would be required to satisfy Besson's criteria.³⁶ What is more, as far as is possible to say in relation to

³⁰ CESCR, *General Comment No 13: The Right to Education* (8 December 1999) E/C.12/1999/10 para 19.

³¹ Articles 2(2) and 3 ICESCR.

³² See, eg, *Şahin v Turkey*, App No 44774/98 (ECtHR, Judgment, 10 November 2005) para 137.

³³ Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857; see also chapter 3, section 4.

³⁴ *Ibid* 864-65. See also Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244, 251-54.

³⁵ Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 33) 865, 73.

³⁶ *Ibid* 872.

economic and social rights, she would not only have to say this in relation to the ECHR rights discussed above, but also about the right to education and certainly the right to health as found in the ICESCR.³⁷

Milanovic would have to say that regardless of the rights involved, all negative human rights duties apply in any case while all positive obligations would depend on whether Ireland has jurisdiction.³⁸ Per his interpretation of jurisdiction he would require Ireland to have effective overall control over an area.³⁹ While his main arguments concern civil and political rights instruments, such as the ECHR and the ICCPR, he endorses their extension to the ICESCR in principle.⁴⁰ In the present case, Milanovic's approach would mean that Ireland does not have any positive obligations towards individuals in Bahrain because it only regulates and administers education but lacks control over any kind of territory. While he would maintain that Ireland has negative obligations in any event, this would not apply in the present case as preventing torture (as opposed to refraining from it) and making education accessible would both be deemed positive obligations on Milanovic's account.⁴¹ In other words, Ireland does not owe any human rights obligations to individuals in Bahrain even given the connection described above.

Turning now to the ECtHR's approach to extraterritoriality, it is likely that the Court would not find any individuals in Bahrain under Ireland's jurisdiction. The reason is that it would require Ireland not only to exercise some or all of the public powers normally exercised by a government, but to do so with regard to control over individuals.⁴² So far, the Court has focused on physical control of individuals

³⁷ See Samantha Besson, 'Science without Borders and the Boundaries of Human Rights' [2015] *European Journal of Human Rights* 462, 464-66, where she argues – among other points – that 'like other human rights' duties, the supply-side of the right to science [as enshrined in article 15 ICESCR] is inherently bounded by the relationship of jurisdiction between right-holders and duty-bearers.'

³⁸ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) ch 4.

³⁹ *Ibid.*

⁴⁰ *Ibid.* 227-28.

⁴¹ *Ibid.* 215-19.

⁴² First articulated in *Banković v Belgium*, App No 52207/99 (ECtHR, Decision, 12 December 2001) para 71; developed and integrated into the personal model of jurisdiction in *Al-Skeini v United Kingdom*, App no 55721/07 (ECtHR, Judgment, 7 July 2011) para 135. On potential implications of the latter move see Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *European Journal of International Law* 121; Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers' [2016] *European Human Rights Law Review* 161.

involving situations of force and detention. Unless it refocuses its case law⁴³ it is thus unlikely to find that Ireland had jurisdiction.

The analysis of Ó Cuinn and Skogly concludes that Ireland had obligations under the ECHR because it is a) an invited public authority exercising government functions in Bahrain and b) should have known that protesters were tortured (in 2011) when it accredited the institution (in 2013) and should have refused accreditation of the medical training based – among others – on its obligations stemming from article 3 ECHR.⁴⁴ While they base this analysis on the case law of the ECtHR, they do not take into account the fact that the Court makes use of the public powers element in the context of the personal model of jurisdiction.⁴⁵ Their discussion is limited to Ireland's obligations under the ECHR and does not address the right to education contained in Protocol 1 to the Convention.

Regarding the role of the exercise of public powers and invitation of the territorial state, the above authors contend that the cooperation between Ireland and Bahrain should be analysed according to the ECtHR's ruling in *Al-Skeini*. They base their analysis on the following passage.

[T]he Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government. Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.⁴⁶

In order for this principle to be relevant, the administration and accreditation of medical education by Ireland needs to be qualified as a public power, and to be exercised with the consent of Bahrain. The authors first conclude that the administration of higher education is indeed a public function.⁴⁷ Further, they see the cooperation between Ireland and Bahrain as the latter inviting the former to exercise these powers on Bahraini territory.⁴⁸ Building on these findings Ó Cuinn and Skogly

⁴³ I have argued elsewhere that the Court should move away from notions of territorial control and instead focus on what the ECtHR calls public powers (and what I call political power) and that its case law would allow for such a readjustment. See Raible (n 42) 165-68.

⁴⁴ Ó Cuinn and Skogly (n 1) 766-77.

⁴⁵ The focus is on the role of invitation instead. See *ibid* 764-66.

⁴⁶ *Al-Skeini* (n 42) para 135 (references omitted).

⁴⁷ Ó Cuinn and Skogly (n 1) 767.

⁴⁸ *Ibid* 767-68.

argue that the invitation of Bahrain provides both the scope of Ireland's jurisdiction and – it seems – its justification.⁴⁹

2.4 Analysis Based on Jurisdiction as Political Power

In the case of bilateral cooperation in higher education I disagree with the different approaches outlined above in different ways. Regarding the approaches to jurisdiction of Besson and Milanovic I argue that they do not fit as well with the legal materials as my account does.⁵⁰ They would find that Ireland did not have jurisdiction while my theory suggests that it does. Regarding the ECtHR's approach there is no saying what I would disagree with as the Court is still meandering its way to a consistent account of jurisdiction.⁵¹ My guess would be that the Court would be reluctant to find that Ireland had jurisdiction. However, if my reading of some of the newer case law, in particular the cases relating to military checkpoints such as *Jaloud v Netherlands*⁵² and *Pisari v Moldova and Russia*,⁵³ is correct, the Court may well come to a different result.⁵⁴ Regarding Ó Cuinn and Skogly's approach, my quibble is with the justification of Ireland's jurisdiction and its precise scope, as opposed to its establishment as such. That is, I disagree with their reasoning but not with the result. Let me set out why.

According to the approach I defend in this thesis in chapters 3 to 5, what matters here is the scope of political power over individuals in terms of activities that it regulates. That is – to use the terminology of the ECtHR – the only relevant consideration is a) whether the power is a public function and b) what human activities or areas of human existence it touches.⁵⁵ As to the role of the invitation of the territorial state – Bahrain – the following thoughts are warranted. Essentially, consent from the host state is irrelevant for the establishment of jurisdiction in international human rights law because it is a matter of duty, not right.⁵⁶ This means that a state does not

⁴⁹ Ibid 768.

⁵⁰ Regarding the relationship of justification and fit, see chapter 2, section 2 above.

⁵¹ On why one might think that this is a problem see Raible, 'Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office: Victim Status, Extraterritoriality and the Search for Principled Reasoning' (2017) 80 *Modern Law Review* 510.

⁵² App No 47708/08 (ECtHR, Judgment, 20 November 2014).

⁵³ App No 42139/12 (ECtHR, Judgment, 19 October 2015).

⁵⁴ This is because one could read into said case law a concept of political power that is very closely related to – if not the same as – the one I am defending in this thesis. See further Raible, 'The Extraterritoriality of the ECHR' (n 42).

⁵⁵ See, in particular, chapter 5 above.

⁵⁶ See chapter 6 above.

need invitation or consent of the territorial state in order to have jurisdiction. On the other hand, the fact that a state acts extraterritorially by invitation or consent does not, in and of itself, establish jurisdiction in international human rights law. Accordingly, consent or invitation are neither necessary nor sufficient to determine whether a state has jurisdiction.

Outside of the context of armed conflict and belligerent occupation, it is of course true that public powers will often be exercised abroad by invitation or at least with consent of the territorial state. Otherwise, they may constitute unlawful intervention or even use of force.⁵⁷ However, this only means that the presence of an invitation is a paradigmatic facet of political power held or exercised extraterritorially. An invitation is not useful, however, in order to establish *whether* a state had political power but instead, if present, offers insight into *the extent* to which this might be the case. But again, the invitation is evidence rather than criterion for the establishment of jurisdiction.⁵⁸ In other words, it is a useful observation when we are looking for potential political power but little more.

The only relevant criterion of jurisdiction is whether Ireland had (as opposed to exercised) political power over a particular area of human activities. In the present case, Ireland held political power over individuals in Bahrain in the area of medical education because it was not only providing technical assistance but also the regulatory framework which impacts access to and enjoyment of higher education. Further, Ireland also oversees and regulates clinical experience by the students. While students, and their teachers, are engaged in this activity they are effectively medical staff at the training hospitals. However, Ireland does not oversee the running of these institutions as such. Consequently, its political power – and thus jurisdiction – even during this phase of the medical training only extends to medical students and their education – that is – instruction staff, but not to patients and their access to healthcare.

Ó Cuinn and Skogly argue that Ireland had obligations to assess the allegations of torture and mistreatment in 2011 when it was assessing the training facilities in 2013 and should have refused accreditation based on the evidence available.⁵⁹ They cite two facets of this obligation. First, article 3 ECHR requires positive steps to be taken in

⁵⁷ See, eg, Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 811-18.

⁵⁸ For further elaboration on the difference see Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 33) 870-78; and chapter 7 above.

⁵⁹ Ó Cuinn and Skogly (n 1) 771-72.

order to prevent torture and mistreatment. If a threat of mistreatment originates in a student's medical education, I agree with this assessment. Second, Ó Cuinn and Skogly draw on the obligation not to recognise as lawful situations arising from a serious breach of international law.⁶⁰ Bahrain may well have violated the prohibition of torture, and the accreditation of the teaching hospitals by Ireland could be classified as such recognition. However, this is not an obligation stemming from international human rights law. The case for jurisdiction as a necessary criterion of this obligation would have to be made in the first place, and rely on the values picking out the particular area of international law it rests on.⁶¹ Thus, I am inclined to agree with the identification of the duty of non-recognition and maybe even with the assessment that Ireland has breached it. However, I would not argue that this is anything to do with the jurisdictional link established above. The reason lies in the interpretation of jurisdiction. This interpretation rests on the values of integrity and equality because it describes the relationship between individuals and states that justifies the allocation of human rights obligations towards those individuals and those states. A duty of non-recognition is not a human rights obligation as such and would thus not require jurisdiction at all.

The example of the cooperation in education between Ireland and Bahrain highlights that notions of (sovereign) consent, which are a lingering expression of the territoriality of jurisdiction,⁶² should be disregarded and replaced with the criterion of political power. Further, it illustrates that the scope of jurisdiction needs to be defined with reference to the human activities referred to in the rights provisions of treaties. That is, it is not only relevant which state had political power but also what activities this power concerned in actuality. In the case of Ireland overseeing medical training in Bahrain, the political power – manifested by the fact of public oversight – only extends to admissions, training, and awarding degrees as well as any quality control related to these activities. The only area of human activity under the political power of Ireland that clearly overlaps with a human rights provision is (access to) education. Consequently, Ireland has jurisdiction with regard to the rights to education and non-discrimination regarding the access and enjoyment of education – to the extent that it is an international human right. In sum, jurisdiction as political power over aspects of

⁶⁰ Ibid; Article 41(2) ARSIWA.

⁶¹ See chapters 1 and 2 above.

⁶² See chapter 6 above.

human activity explains when Ireland has jurisdiction, why that is the case, and because of this allows for a nuanced outcome that fits with the legal materials as well as with moral intuitions.

3 Special Economic Zones

3.1 Factual Background

Special Economic Zones (SEZ) encompass a rather heterogeneous group of concepts. Nevertheless, they can be defined as

demarcated geographic areas contained within a country's national boundaries where the rules of business are different from those that prevail in the national territory. These differential rules principally deal with investment conditions, international trade and customs, taxation, and the regulatory environment; whereby the zone is given a business environment that is intended to be more liberal from a policy perspective and more effective from an administrative perspective than that of the national territory.⁶³

As such, the term SEZ refers to three main features. The zones are special because they are subject to a differential regulatory regime. Economic denotes the main activity carried out in these areas and the term zone refers to the fact of their territorial and – to an extent – legal demarcation.⁶⁴ While there are different types of such zones, they have in common that the rights and privileges of shareholders in such projects habitually go beyond both businesses outside of special economic zones and ordinary land owners in various ways. There are different types of SEZs with differing policy aims and implications.⁶⁵

The Lekki Free Zone on the Lekki peninsula in Nigeria is an example of such a SEZ.⁶⁶ While its name suggests that it is a free trade zone, it is in fact a hybrid vehicle, combining aspects of different models. The stated aim of the project is to become a satellite city of Lagos, from which it is about 50 kilometres away.⁶⁷ According to the construction plans, the first phase of its development consists of 30 square kilometres

⁶³ Thomas Farole, *Special Economic Zones in Africa – Comparing Performance and Learning from Global Experiences* (World Bank 2011) 23.

⁶⁴ Ibid 26-27; see also FIAS, *Special Economic Zones – Performance, Lessons Learned, and Implications for Zone Development* (World Bank 2008)

⁶⁵ For a typology see FIAS (n 64) 3.

⁶⁶ Publicly available facts about this project are patchy. I am basing my analysis of the scenario on the facts as I give them here. However, this account should not be taken as an attempt to establish the exact details of the Lekki Free Zone, its development, operation, or exact regulatory framework.

⁶⁷ At least, this is the description available in the project's publicly available prospective: <http://en.calekki.com/news_detail/newsId=233.html> accessed 25 January 2017.

of land, 27 square kilometres of which are set aside for general urban construction.⁶⁸ If realised, this area is estimated to accommodate 120'000 residents and would integrate an array of industries.⁶⁹

The land required to establish the SEZ as designated by the Lagos State Government is inhabited by a number of coastal communities. They rely on the area for their 'homes, ancestral villages, cultural and burial grounds, farmlands and access to fishing resources.'⁷⁰ At least part of the necessary land was acquired forcibly and without the legally mandated consultation of the affected communities or social and environmental assessments.⁷¹ The local communities protested this cause of action, which resulted in a protracted dispute.⁷² As a consequence, the affected communities won a transfer of shares of the projects as well as some assurances of preferential treatment in employment offered.⁷³

Lekki Free Zone is a joint venture. The two Nigerian shareholders are the Lagos State Government and Lekki Worldwide Investment Limited and hold 20 per cent of the shares each. The majority shareholder – at 60 per cent – is the China-Africa Development Fund.⁷⁴ Recent scholarly description of the Lekki Free Zone focuses on its being a public-private-partnership initiative.⁷⁵ Such initiatives are described as bringing together the following typical features. The public sector – usually in the form of the authorities of the host state – provides policy formulation, regulation, and enforcement. The private sector, on the other hand, provides planning, construction and day-to-day operation of the special economic zone.⁷⁶

Indeed, the Nigerian legislation on special economic zone seems to envisage exactly this model of a public-private-partnership. Special economic zones in Nigeria are (supposed to be) regulated by the Nigeria Export Processing Zones Authority Decree (NEPZA Act).⁷⁷ It establishes in its section 2(1) the Nigeria Export Processing

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Coomans and Künnemann (n 2) 95.

⁷¹ Ibid.

⁷² Ibid 95-97.

⁷³ Deborah Brautigam and Xiaoyang Tang, 'China's Investment in Special Economic Zones in Africa' in Thomas Farole and Gokhan Akinci (eds), *Special Economic Zones – Progress Emerging Challenges and Future Directions* (World Bank 2011) 93.

⁷⁴ Lekki Webpage (n 67). For a brief account of partnerships, events, and investments up to 2010 see Brautigam and Tang (n 73) 78-79.

⁷⁵ See Farole (n 63) 39-42.

⁷⁶ Ibid 39.

⁷⁷ (DN63) 1992.

Zones Authority (NEPZA) and stipulates that this government agency is a body corporate and has power to demarcate and regulate special economic zones in the country.⁷⁸ Relevantly for our purposes, the authority provides for particular parts of law enforcement ranging from customs, police, and immigration functions to dispute resolution between employers and employees.⁷⁹

However, there are reasons to believe that there are a number of practical difficulties that may blur the line. For one, concerns have been raised that regulation is not always effective in practice. The reasons range from institutional overlaps to uncertain budgets, and consequences include a lack of labour protections.⁸⁰ In addition, the Lekki Free Zone involves Chinese state-owned companies as well as the Chinese Government. Two forms of backing stand out. First, the China-Africa Development Fund – the majority shareholder – is entirely funded by the China Development Bank, a government policy bank.⁸¹ Second, the project won approval under China’s Ministry of Commerce “Going Global” initiative and because of this receives further, specific funding from the Chinese Government.⁸² Thus, while it is technically true that Lekki Free Trade Zone is a form of public-private partnership, China’s authorities are involved to a significant extent and – faced with a vacuum resulting from ineffective regulation – may well have greater power (in the sense of ability, not right)⁸³ to regulate than a look at the legislation suggests.

The question here is whether China has obligations towards individuals in Nigeria when they come into contact with the Lekki Free Zone’s activities and to what extent this is the case.

3.2 Human Rights Provisions

When an SEZ is being established, implicated human rights provisions include the right to an adequate standard of living as enshrined in article 11 of the ICESCR.⁸⁴ The transfer of lands to a special economic zone may infringe upon the right to housing

⁷⁸ Ibid sections 1 and 4.

⁷⁹ Ibid sections 4(c) and (e).

⁸⁰ Farole (n 63) 187, 259-60.

⁸¹ Brautigam and Tang (n 73) 71.

⁸² Ibid 69, 78-79.

⁸³ See chapters 4 and 6 above.

⁸⁴ Other rights, such as the rights to privacy in article 17 ICCPR or the right to meaningful participation found in article 25 of the same instrument, are also potentially relevant. However, China has signed but not ratified the ICCPR, which precludes it from incurring any obligations under this instrument. This section will thus not discuss these rights further.

and – particularly in the case of subsistence farmers – the right to food, which are both seen to form part of that provision. For a SEZ to be established, land needs to be repurposed and this process usually involves taking away rights of land use from a habitually resident population. Depending on whether they only reside on the land or also use it for food production, different parts of the right to an adequate standard of living are important. In any event, and even if one were to take the stance that the right to food is not relevant here, the right to housing protects against forced evictions at the very least.⁸⁵ Forced evictions in this context are defined as ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’⁸⁶ When large areas of land are repurposed in the name of development, as is the case with the establishment of SEZs, forced evictions in this sense are common and widespread.⁸⁷

Once an SEZ is established, articles 6 to 9 of the ICESCR become relevant.⁸⁸ These are the right to work in article 6, the right to just and favourable conditions of work as found in article 7, the right to form and be part of trade unions in article 8, and the right to social security as enshrined in article 9. Special economic zones often provide most of the employment in their area. Any issues regarding discrepancies in bargaining power are therefore even more pressing than they usually are when it comes to special economic zones.⁸⁹ The Nigerian Labour Congress and the ILO have expressed concern over working conditions and the right to form trade unions in these zones.⁹⁰ One of the main reasons cited is that special economic zones and the legislation relied on to establish them tend to relax the regulative framework dealing with these issues.⁹¹ Finally, throughout all stages of the establishment and running of

⁸⁵ CESCR, *General Comment No 7: The Right to Housing (Art 11.1) – Forced Evictions* (20 May 1997) E/1998/22.

⁸⁶ *Ibid* para 3.

⁸⁷ *Ibid* para 7.

⁸⁸ This is illustrated by the fact that the International Labour Organization (ILO) finds it necessary to monitor Export Processing Zones – which are a type of special economic zone – regarding working conditions, unions and their members, and industrial relations more generally. See <http://www.ilo.org/actrav/areas/WCMS_DOC_ATR_ARE_EPZ_EN/lang--en/index.htm> accessed 22 September 2017.

⁸⁹ The most influential approach to labour rights as an issue of bargaining power was developed by Otto Kahn-Freund. See Otto Kahn-Freund, *Kahn-Freund's Labour and the Law* (P L Davies and others eds, 3rd edn, Stevens 1983).

⁹⁰ Nigeria Labour Congress, *The State of Trade Unionism and Industrial Relations Practice in Nigeria's Export Processing Zones* (International Labour Organization 2012). See also FIAS (n 64) 40.

⁹¹ Nigeria Labour Congress (n 90) 10.

a special economic zone the right to non-discrimination according to article 2(2) of the ICESCR is central.

3.3 Previous Analysis

Commentary regarding extraterritorial human rights obligations of China in relation to the Lekki Free Zone has focused on foreseeability and preventive steps. Coomans and Künnemann observe the following. First, China is said to have obligations to respect economic and social rights of individuals on the Lekki peninsula because of the involvement of state-owned companies.⁹² They further note that China also has obligations to protect under the ICESCR, which is said to follow from the fact that private companies involved are registered in China.⁹³

China's human rights obligations are framed as a violation of article 11 ICESCR employing the following (partially implicit) reasoning.⁹⁴ First, the removals of the local communities constituted forced evictions in the sense discussed above,⁹⁵ b) were foreseeable within the purview of the project, and c) China had control over the majority shareholder of the project and was thus in a position to exercise decisive influence in order to prevent such forced evictions.⁹⁶ The relevant connection therefore is that China could foresee the displacement and had the capacity to influence the process and result. It is implied that foreseeability and capacity are the relevant connections necessary for human rights obligations to be established, which is reminiscent of both interest-based accounts of human rights that I rejected as flawed.⁹⁷ The authors do not analyse obligations incurred while running a SEZ like the Lekki Free Zone.

The CESCR also considered China's business engagements abroad. In its 2014 Concluding Observations regarding China the Committee remarked that

[it] is concerned about the lack of adequate and effective measures adopted by the State party to ensure that Chinese companies, both State-owned and private, respect economic, social and cultural rights, including when operating abroad.⁹⁸

⁹² Coomans and Künnemann (n 2) 100.

⁹³ Ibid 100-01.

⁹⁴ Ibid 100-02.

⁹⁵ See section 3.2 above.

⁹⁶ See for the complete set of arguments and relevant citations Coomans and Künnemann (n 2) 100-02.

⁹⁷ See chapter 2, section 1.2 above.

⁹⁸ CESCR, *Concluding Observations: China* (13 June 2014) E/C.12/CHN/CO/2 para 13.

Based on this concern, the Committee recommended that China ensure that it enacts appropriate regulations dealing with the conduct of its companies abroad. Further, China should ensure the legal liability of these companies for violations of economic and social rights.⁹⁹ To recommend this course of action, the committee must be assuming the following. First, non-state actors are potential human rights duty bearers. This assumption is necessary in order to say that companies abroad can and do violate economic and social rights: it implies that these companies – a category of non-state actors – have relevant obligations in the first place. Otherwise, it would not make sense to hold them accountable for human rights violations. Second, China has an extraterritorial obligation to not just respect but also protect individuals against the conduct of Chinese companies. China is said to have a duty to do this both preventively and retroactively. Third, the fact that Chinese companies operate abroad and might harm individuals is sufficient to establish China's obligations under the ICESCR. At no point, however, does the Committee explicitly establish *why* this link is sufficient.

These analyses focus on foreseeable effects and steps of prevention without considering whether China had jurisdiction. The result is that China is said to have obligations towards the displaced population as well as anyone involved in, working, or living within the Lekki Free Zone. Neither Coomans and Künnemann nor the CESCR explicitly address the potentially relevant problem of non-state actors' human rights obligations nor do they spell out the required degree of China's power over (former) residents and workers on the Lekki peninsula.

Milanovic has not to my knowledge taken a stance on SEZs. However, given his preferred model of extraterritorial application, he would have to argue that China has what he refers to as negative human rights obligations in any case.¹⁰⁰ Regarding the positive obligations, for example the obligation to protect residents from violations perpetrated by the Chinese companies involved, he would most likely maintain that China does not owe any to the residents or workers in the Lekki Free Zone. The reason would be that China does not have jurisdiction because it lacks relevant control over the area.¹⁰¹

Besson, on the other hand, would require China to have jurisdiction understood as *de facto* political and legal authority in order to establish any human rights

⁹⁹ Ibid para 13 a) and b).

¹⁰⁰ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 38) 212-17.

¹⁰¹ Ibid 210.

obligations, including negative ones.¹⁰² Regarding the Lekki Free Zone she would most likely reject China's jurisdiction and thus human rights obligations on account of two reasons. First, authority only counts as jurisdiction if it is held over a reasonably large number of interdependent stakes.¹⁰³ This means that authority that is held only with regard to the repurposing of the land, or only over workers, and only with regard to the employment relationship, to give just two examples, would presumably not meet the threshold. On my reading of Besson's view, the same is true even if we assume that China controls the Chinese shareholders and they manage the day-to-day workings of the Lekki Free Zone as this would concern only economic terms and access rights. Second, Besson stresses that her account is one of jurisdiction in international human rights law and that – usually – states are the sole duty bearers in this context.¹⁰⁴ Accordingly, involvement of non-state actors – even largely state-controlled ones as in this case – would mean that international human rights law cannot come into the picture due to this factor alone.¹⁰⁵ Besson would thus presumably deny that China or Chinese companies involved owe any human rights obligations to the population of the Lekki Peninsula. However, this does not preclude China from bearing what Besson refers to as responsibilities for human rights.¹⁰⁶

3.4 Analysis Based on Jurisdiction as Political Power

Understanding jurisdiction as political power again yields results that differ from the conclusions summarized above. My main disagreements are the following. Coomans and Künnemann neglect the relationship of jurisdiction, which is central to the approach defended in this study. Consequently, even if some of my conclusions overlap with theirs, the reasons differ significantly. In particular, reliance on foreseeability and capacity as connecting links translates into utilizing influence instead of power as the central concept in establishing the relevant relationship underlying the application of human rights law.¹⁰⁷

¹⁰² Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 33) 864-65; see also section 8.2.3 above.

¹⁰³ Ibid 865.

¹⁰⁴ Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights:' (n 34) 254.

¹⁰⁵ For a sketch of reasons why non-state actors are excluded see *ibid* 258.

¹⁰⁶ *Ibid* 261-68.

¹⁰⁷ I have argued that this is a mistake. See chapter 4, section 3 above.

Milanovic's approach exhibits some signs of crudeness here. His account would mean that a state-influenced Chinese development fund that may have significant regulatory power owes fewer human rights obligations than a state which is operating with very limited personnel in the chaos of belligerent occupation.¹⁰⁸ However, he is unable to explain why this is. Recall that capacity to meet positive human rights obligations is a key criterion on his account – at least implicitly.¹⁰⁹ However, if capacity is really that important, surely he would have to come to the opposite conclusion.

Besson, on the other hand, in this example gives away how high her proposed threshold of jurisdiction really is. In addition, her rejection of even the possibility of non-state actors bearing human rights obligations means that she has to prioritize form over substance. This is because her focus on democracy means that she would have to exclude non-state actors even when they take on state-like, that is public, functions.

Jurisdiction as political power suggests that China, and, in these particular circumstances China-Africa Development Fund as well, owe both negative and positive human rights obligations to residents and workers of the Lekki Free Zone. However, the obligations only arise once the Chinese actors involved take on their duties in constructing and/or running the SEZ. On the other hand, if the facts are as given above, China does not owe human rights obligations to members of the communities who were displaced before the construction of the zone. The reasons are as follows.

First, political power and the application of rules does not have to permeate all potential public functions. On the contrary, political power can manifest itself in a mostly economic environment. The only relevant considerations are whether the function in question is a) conceivably public and b) establishes power over a human activity covered by international human rights law.¹¹⁰ This is evidently the case in a special economic zone. As outlined above, the Chinese shareholder manages the zone and exercises at least some regulatory functions. Further, in the case of rights contained in the ICESCR that deal with employment relationships the second criterion is also

¹⁰⁸ This is the implication of his definition of jurisdiction as effective control over an area together with his argument that positive obligations cannot arise extraterritorially if the violations are committed by non-state actors. On the latter see Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 38) 218-19.

¹⁰⁹ See chapter 3, section 3 above.

¹¹⁰ See chapter 5, section 3.2 above.

met. This is particularly true because the shareholders of special economic zones in Nigeria have managed to frustrate the application of Nigerian labour legislation¹¹¹ and have thus manifested that they in fact do hold political power relating to the regulation of these human activities.

Second, my account of jurisdiction allows for political power to be mediated through and/or held by non-state actors. Again, the only relevant considerations are that these institutions have the right kind of potential and are applying the (mostly legal) rules themselves.¹¹² In the case of the Lekki Free Zone, the relevant non-state actors encounter areas where the Nigerian Economic Zone Authority seems to be weak in its provision of public functions. The nature of SEZs then allows these non-state actors to step in. Further, the relevant non-state actors are partly state-controlled and at least presumably subject to policy decisions, which makes their political nature even more pronounced. I stress that this latter feature of the present case is not a requirement to meet the threshold of jurisdiction as I defend it. However, it provides further evidence in favour of my conclusion. Finally, it is worth noting that China's or, in fact, the China-Africa Development Fund's *capacity* or *influence* are not relevant to this analysis.¹¹³

Accordingly, my theory of jurisdiction suggests that China has obligations towards at least the present population and/or workers of the Lekki Free Zone. It further advocates recognising that non-state actors may also have jurisdiction because of their hybrid role in this type of project. The upshot is that in this case I agree with the CESCR's conclusions to an extent, but that the Committee's reasons and mine differ significantly.

¹¹¹ Nigeria Labour Congress (n 90) 10.

¹¹² See chapter 5, section 5 above.

¹¹³ See chapter 2, section 1.2 (on interest-based accounts of human rights); chapter 3, section 3 (on the role of capacity for notions of jurisdiction); and chapter 4, section 3 (on why influence is conceptually speaking inferior to power in this context).

4 Export Subsidies for Agricultural Goods

4.1 Factual Background

The EU¹¹⁴ is infamous for making use of export subsidies for agricultural goods through its Common Agricultural Policy (CAP).¹¹⁵ Put simply, export subsidies are direct payments making up the difference between EU internal market prices and lower world market prices.¹¹⁶ One of their effects is to enable EU producers to dump their products in developing countries at prices below production costs, allowing these producers to take away market shares from other exporting (mostly developed) economies and – more significantly for our purpose – to compete unfairly with local producers in developing countries.¹¹⁷ The detrimental effects on local producers in developing countries are significant and have been demonstrated widely.¹¹⁸ Of course, lower prices do not only harm producers but also benefit consumers.¹¹⁹ And while this is a relevant consideration, it does not necessarily mitigate the experiences of local farmers.

The most striking example of market distorting export subsidies is said to be the EU's sugar regime, especially prior to its reform in 2006.¹²⁰ The EU produces mainly beet sugar, which incurs higher production costs when compared with sugar

¹¹⁴ As the EU is technically a non-state actor, one could object at this point that this is not a relevant example because it is not paradigmatic. However, for argument's sake, I am assuming here that a) it would be entirely plausible to say that acts of the EU are also acts of the member states and b) that any such measures as discussed here have the same effects regardless of whether they are adopted and implemented by the EU or, for example, China, which would be a potential duty bearer in any case.

¹¹⁵ The legal basis for the CAP regime are articles 38-44 of the Treaty on the Functioning of the European Union. Export subsidies are a form of direct payments and are not the only tool employed under the umbrella of the CAP. However, direct payments account for the majority of CAP expenditure and are even more central after the 2013 reform. See Jean-Christophe Bureau and others, 'The Common Agricultural Policy after 2013' (2012) 47 *Intereconomics* 316, 321-22.

¹¹⁶ See, eg, Alan Matthews, 'The European Union's Common Agricultural Policy and Developing Countries: The Struggle for Coherence' (2008) 30 *Journal of European Integration* 381, 383-84.

¹¹⁷ See *ibid.* For a critical view see Arvind Panagariya, 'Agricultural Liberalisation and the Least Developed Countries: Six Fallacies' (2005) 28 *World Economy* 1277.

¹¹⁸ See, eg, Kevin Watkins, *Dumping on the World: How EU Sugar Policies Hurt Poor Countries* (Oxfam Briefing Paper 61, 2004); Mark Curtis, *Milking the Poor – How EU Subsidies Hurt Dairy Producers in Bangladesh* (Actionaid 2011).

¹¹⁹ In the case of sugar, this is likely negligible because it is not only – very probably – a luxury good, but also – even more probably – unhealthy. That is, the benefit to consumers is unlikely to outweigh the detriment of producers. This is different when it comes to other foodstuffs such as grains or pulses, in which case the benefit to, for example, the urban poor may in fact be considered more important or at least weightier than the harm producers suffer. I make this point with thanks to Oisín Suttle for raising the issue in a conversation.

¹²⁰ For a summary see Vandenhoe (n 3) 75-83, where he carefully traces the different EU sugar regimes until 2007. However, this is not the only example. The same phenomenon applies to poultry produced in the EU and exported into developing countries. On chicken exports to Ghana specifically see Coomans and Künnemann (n 2) 17-19.

made from cane. However, at least until 2006 EU export subsidies were high enough to make exporting beet sugar profitable. Further, the direct payments kept prices so low that they could (and did) push local producers of cane sugar out of their local markets as well as export markets,¹²¹ even though they were producing sugar at lower costs and more efficiently. In other words, the EU sugar regime has exactly the detrimental effects on producers in developing countries that is generally attributed to export subsidies. It is a striking example in particular because cane sugar, which is produced in developing countries, benefits from more efficient production as opposed to beet sugar but was still priced out. In sum, the EU sugar regime has harmed or destroyed livelihoods of small scale farmers in developing countries.

It is true that the sugar regime has been reformed in 2006 and the CAP was overhauled in 2013. Both reforms aimed at greater market liberalization but no CAP reform has significantly reduced the overall spending on direct payments since their inception in 1992.¹²² On a more meaningful note, the EU has since agreed to gradually phase out all export subsidies.¹²³ However, this only means that the problems created or exacerbated by such economic policies are set to gradually decrease. It does not mean that the example is not useful in order to illustrate, which economic measures and effects trigger the extraterritorial application of human rights treaties and which do not.¹²⁴

4.2 Human Rights Provisions

The most important human rights provision implicated here is the right to an adequate standard of living in article 11(1) of the ICESCR. The wording includes the rights to adequate food, clothing and housing, and to the continuous improvement of living conditions. The right to adequate food is further specified in article 11(2), which recognizes the right of everyone to freedom from hunger. Article 11(2)(a) stresses that states should cooperate internationally ‘...to achieve the most efficient development and utilization of natural resources’ and article 11(2)(b) calls on states to ‘[take] into

¹²¹ Penny Fowler, *A Sweeter Future? The Potential for EU Sugar Reform to Contribute to Poverty Reduction in Southern Africa* (Oxfam Briefing Paper 70, 2004) 12-13.

¹²² Bureau and others (n 115) 321-22.

¹²³ Alan Matthews, ‘The EU has finally Agreed to Eliminate All Export Subsidies... Three Cheers!’ (CAPReform Blog, 25 November 2015) <<http://capreform.eu/the-eu-has-finally-agreed-to-eliminate-export-subsidies-three-cheers/>> accessed 22 September 2017.

¹²⁴ I am drafting this after a newly inaugurated US President promised to put ‘America first’, which may well point to a new age of reinvigorated protectionism.

account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.’ The CESCR emphasizes that hunger and malnutrition are not rooted in an absolute lack of food but in a lack of access to available food.¹²⁵

The right to an adequate standard of living and the right to adequate food in particular are said to be implicated here because of the detrimental effects of subsidies on farmers in developing countries. The claimed connection is this: if a farmer is unable to sell her produce at a price that covers production costs because of subsidies, her business will eventually falter and she will have no source of income. In turn, this usually means she will lack the funds to buy food or she will have to resort to subsistence farming. Either of these options plausibly harm her prospects of accessing suitable food as well as her food security, both of which form part of the right to adequate food as found in article 11 of the ICESCR.¹²⁶

4.3 Previous Analysis

The abstract question regarding the extraterritoriality of international human rights law in this context is the following: do the detrimental transnational economic effects stemming from distorting subsidies violate human rights obligations of countries making use of these subsidies towards individuals in third states that suffer the consequences? Authors who address extraterritorial human rights obligations in the area of economic and social rights tend to answer this question in the affirmative.¹²⁷ Interestingly, these conclusions are not only defended with regard to low prices – which affect producers – but also with respect to high prices – which affect consumers.¹²⁸

When this is done, the reasoning generally displays the following elements. First, an economic policy measure – be it speculation, subsidies, or liberalisation – is said to harm individuals outside of the state where the measure is adopted.¹²⁹ And

¹²⁵ CESCR, *General Comment No 12: The Right to Adequate Food* (12 May 1999) E/C.12/1999/5 para 5.

¹²⁶ *Ibid* paras 6-7.

¹²⁷ Vandenhole (n 3); Margot E Salomon, ‘Deprivation, Causation and the Law of International Cooperation’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013).

¹²⁸ See, eg, Smita Narula, ‘Reclaiming the Right to Food as a Normative Response to the Global Food Crisis’ (2010) 13 *Yale Human Rights and Development Law Journal* 403.

¹²⁹ See, eg, Salomon (n 127) 263-67, 72-76.

second, the harm was either a reasonably foreseeable consequence of such policies¹³⁰ or the state in question has the capacity to remedy the effects.¹³¹ Such arguments skip, but undoubtedly assume, that human rights are grounded in important human interests, that they entail duties to effect certain outcomes and that the guiding principle justifying who is to bear these duties is capacity plus least cost.¹³² What is allocating the duty here are neither the affected individual's interests nor the negative effects of policy measures. Instead, whoever has the capacity to do something – anything – should bear respective obligations. Accordingly, on this analysis, the EU or its member states respectively have the capacity to stop administering subsidies that enable the dumping of sugar and thus have the extraterritorial human rights obligation to do so.

Vandenhoe's analysis of the EU sugar policy considering the extraterritoriality of the ICESCR, on the other hand, holds the following. First, the ICESCR contains – at the very least – an obligation to respect the right to food extraterritorially. The main content of this obligation is based on the requirement to cooperate internationally and requires states to refrain from interference with the progressive realisation of economic, social and cultural rights abroad, particularly in developing countries.¹³³ Accordingly, it is fair to assume that Vandenhoe uses the term cooperation instead of jurisdiction in order to establish whether a state has human rights obligations or not. He concludes that the detrimental effects on producers described above do in fact constitute such an interference.¹³⁴ Second, such interferences may be justified under the ICESCR according to article 4, which requires any such measures to be provided for by law, in line with the nature of the rights and to be aimed at promoting general welfare in a democratic society.¹³⁵ However, Vandenhoe concludes that sugar subsidies – in particular those, which incentivise surplus production and dumping – are not justifiable and thus constitute a violation of article 11 ICESCR.

Most notable – for our purposes – Vandenhoe puts forward a threefold argument that supports extraterritorial obligations in this context. First, the ICESCR does not have a jurisdiction clause and is therefore potentially applicable to any state

¹³⁰ Ibid 281.

¹³¹ Ibid 282-88.

¹³² On the mistakes this kind of reasoning involves see chapters 2, 3, and 5 above.

¹³³ Vandenhoe (n 3) 91-92.

¹³⁴ Ibid 92.

¹³⁵ Ibid 93.

act regardless of where affected individuals might be found.¹³⁶ Second, he takes the mentioning of international assistance and cooperation in the Covenant to be the basis for extraterritorial obligations – at the very least – of developed states towards individuals in developing states.¹³⁷ And third, he maintains that the obligation to respect economic and social rights is the only clearly established extraterritorial obligation. However, he does so because he identifies a lack of clarity regarding positive obligations to protect and fulfil.¹³⁸ His reason is thus not identifiably of a conceptual, let alone normative nature. Finally, he concludes that acts of the EU are imputable to the member states.¹³⁹ In more recent work, Vandenhole has further expressed the view that ‘international cooperation for development’ is a human rights obligation.¹⁴⁰ This does not easily chime in with the analysis described immediately above. Instead it is more akin to the approach that classifies potentially harmful economic policies as human rights interferences, where the potential to harm coupled with a capacity to avoid it is taken to establish a human rights obligation.

Milanovic’s view would yield similar results to Vandenhole’s as he would make the same distinction between negative and positive obligations, although their reasons differ.¹⁴¹ Besson would likely disagree with Vandenhole. She would instead hold that states might well be required to take affected interests into account as part of their responsibilities for human rights rather than their human rights obligations.¹⁴² She stresses that these responsibilities are distinct and characterises them as belonging to the realm of global justice.¹⁴³ However, a closer look at her list of potential content of such responsibilities reveals that responsibilities to respect might not correspond to a (human) right and might thus not be directed at particular right holders.¹⁴⁴ This means that ultimately Besson’s account might not require states to take into account adverse effects on individuals. Instead, they are aimed at preserving the ability of states that do

¹³⁶ Ibid 87-88.

¹³⁷ Ibid 88-89, 91.

¹³⁸ Ibid 88-91.

¹³⁹ Ibid 94-98.

¹⁴⁰ Wouter Vandenhole and Wolfgang Benedek, ‘Extraterritorial Human Rights Obligations and the North-South Divide’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 333.

¹⁴¹ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 38) 212-17.

¹⁴² See Besson, ‘The Bearers of Human Rights’ Duties and Responsibilities for Human Rights’ (n 34) 261-67.

¹⁴³ Ibid 261.

¹⁴⁴ Ibid.

have human rights obligations to honour them.¹⁴⁵ To my mind, it is not clear how this account would apply to economic measures.

Overall, previous analyses all display shortcomings. Accounts that require any kind of potential harm to impose human rights obligations, tend to be over-inclusive. Approaches relying on the morally irrelevant distinction of negative and positive duties, on the other hand, may reach reasonable results but do so at the expense of conceptual and normative clarity. Finally, where human rights obligations and responsibilities for human rights are distinguished, the result of the analysis of subsidies is unclear to begin with.

4.4 Analysis Based on Jurisdiction as Political Power

When we accept that a state only has human rights obligations towards individuals when relevant areas of their activity or existence are subject to political power of that state, we can paint a different picture. My analysis suggests that effects of subsidies do not trigger jurisdiction because they a) do not constitute political power over individuals and b) the rules in question are not being applied to the individuals suffering the consequences. Let me take the criteria, and the reasons why subsidies of sugar do not normally appear to meet them, in turn.

Why do the effects of subsidies not amount to political power, given their detrimental effects? This question may be answered by reference to the difference between power and influence.¹⁴⁶ While a decision taken at home but affecting individuals abroad certainly constitutes influence, it does not constitute power. After all, subsidies do not effect a farmer's situation but only contribute to it. Of course, the same is true for farmers receiving subsidies at home. However, the situation of receiving or not receiving subsidies for a good one produces within a more or less complete legal system only contributes to one's situation. It is the same institution – the same state – which has power over the rest of one's situation. Which means that in a case like this, the real work is being done by the second criterion. The rules must be applied to the individuals in question. A touch of their consequences is not enough. Subsidies and the rules that implement them are applied only to producers who are eligible to receive them in the first place. Producers abroad are not, and are thus not within the jurisdiction of the subsidising state.

¹⁴⁵ Ibid 262.

¹⁴⁶ See chapter 4, section 3 above.

None of this is to say that detrimental effects of subsidies are not morally relevant. Such measures have been consistently shown to be (directly or indirectly) harmful to small-scale, local producers in developing countries. Accordingly, the value of equal respect for individuals' choices and well-being is clearly implicated. However, international human rights law is not the only system of allocating rights and duties that is capable of dealing with this situation. Notions such as 'sovereigns as trustees of humanity'¹⁴⁷ or distributive justice in trade law¹⁴⁸ could also – and to my mind more helpfully – be utilised in order to take the well-being of individuals into account. It is telling in this respect that EU export subsidies were set to be phased out by 2018 not primarily because of human rights concerns but due to pressure from the US and developing countries to abolish them owing to concerns over trade relations, development, and international economic law.¹⁴⁹

The example of the EU sugar regime also closes one of the circles of this thesis. The problems discussed in the introductory puzzles, but also in chapter 2 arise – in part – because it is difficult to reconcile international human rights law as a system of accountability with questions of full distributive justice. If human rights, including economic and social rights, are supposed to be both fundamental and special, as the international legal practice and human rights discourse suggest, it is not possible that every question of fair distribution of resources and opportunity is also a human rights issue. I have argued that these domains may well be regulated by the same value – equality – but by different principles.¹⁵⁰ International legal human rights allocate corresponding duties to institutions which have political power over and apply rules to individuals, whether at home or abroad. Employing this definition of jurisdiction in a case dealing with subsidies allows us to limit extraterritoriality in a principled manner, even if we do not accept that human rights primarily address questions of distribution. My hope is that this demonstrates a further merit of the theory of extraterritoriality defended here; namely, its ability to plug into current dialogues without asking readers to accept too much in terms of political philosophy.

¹⁴⁷ See Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295.

¹⁴⁸ See Oisín Suttle, 'Equality in Global Commerce: Towards a Political Theory of International Economic Law' (2014) 25 *European Journal of International Law* 1043.

¹⁴⁹ Matthews, 'The EU has finally Agreed to Eliminate All Export Subsidies...' (n 123).

¹⁵⁰ See chapter 2, section 3.3 above.

5 Conclusion

The case studies explored here revealed considerable differences between the theory of extraterritorial human rights obligations developed in this study and previous analyses. In detailing the disagreements, I have shown that the present approach is more successful than others in explaining extraterritorial human rights obligations of states. It allows us to assess very different scenarios according to the same rule, substantiated by the same principles: jurisdiction is required, and it is based on political power and the application of rules because this is what integrity and equality make it. Further, my account explains the restrictions that have been sought to apply in terms of international human rights law as such, thus covering not just economic and social rights but also civil and political ones. In sum, the case studies show the present theory's potential to supply more plausible guidance in a principled manner, and across a very wide spectrum of cases, than any of the previously available accounts. I thus conclude that they should be abandoned and replaced with jurisdiction as political power in the sense defended here.

Conclusion

In the introduction to this thesis, we encountered two puzzles on the extraterritoriality of the ICESCR. First, we saw that the Committee calls on developed states parties to assign 0.7 per cent of their Gross National Income to development cooperation. At the outset of this project, it was not clear whose human rights are violated if a state does not make available funds for a postulated purpose. If development cooperation is a human rights issue – as this call by the CESCR suggests – who is the holder of the human right and who is the bearer of the corresponding obligation? In the same vein, it was unclear how to assess the following argument. When food prices rise due to biofuel production in the first world, and the global poor bear the brunt of this burden, the biofuel producing states violate the human right to food of those affected. We lacked the tools to situate these examples in an account of extraterritorial human rights obligations in the ICESCR. Throughout this project, I developed the necessary tools. Let me set them out before we return to applying them to solve our puzzles.

This thesis has advanced four main arguments that should fundamentally change the way we think about extraterritorial human rights obligations. First, I have argued that the questions regarding extraterritoriality are really about justifying the allocation of human rights obligations to specific states. Second, I have sought to show that human rights as found in international human rights law, including the ICESCR, are underpinned by the values of integrity and equality. Third, I have argued that these same values justify the allocation of human rights obligations towards specific individuals to public institutions – including states – that hold political power over said individuals. Fourth, I argued that title to territory is best captured by the value of stability, as opposed to integrity and equality. Because of this, models of jurisdiction that incorporate a close relationship with title to territory, cannot be successful. I sought to show that this is true regardless of which interpretation of jurisdiction one favours, and consequently this insight does not depend on whether one agrees with my account. The consequence of these arguments is a major shift in how we view extraterritoriality. Namely, the upshot is that all standards in international human rights law, including the ICESCR, that count as human rights require that a threshold of jurisdiction understood as political power is met. On my account, this threshold is not

just a conceptual necessity but a normative one as well. It is the relevant threshold not only for practical reasons, but because it *justifies* the allocation of obligations.

More specifically, in the first instance, I have examined and criticised the idea that rules of treaty interpretation as set out in the VCLT would provide us with an avenue to account for extraterritorial human rights obligations.¹ The reason is that rules set out as text are not sufficient to give meaning to international treaties, including human rights treaties. Instead, interpretation is an evaluative activity, based on values and principles. These are normative propositions that tell us which facts are relevant to the interpretation of a treaty and which facts are not. It follows that an interpretation of the extraterritorial scope of the ICESCR involves reasoning about normative proposition, that is, values and principles that underpin it.

Building on this insight, I proceeded to shed light on the values of international human rights law.² In particular, I sought to demonstrate that rights theory in general and human rights theory in particular neglect to justify the allocation of correlating duties. With regard to international human rights law, I argued that it is a normatively salient context for human rights: that is, human rights mean something in this context that may or may not be the same in other contexts. I further made the case that human rights in the context of international human rights law are underpinned by the values of integrity and equality. The consequence of interpreting international human rights law in the light of integrity and equality, I have sought to argue, is twofold. First, integrity and its need for public institutions and a legal system shows that we must identify a threshold criterion for applying international human rights law as a matter of its purpose even if a given human rights treaty does not mention this need explicitly. And second, the value of equality demonstrates that only those public institutions that are able to discharge obligations resulting from equal respect and concern for a particular individual should be understood to be duty bearers of human rights of that individual. In turn, this means that human rights as found in international human rights law – including the ICESCR – only apply when the relevant relationship between a state and individual is present.

This relationship is already present and argued about in practice and doctrinal scholarship, where it is usually referred to as jurisdiction.³ Consequently, I developed

¹ See chapter 1 above.

² See chapter 2 above.

³ See chapter 3 above.

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desiderata for an account of jurisdiction. Specifically, I argued that such an account must provide plausible guidance, relate to the nature of human rights, tie into the justification of the allocation of human rights duties, and that it should not be internally inconsistent. To check whether it is necessary to develop such an account or whether I could rely on one that is already present, I analysed the two most sophisticated approaches currently available. However, I concluded that neither Milanovic's nor Besson's model meets all the success criteria.

In turn, this meant that a new approach to jurisdiction as a justificatory threshold criterion needed to be developed. I approached this task by moving from the conceptual to the substantive arguments over the course of two chapters,⁴ where I sought to demonstrate the following. First, the underlying concept of jurisdiction has not been addressed in any depth before. Instead, concepts such as power, control, (decisive) influence, or authority, are used interchangeably, usually without being defined.⁵ This conceptual challenge was met in two steps. I argued that conceptual confusion lies at the root of a significant part of the normative disagreements and conflation present in accounts of extraterritoriality. In response to this, I made the case that power understood as a potential to effect is the most promising conceptual basis for an understanding of jurisdiction.

Building on the concept of power as a potential to effect, I argued that jurisdiction is best understood as political power.⁶ The basis for this claim – in line with the desiderata for an account of jurisdiction – the values that underpin human rights: integrity and equality. Integrity justifies allocating human rights obligations to public institutions and tells us that it is their claim to legitimacy and the obligation to improve it that makes this true. Equality, in the sense of the intrinsic value of each human life, in turn, justifies the allocation of human rights obligations to public institutions that are in a position to guarantee an individual's equality. The feature apt to capture this position of a public institution consists of political power. The exercise of this power results in control of human existence or activity as made relevant by a human rights provision, and is exercised through the choice and application of rules.

⁴ See chapters 4 and 5 above.

⁵ See chapter 4 above.

⁶ See chapter 5 above.

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Further, I argued that title to territory is best captured by the value of stability, as opposed to integrity and equality.⁷ Because of this, models of jurisdiction that incorporate a close relationship with title to territory, cannot be successful. I sought to show that this is true regardless of which interpretation of jurisdiction one favours, and consequently this insight does not depend on whether one agrees with my account or not. Lastly, I applied my account of jurisdiction as political power to bilateral cooperation in higher education, the running of a SEZ, and export subsidies for agricultural goods. In doing so, I have sought to draw out how my account differs from other approaches to extraterritoriality and why it is superior.⁸ Instead of repeating these arguments made immediately above, let me return to our initial puzzles.

How do the arguments put forward in this project help us make sense of these puzzles? If we accept that jurisdiction as political power is necessary to justify the allocation of human rights obligations to a state, neither of the scenarios are examples of an emergence of extraterritorial human rights obligations. Allocating or not allocating a particular amount of money to development cooperation does not amount to political power over anyone abroad. While power captures that even the potential to make a decision must be possible to be curtailed or channelled, the potential to allocate funds does neither result in control, nor is it a manifestation of the application of rules to individuals. The same is true for producing biofuels and thereby causing food prices to rise. In sum, on my account neither of our puzzles are examples of how extraterritorial human rights obligations are justifiably allocated.

Given this, one may worry that my approach is unduly narrow, and thus wrong, irrelevant, or even an ultimate disservice to human rights as normative standards. Thus, before concluding this project, I want to respond to these charges. This will lead me, in turn, to sketch why I do not think that narrowness is itself a problem, and why I believe that my approach is not only not a disservice to human rights, but a major contribution to making them relevant in the right sense.

The fact that my theory of extraterritorial human rights obligations, particularly those in the ICESCR does not cover our puzzles, I want to argue, is no cause for worry. I agree that it would be worrisome if international human rights law, or the ICESCR, were the only normative or legal tools we had at our disposal. But they are not. We have a host of other tools and responses we can utilise to advance goals of improving

⁷ See chapter 6 above.

⁸ See chapter 7 above.

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individual or societal wellbeing. Take, for example, the argument that sovereigns, of whatever kind, are trustees of humanity and that with this standing comes a general obligation to take into account the interests and wellbeing of stakeholders, be they at home or abroad.⁹ This argument by Benvenisti is made without significant reference to human rights. Tellingly, the examples he employs are drawn, among others, from international economic law,¹⁰ and the law on transboundary harms.¹¹ If nothing else, this shows that the extraterritorial application of human rights is by no means the only way to extend forms of protection to individuals beyond borders. On the contrary, in some instances, obligations of states grounded in environmental law may go further, or may require far less onerous justification than human rights duties and may thus be preferable.

Let me give another example of how considerations not involving human rights may sometimes not only be possible, but preferable. I have mentioned above that the ICESCR may impose social justice obligations and global justice obligations in addition to human rights.¹² Our puzzle regarding development cooperation is instructive here. The reason why we cannot point to whose rights are violated if the money is not found in a human rights framework is that equality and integrity do not supply an answer. In other words, this is not a question of meeting a standard of treatment but of allocating resources of the right kind, and the right measure, according to the right priority.¹³ However, the intrinsic value of each human life and integrity do not generate principles of priority in this sense. This means that development cooperation would need to be allocated according to principles that could point to the priority of some concerns or some individuals over others.

This study has analysed extraterritorial human rights obligations in the ICESCR, and, because its account applies to international legal human rights in general, in other human rights instruments. It has not done less, but it has not done more, either. Thus, to conclude, I want to suggest that this project should not only be seen as an account of extraterritoriality in the ICESCR. Instead, I hope that it is also one to differentiate, situating international legal human rights in their particular spot

⁹ See Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295, 314-18.

¹⁰ *Ibid* 316.

¹¹ *Ibid*.

¹² See chapter 2, section 3.3 above.

¹³ See generally Parfit, 'Equality and Priority' (1997) 10 *Ratio* 202.

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within broader normative debates. As such, the project also contributes to carving out more space for nuance. Going forward, I believe the main task should be to identify what kinds of obligations the ICESCR – and international human rights law generally – impose beyond the standard of treatment mandated by human rights. It is in this sense that I believe the project's narrow account of extraterritorial human rights obligations in the ICESCR is not a weakness, but a strength.

List of Treaties and Legislation

Treaties

American Convention American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1465 UNTS 85, entered into force 26 June 1987.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) ETS 5, 213 UNTS 222, entered into force 3 September 1953.

General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand-Pact) 94 LNTS 57, signed 27 August 1928.

International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171, entered into force 23 March 1976.

International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3, entered into force 3 January 1976.

Montevideo Convention on the Rights and Duties of States, 165 LNTS 19, signed 26 December 1933.

Optional Protocol to the Covenant on Economic, Social and Cultural Rights (Optional Protocol, OP-ICESCR) A/RES/63/117, entered into force 5 May 2013.

Treaty on the Functioning of the European Union [2008] Official Journal C115/1,
entered into force 1 December 2009.

Vienna Convention on the Law of Treaties (VCLT) 1155 UNTS 331, entered into force 27 January 1980.

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