

# Routledge Handbook of International Human Rights Law

978-0-415-62073-4

Chapter 35

The extraterritorial application of international human rights  
law on civil and political rights

*Ralph Wilde*

(CC BY-NC-ND 3.0)

# The extraterritorial application of international human rights law on civil and political rights\*

Ralph Wilde

## 1 Introduction

The policy and practice of any given state has an impact on the enjoyment of human rights not only on the part of people within that state's sovereign territory. Also, often there is a significant extraterritorial impact on people in the rest of the world. In the case of civil and political rights, relevant extraterritorial activity includes the conduct of warfare, occupation, other military action, anti-migration and anti-piracy initiatives at sea, sanctions regimes, extraordinary rendition, strikes by so-called 'drones' and the operation of extraterritorial detention and interrogation sites housing combatants and migrants, including refugees.

Domestic and international public policy concerned with the obligations of states towards the enjoyment of human rights by people outside their territories potentially has a legal dimension in international human rights treaty law.<sup>1</sup> However, in the field of civil and political rights, a frequent question is raised as to whether certain activities relevant here, notably those associated with the US eras of George W. Bush's 'War on Terror' and President Barack

\* The work on this piece was funded by the Leverhulme Trust and the European Research Council.

1 For academic commentary on this topic, see, e.g. the sources listed at the end of this chapter, and Ralph Wilde, 'Legal "Black Hole"?: Extraterritorial State Action and International Treaty Law on Civil and Political Rights', (2005) 26 *MJIL* 739 (Wilde 2005); Ralph Wilde, 'Case Note, *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)*', (2008) 102(3) *AJIL* 628 (Wilde 2008); Ralph Wilde, 'From Trusteeship to Self-Determination and Back Again: the Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers', (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 75–132; Ralph Wilde, 'Compliance with Human Rights Norms Extraterritorially: "Human Rights Imperialism"?', in Laurence Boisson de Chazournes and Marcelo Kohen (eds), *International Law and the Quest for its Implementation* (Brill/Martinus Nijhoff, 2010); various authors, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, adopted 28 September 2011 (Maastricht Principles); Fons Coomans and Rolf Künnemann, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia, 2012) (Coomans and Künnemann); Malcolm Langford, Wouter Vandenhole, Martin Scheinin and Willem van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, 2013) (Langford, Vanderhole, Scheinin and van Genugten).

Obama's policy of a similar nature (e.g. 'drone' strikes, rendition and extraterritorial detention and interrogation), take place in a 'legal black hole', usually taken to denote the absence not necessarily of all law, but of those areas of law that would provide checks and balances to guard against human rights abuses.<sup>2</sup> Whether and to what extent international human rights law concerned with civil and political rights (which, it is claimed, provides such checks and balances) applies extraterritorially is indeed contested and uncertain. The case law and commentary is sparse and often highly situation-specific, and states take varying and mutually inconsistent positions on it, from the rejection of extraterritorial application per se by certain states (e.g. the USA), to the willingness of certain states (e.g. in Europe) to accept the constraints of human rights law abroad in particular circumstances.<sup>3</sup>

In this context, the present chapter addresses two fundamental interrelated questions. In the first place, does international human rights law on civil and political rights apply extraterritorially and, if so, on what basis and in which circumstances? In the second place, what is the significance of some of the underlying political ideas at stake – for example, the claim that a 'legal black hole' is problematic, and needs to be remedied – for the meaning and scope of the law on applicability?

The focus is on civil and political rights only, not also on economic, social and cultural rights.<sup>4</sup> The latter set of rights also raise important issues in the extraterritorial context, and states are bound by international legal rules covering both sets of rights.<sup>5</sup> However, the law on the extraterritorial application of civil and political rights has important differences in terms of treaty provisions,<sup>6</sup> enjoys a significant body of specific case law and other authoritative commentary,<sup>7</sup> and implicates special policy questions worthy of discrete evaluation, notably as concerns the relationship between the individual and the state<sup>8</sup> and the notion of a 'legal black hole'.<sup>9</sup>

The foregoing analysis evaluates relevant treaty provisions and how they have been interpreted by judicial and international expert-body decisions.<sup>10</sup> In particular, decisions (in their various forms) from the following bodies are reviewed: the International Court of Justice;<sup>11</sup>

2 See the discussion and sources cited in Wilde 2005 (n. 1). This issue is discussed further below, in section 35.5.

3 See Wilde 2005 (n. 1).

4 Due to space limitations, this chapter does not cover the extraterritorial application of non-refoulement obligations in refugee law and human rights law, or the obligations of international organisations.

5 On the extraterritorial application of economic, social and cultural rights, see e.g. Maastricht Principles; Coomans and Künnemann; Langford, Vanderhole, Scheinin and van Genugten, and sources cited therein (n. 1).

6 In particular, the use of the term 'jurisdiction' as the trigger for applicability; see below, section 35.2.1.

7 Notably the jurisprudence relating to the European Convention on Human Rights. See below, section 35.2.

8 See below section 35.5.2.

9 See below section 35.5.3.

10 For the treaty provisions, see the sources cited in nn. 17–20, 22–26, 31 below.

11 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, 2004 ICJ 163 (9 July) (*Wall Advisory Opinion*); *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, 2005 ICJ 116 (19 December), at paras 216–17 (*DRC v Uganda*); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) Order Indicating Provisional Measures (Georgia v Russia Provisional Measures)*, 15 October 2008, available at: <http://www.icj-cij.org/docket/files/140/14801.pdf>, paras 109, 149.

the United Nations Human Rights Committee;<sup>12</sup> the European Commission and Court of Human Rights;<sup>13</sup> the Inter-American Commission on Human Rights;<sup>14</sup> the United Nations Committee Against Torture;<sup>15</sup> and the courts of England and Wales.<sup>16</sup>

## 2 Applicability provisions in human rights treaties

### 2.1 'Jurisdiction'

Some of the main international human rights treaties addressing civil and political rights, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR) and their Protocols, the Convention against Torture (CAT), as well as the Convention on the Rights of the Child (CRC) (which also covers economic, social and cultural rights) do not conceive obligations simply in terms of the acts of states parties. Instead, responsibility is conceived in a particular context: the state's 'jurisdiction'. Under the ECHR and some of its

- 12 General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004) (HRC General Comment No. 31) para. 10; *Lilian Celiberti de Casariego v Uruguay*, Comm. No. 56/1979, UN Doc. CCPR/C/13/D/56/1979 (29 July 1981) (*Celiberti de Casariego*), para. 10.3, *Lopez Burgos v Uruguay*, Communication No. R.12/52, Supp. No. 40, at 176, UN Doc. A/36/40 (1981) (*Lopez Burgos*), para. 12.3; *Mabel Perreira Montero v Uruguay (Montero)*, Comm. No. 106/1981, UN Doc. CCPR/C/OP/2 at 136 (1990) (31 March 1983), para. 5.
- 13 *Gillow v United Kingdom*, App. No. 13/1984/85/132 (ECtHR, Judgment of 23 October 1986), (*Gillow*), para. 62; *Bui Van Thanh v United Kingdom*, App. No. 16137/90 (ECtHR, Eur. Comm'n H.R., 12 March 1990) (*Bui Van Thanh*); *WM. v Denmark*, App. No. 17392/90, 73 Eur. Comm'n H.R. Dec. & Rep. 193 (1992), 196 (*WM*); *Loizidou v Turkey*, 310 ECtHR (ser. A) (1995) (Preliminary Objections) (*Loizidou* (Preliminary Objections)), para. 62; *Loizidou v Turkey*, 1996-VI, ECtHR, (ser. A) 2216, (GC) (Merits), (*Loizidou* (Merits)), paras 52–56; *Yonghong v Portugal*, App. No. 50887/99 (ECtHR, Judgment of 25 November 1999) (*Yonghong*); *Öcalan v Turkey*, App. No. 46221/99 (ECtHR, Admissibility Decision, 14 December 2000) (*Öcalan* Admissibility Decision) and 2005-IV ECtHR (GC) (*Öcalan* GC); *Cyprus v Turkey*, 2001-IV ECtHR, 1 (GC), at para. 77 (*Cyprus v Turkey*); *Issa and Others v Turkey*, ECtHR, Admissibility Decision of 30 May 2000 (*Issa* (Admissibility)) and 41 ECtHR 27 (2004) (Merits) (*Issa* (Merits)), para. 71; *Banković v Belgium*, 2001-XII ECtHR, 333 (GC), at para. 70–71 (*Banković*); *Ilascu and Others v Moldova and Russia*, ECtHR, App. No. 48787/99 (Grand Chamber), Reports 2004-VII (8 July 2004) (*Ilascu*); *Solomou v Turkey*, ECtHR, App. No. 36832/97, 24 June 2008, (*Solomou*), Paras. 43–52; *Isaak v Turkey*, ECtHR, App. No. 44587/98, 28 Sept 2006, Admissibility, page 21 (*Isaak*); *Andreou v Turkey*, ECtHR, App. No. 45653/99, Admissibility decision, 3 June 2008 (*Andreou* (Admissibility)), p. 11, and Merits, 27 October 2009, (*Andreou* (Merits)) para. 25; *Al-Saadoon and Mufidhi v United Kingdom*, App. No. 61498/08 (ECtHR, Chamber decision, 2 March 2010) (*Al-Saadoon*); *Al-Skeini v United Kingdom*, App. No. 55721/07 (ECtHR, Judgment of 7 July 2011) (*Al-Skeini* (ECtHR)).
- 14 *Coard v US*, Case 10.951, Report No.109/99, OEA/Ser.L./V/II.85, doc. 9 rev. (1999), (*Coard*), paras 37, 39, 41.
- 15 *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America*, UN Doc. CAT/C/USA/CO/2 (25 July 2006), para. 15; General Comment No. 2: *Implementation of Article 2 by States Parties*, 23 November 2007, UN doc. CAT/C/GC/2 (24 January 2008), para. 16.
- 16 *R. v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, 9 December 2004 (*Roma Rights*); *R. (on the application of Al-Skeini and others) v Secretary of state for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2007] 3 WLR 33 (*Al-Skeini* (HL)); [2005] EWCA (Civ) 1609 (21 December 2005) (*Al-Skeini* (CA)); [2004] EWHC 2911 (Admin), 14 December 2004, (*Al-Skeini* (DC)).

Protocols and the ACHR, the state is obliged to 'secure' the rights contained in the treaty within its 'jurisdiction'.<sup>17</sup> Under the CAT, the state is obliged to take measures to prevent acts of torture 'in any territory under its jurisdiction'.<sup>18</sup> Under the CRC, states parties are obliged to 'respect and ensure' the rights in the treaty to 'each child within their jurisdiction'.<sup>19</sup> The ICCPR formulation is slightly different from the others in that applicability operates in relation to those 'within [the state's] territory and subject to its jurisdiction'.<sup>20</sup>

Thus a nexus to the state – termed 'jurisdiction' – has to be established before its obligations are in play (the significance of the separate reference to 'territory' in the ICCPR will be considered below<sup>21</sup>).

## 2.2 Colonial extension clauses

Several early human rights treaties, for example the ECHR (and some of its subsequent Protocols) and the 1948 Genocide Convention contain a 'colonial clause' allowing the states parties to make a declaration that the rights contained in the treaty will apply in 'territories for whose international relations it is responsible', a term referring to colonial and (UN) Trusteeship territories, now in the case of the former (there are no more Trusteeship territories) sometimes referred to using alternative euphemistic terminology such as 'dependencies' or 'overseas territories'.<sup>22</sup> Similarly, the 1926 Slavery Convention contains an 'opt-out' clause which allows states parties to declare that their acceptance of the Convention does not bind some of the territories placed under their jurisdiction,<sup>23</sup> whilst the 1956 Supplementary Slavery Convention, although providing that '[t]his Convention shall apply to all non self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any State Party is responsible', requires states parties to specify to which territories the Convention applies.<sup>24</sup>

17 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov., 1950, 213 UNTS 221 (ECHR), Art. 1; ECHR Protocol No. 1 (ECHR Protocol 1), Art. 4; ECHR Protocol No. 6 (ECHR Protocol 6), Art. 5; ECHR Protocol No. 13 (ECHR Protocol 13), Art. 4. American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36, 1144 UNTS 123, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, Doc. 21, Rev. 6 (22 November 1969) (ACHR), Art. 1.

18 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 46, UN GAOR, 39th Sess., Supp. No. 51, UN Doc. A/39/51, 10 December 1984, 1465 UNTS 85 (CAT), Art. 2.

19 Convention on the Rights of the Child, GA Res. 44/25, Annex, 44 UN GAOR Supp. No. 49, UN Doc. A/44/49 (20 November 1989), 1577 UNTS 3 (CRC), Art. 2.1.

20 International Covenant on Civil and Political Rights, GA Res. 2200A/XXI, 16 December 1966, UN Doc. A/6316 (19 December 1966), 999 UNTS 171 (ICCPR), Art. 2.

21 See section 35.2.2.

22 ECHR, Art. 56 (formerly 63) (n. 17); ECHR Protocol No. 1, Art. 4 (n. 17); ECHR Protocol No. 6 (n. 17), Art. 5; ECHR Protocol No. 13 (n. 17), Art. 4; Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, UNTS, vol. 78, p. 277 (Genocide Convention) Art. 25.

23 International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, Geneva, 25 September 1926, LNTS, vol. 60, p. 253, as amended by the Protocol Amending the Slavery Convention, approved by GA Res. 794 (VIII) of 23 October 1953, entered into force on 7 December 1953 (1926 Slavery Convention) Art. 9.

24 Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956 (1956 Supplemental Slavery Convention), Art. 12(1).

The question of whether, in each case, a territorial unit covered by such clauses falls within, or outside, the sovereign territory of the states party to human rights treaties is beyond the scope of this chapter. In the case of territories in the former category, the clauses are concerned with the scope of application within a state's territory; in the case of territories in the latter category, they determine extraterritorial applicability. Similar colonial extension clauses were not included in later human rights treaties, including the ICCPR, the CRC and the CAT. Whether, for those other treaties that do have a colonial extension clause, the 'jurisdiction' test can trigger applicability in overseas territories as an alternative to the operation of the extension clause is addressed below.

### *2.3 No general applicability provision: American Declaration, African Charter, CEDAW and CERD*

Certain other international human rights instruments do not contain a general provision, whether using the term 'jurisdiction' or something else equivalent, stipulating the scope of applicability of the obligations they contain: the 1948 (Inter-) American Declaration of the Rights and Duties of Man (not a treaty), the 1981 African Charter on Human and Peoples' Rights, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD or CERD), the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000.<sup>25</sup>

In the case of the CERD, a sub-set of obligations are conceived in the context of the state's 'jurisdiction'. The obligation concerning racial segregation and apartheid applies to parties with respect to 'territories under their jurisdiction'.<sup>26</sup> Similarly, the provision of remedies operates with respect to people in the state's 'jurisdiction', in terms of both the obligation borne by the state to provide such remedies itself, and the jurisdiction of the international Committee on the Elimination of Racial Discrimination, if it has been accepted, to hear complaints against parties.<sup>27</sup>

The Inter-American Commission on Human Rights has treated the American Declaration as if it does contain the 'jurisdiction' trigger, without an explanation for this assumption.<sup>28</sup> Similarly, the International Court of Justice appeared to treat the African Charter and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000 as if they contained the 'jurisdiction' trigger, again without any explanation.<sup>29</sup>

25 American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, OAS Res. XXX (1948) (American Declaration); African Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 27 June 1981) (ACHPR); International Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, UNTS, vol. 1249, p. 13 (CEDAW); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD or CERD) Adopted by General Assembly Resolution 2106 (XX), 21 December 1965; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000 (CRC Optional Protocol).

26 CERD Art. 3 (n. 25).

27 CERD Arts 6 (domestic remedies), 14.1 (jurisdiction of the Committee) (n. 25).

28 *Coard*, para. 37 (n. 14).

29 *DRC v Uganda*, paras 216–17 (n. 11).

### 3 Extraterritorial meaning of the term 'jurisdiction' in human rights treaties

#### 3.1 *Relevance of the international law meaning of 'jurisdiction'*

An area of international law also named 'jurisdiction' exists separately from international human rights law.<sup>30</sup> The international law concept of 'jurisdiction' is concerned with rules prescribing the particular circumstances where a state is legally permitted to exercise its legal authority – for example prescriptive, enforcement or adjudicative – over a particular situation, such as prosecuting its own nationals for crimes committed abroad.

In the *Banković* decision concerning the NATO bombing of Belgrade in 1999, the Grand Chamber of the European Court of Human Rights seemed to suggest that the meaning of 'jurisdiction' in the ECHR should somehow reflect the meaning of that term in public international law generally.<sup>31</sup> However, insofar as the Court intended make such a suggestion, it does not fit with how the Court and other authoritative bodies have approached the issue in other decisions, where extraterritorial jurisdiction has been defined as simply a factual test, without the additional normative consideration of whether or not the activity under consideration constitutes a lawful exercise of jurisdiction as a matter of general international law. For example, the Court held that Turkey's presence in Northern Cyprus constituted the exercise of jurisdiction for ECHR purposes because of the nature of control exercised, stressing that such jurisdiction could subsist on this basis regardless of the legality of the exercise of control.<sup>32</sup>

As for the ICCPR, the UN Human Rights Committee, in a passage that can be interpreted as alluding to the relevance of the legality of extraterritorial action to the question of whether such action is regulated by the Covenant, stated in General Comment No. 31 that the principle of making available the enjoyment of Covenant rights to all individuals regardless of nationality, 'applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained'.<sup>33</sup>

#### 3.2 *Whether or not 'jurisdiction' can have an extraterritorial meaning at all*

The consistent jurisprudence and authoritative statements of the relevant international human rights review bodies and the International Court of Justice regarding the ECHR, the ACHR and the CAT has been to interpret the term 'jurisdiction' in these treaties as operating extraterritorially in certain circumstances.<sup>34</sup>

Although there is less authoritative commentary on the extraterritorial applicability of the CRC, the meaning of 'jurisdiction' in this treaty is arguably similar. The International Court of Justice appeared to assume so in affirming the applicability of this treaty to Israel's presence in the Palestinian territories in the *Wall* Advisory Opinion, and to Uganda in the Democratic Republic of the Congo (DRC) in the *DRC v Uganda* judgment.<sup>35</sup>

30 See, e.g., James Crawford, *Brownlie's Principles of Public International Law* (2012), ch. 21, and sources cited therein.

31 *Banković*, paras 59–61 (n. 13).

32 *Loizidou* (Preliminary Objections), para. 62; *Loizidou* (Merits), paras 52–56 (n. 13). See also *Cyprus v Turkey*, para. 77 (n. 13).

33 HRC General Comment No. 31, para. 10 (n. 12).

34 See the sources cited in nn. 10, 13–15 above.

35 *Wall* Advisory Opinion, para. 113 (n. 11); *DRC v Uganda*, paras 216–17 (n. 11).

The aforementioned treatment by the International Court of Justice of the applicability of the ACHPR and the Optional Protocol to the CRC, in terms of whether situations at issue constituted the exercise of ‘jurisdiction’ (despite that term not being used in these instruments), was a part of the Court’s affirmation that these instruments were capable of extraterritorial application on this basis.<sup>36</sup> Similarly, the aforementioned treatment of the applicability of the (Inter-) American Declaration by the Inter-American Commission on Human Rights in terms of the exercise of ‘jurisdiction’ was in the context of extraterritorial activity, which it regarded as capable of constituting the exercise of jurisdiction and thereby falling under the scope of the obligations in the Declaration.<sup>37</sup>

As mentioned earlier, the ICCPR provision on scope of application addresses those ‘within [the state’s] territory and subject to its jurisdiction’.<sup>38</sup> By including the word ‘territory’ in addition to ‘jurisdiction’, it might be read to suggest that jurisdiction is limited to territory, thereby ruling out extraterritorial applicability. However, this position is difficult to sustain given the affirmation of extraterritorial applicability by the International Court of Justice and the UN Human Rights Committee.<sup>39</sup> An absolutist denial of extraterritorial applicability not only lacks support in, but also is rejected by, the jurisprudence and other authoritative interpretations on this issue. The key question has not been whether human rights law treaty obligations apply extraterritorially, but, rather, in what circumstances this occurs.

As will be explained, the term has been understood in the extraterritorial context as a connection between the state, on the one hand, and either the territory in which the relevant acts took place – referred to herein as a *spatial* or *territorial* connection – or the individual affected by them – referred to herein as a *personal*, *individual* or, because of the type of state action involved, *state-agent-authority* connection. Within these two categories, there is considerable uncertainty due to the sparse nature of case law and a variety of views taken by states, interpretative/enforcement bodies such as courts, and expert commentators.

### 3.3 Jurisdiction trigger (1): territorial control

#### 3.3.1 General concept

Extraterritorial jurisdiction understood spatially conceives obligations as flowing from the fact of effective control over territory. This approach was articulated in decisions relating to the aforementioned *Cyprus v Turkey* case, the *Loizidou* case regarding the same situation, the aforementioned *Banković* and *Al-Skeini* cases, and the *Issa* case concerning Turkey in Iraq, all before the European Court of Human Rights (and also the courts of England and Wales as far as *Al-Skeini* is concerned). It is also adopted, to a certain extent, in the *Wall* Advisory Opinion and the *DRC v Uganda* judgment of the International Court of Justice.<sup>40</sup>

36 On the ACHPR and the CRC Optional Protocol (n. 25), see *DRC v Uganda*, paras 216–17 (n. 11).

37 *Coard*, para. 37 (n. 14).

38 ICCPR, Art. 2 (n. 20).

39 In the *Wall* Advisory Opinion (n. 11); and HRC General Comment No. 31 (n. 12).

40 *Cyprus v Turkey* (n. 13); *Loizidou* (Preliminary Objections) (Merits) (n. 13); *Banković* (n. 13); *Al-Skeini* (DC), (CA), (HL), (ECtHR) (nn. 13, 16); *Issa* (n. 13); *Wall* Advisory Opinion (n. 11); *DRC v Uganda* (n. 11).

### 3.3.2 Effective 'overall' control of a distinct entity/regime

In one of its judgments in the *Loizidou* case, the European Court of Human Rights emphasised that Turkey exercised effective control operating 'overall'; in such circumstances, it was unnecessary to identify whether the exercise of control was detailed.<sup>41</sup> So if the state is in effective overall control of a territorial unit, everything within that unit falls within its 'jurisdiction', even if at lesser levels powers are exercised by other actors (e.g. if particular activities are devolved to other states or local actors).<sup>42</sup> The exercise of this type of control also leads to a generalised obligation to secure the 'entire range of substantive rights' in the area in question.<sup>43</sup>

### 3.3.3 Can it be a sliding scale depending on the level of control?

In the *Banković* case, the applicants claimed that 'jurisdiction' under Article 1 of the ECHR could be said to exist on the basis of effective territorial control to the extent that such control was in fact exercised, and that, accordingly, in the words of the European Court of Human Rights, 'the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised'.<sup>44</sup> This might be understood to suggest a 'sliding scale' or 'cause and effect' concept of jurisdiction based on territorial control: obligations apply insofar as control is exercised; their nature and scope is set in proportional relation to the level of control.<sup>45</sup>

The European Court of Human Rights rejected this argument; it held that the concept of jurisdiction could not be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'.<sup>46</sup> However, in the later *Issa* decision of 2004, the Court, having concluded that Turkey did not exercise 'overall control' in the area of Northern Iraq in question, did not end its consideration of whether the Turkish presence constituted the exercise of 'jurisdiction'. Rather, it went on to consider 'whether at the relevant time Turkish troops conducted operations in the area where the killings took place'.<sup>47</sup> The assumption was that if the troops had been doing this, which the Court found on the facts they had not, jurisdiction would have subsisted. Unfortunately, the Court failed to indicate whether at this stage it was considering extraterritorial jurisdiction defined as territorial control (as opposed to the alternative definition based on control over individuals), but if it was, one might discern a more receptive attitude towards the broader cause-and-effect concept than in the earlier dictum in *Banković*.

This concept was picked up in the English Court of Appeal stage of the *Al-Skeini* case by Lord Justice Sedley, who considered the idea that applicability might depend not on 'enforceability as a whole' but 'whether it lay within the power of the occupying force to avoid or remedy the particular breach in issue'.<sup>48</sup> Although he acknowledged that this was blocked by

41 *Loizidou (Merits)*, para. 56 (n. 13).

42 See also *Cyprus v Turkey*, para. 77 (n. 13).

43 See also *Cyprus v Turkey*, para. 77, (n. 13); *Isaak*, p. 20 (n. 13); *Solomou*, p. 47 (n. 13).

44 *Banković*, para. 46 and 47 (n. 13).

45 See also *Banković*, para. 75 (n. 13).

46 *Banković*, paras 75–76 (n. 13).

47 *Issa*, para. 76 (n. 13).

48 *Al-Skeini (CA)*, para. 198 (Lord Justice Sedley) (n. 16).

the *Banković* dictum, he rejected the underlying logic of the dictum and suggested that the European Court of Human Rights might sooner or later revisit it.<sup>49</sup> Indeed, there is possibly a further approach to jurisdiction defined spatially (considered in section 35.3.3.4 immediately below), and other approaches regarding the alternative trigger for jurisdiction as control over individuals (considered in section 35.3.4.3 below), which may offer greater opportunities for the kind of flexibility considered here.

### 3.3.4 Does it cover bombing/shooting?

In the *Banković* decision, the European Court of Human Rights rejected applicability of the ECHR in the context of the NATO bombing of a radio and TV station in Belgrade, holding that aerial bombardment did not constitute the exercise of territorial control so as meet the test for the territorial/spatial concept of extraterritorial jurisdiction.<sup>50</sup>

The *Andreou v Turkey* case concerned soldiers of the Turkish Republic of Northern Cyprus located on the TRNC side of the neutral UN buffer zone between the TRNC and the rest of Cyprus, who shot into the buffer zone and hit the applicant, Mrs Andreou, who had moved in this area. The European Court of Human Rights held that Mrs Andreou came within Turkey's extraterritorial jurisdiction because:

even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the] jurisdiction' of Turkey.<sup>51</sup>

As established in the aforementioned earlier decisions about Northern Cyprus, the TRNC side of the buffer zone from which the shots were fired constituted Turkish extraterritorial jurisdiction for the purposes of the ECHR on the basis of effective territorial control. The Court focused on the act performed in this space – 'the opening of fire' – as being the determinative act, rather than its effect, which took place outside Turkish extraterritorial jurisdiction, on the Greek side. The Court did not, then, consider whether shooting per se constituted an exercise of jurisdiction, since the territory from which the shot fired already constituted extraterritorial Turkish jurisdiction for a different reason.

This finding raises the possibility that a continuous act that starts in the state's jurisdiction, whether territorial or extraterritorial, will be covered by human rights law in its entirety, including if the end point is, as here, more generally extraterritorial jurisdiction. Revisiting *Banković*, it might be asked whether bombing which is initiated from the state's jurisdiction, for example missiles launched from state territory which land extraterritorially, or aircraft located outside the jurisdiction when the bombing mechanism is operated from within the jurisdiction (such as in the case of remotely operated aircraft, so-called 'drones') would be covered by human rights obligations.

49 Ibid. paras 201–02. The idea of dividing and tailoring was criticised at the House of Lords stage. See in particular *Al-Skeini* (HL) paras 79–80 (Lord Rodger) and 128–30 (Lord Brown) (n. 16).

50 *Banković*, paras 75–76 (n. 13).

51 *Andreou* (Merits), para. 25 (n. 13).

### 3.3.5 The looser test of effective authority/decisive influence from *Ilascu*

The *Ilascu* decision of the Grand Chamber of the European Court of Human Rights in 2004 concerned complaints of violations of the ECHR by the authorities of the Moldovan Republic of Transdniestria (MRT), an entity in the territory of Moldova which had declared its independence in 1992–93, with Russian support, and was not recognised as an independent state by other states. The applicants argued that Moldova was responsible because what they complained of took place in Moldovan territory, and Russia was responsible because it was supporting the breakaway MRT.<sup>52</sup>

As far as Russian responsibility was concerned, the Court held that:

[the MRT] set up in 1991–92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.<sup>53</sup>

In consequence, the acts complained of fell within the extraterritorial exercise of jurisdiction by Russia. The test of ‘effective authority . . . or at the very least . . . decisive influence’, or ‘in any event’ survival ‘by virtue of . . . support’ suggests a much wider definition of extraterritorial jurisdiction than the earlier decisions on this issue. It is broad enough to cover the behavior of a state within its own territory exclusively. Moreover, it suggests a test for causation that is very loose. Authorities in a range of places could meaningfully be described as surviving by virtue of the support from, and/or being subject to the decisive influence of, other states. It remains to be seen whether this broader test is picked up in future decisions.

## 3.4 Jurisdiction trigger (2): control over individuals

### 3.4.1 Introduction

The second main trigger for extraterritorial jurisdiction concerns control over individuals. This is referred to herein and in some of the relevant judicial decisions as a *personal, individual* or, because of the type of state action involved, *state-agent-authority* connection. This connection has been understood variously as *control* (like the spatial relationship discussed already), *power* or *authority*. This test has been held to be met, triggering the applicability of human rights obligations, in the context of extraterritorial abductions (the *Celiberti de Casariego* and *Lopez Burgos* decisions by the UN Human Rights Committee and the *Öcalan* decisions by the European Court of Human Rights),<sup>54</sup> lethal physical violence by public agents (the *Isaak* decision by the European Court of Human Rights),<sup>55</sup> detention of individuals (the *Coard* decision by the Inter-American Commission of Human Rights, the *Al-Skeini* and *Al-Saadoon* decisions of the English courts and the European Court of Human

52 *Ilascu*, paras 71–72 and 86–87 (n. 13).

53 *Ilascu*, para. 392 (n. 13).

54 *Celiberti de Casariego*, para. 10.3 (n. 12); *Lopez Burgos*, para. 12.3 (n. 12); *Öcalan* (GC), para. 91 (n. 13).

55 *Isaak*, ‘Admissibility’, page 21 (n. 13).

Rights)<sup>56</sup> presence in an embassy (the *WM* decision of the European Commission of Human Rights)<sup>57</sup> and the issuance of a passport (the *Montero* decision by the UN Human Rights Committee).<sup>58</sup>

### 3.4.2 Narrower and broader notions of control over individuals

In the domestic proceedings in the *Al-Skeini* case concerning UK forces in Iraq, a distinction emerged between two different conceptions – narrow or broad – of the ‘control over individuals’ test. The narrow basis defines this trigger for jurisdiction extraterritorially as covering control exercised over individuals only in state-run facilities such as ships, embassies and, as affirmed in *Al-Skeini* in the English courts, detention facilities.<sup>59</sup> The broad basis, by contrast, defines this trigger as such control short of any state-run facility context, in any situation.

The distinction between these conceptions of the individual/state agent authority basis for extraterritorial ‘jurisdiction’ was moot in *Al-Skeini* because the relevant situation under evaluation in that case fell within the narrower test (it concerned the torture and killing of an individual held in a UK military base). The distinction is potentially relevant, however, to other situations.

None of the pre-*Al-Skeini* Strasbourg decisions concerned with the ‘individual’ heading of extraterritorial jurisdiction, even if sometimes covering situations taking place in state-run facilities, affirmed a requirement of such a location as being part of the test for applicability.<sup>60</sup> Nonetheless, in the English courts, the narrower version of the test – with the requirement – ultimately prevailed in the final decision at the House of Lords (as it was then).<sup>61</sup> When a different aspect of the case was brought before the European Court of Human Rights, the Court engaged in a general review of the law on extraterritorial jurisdiction, and in its observations on its previous case law on the ‘individual’ trigger, stated that it did not consider that jurisdiction arose in the decisions under evaluation:

solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.<sup>62</sup>

This suggests that extraterritorial jurisdiction may not be understood to subsist simply because the state operates facilities abroad – there has to be ‘physical power and control’ exercised over individuals within those facilities in order for such treatment to be regulated by the Convention. What is left open is whether the exercise of such power outside state-run facilities would also be covered. Moreover, it is unclear what the caveat amounts to – what exactly would fall within, and outside, the boundaries of the test – in the context of state-run facilities, and how this approach is reconciled with the finding in the *WM* case, which concerned

56 *Coard*, para. 1–4, 37, 39 41 (n. 14); *Al-Skeini* (DC) (CA) (HL), *passim* (n. 16); *Al-Saadoon*, *passim* (n. 13).

57 *WM*, p. 196, section ‘The Law’, para. 1, (n. 13).

58 *Montero* para. 5 (n. 12).

59 *Al-Skeini* (DC) (CA) (HL) *passim* (n. 16); see also Wilde 2008 (n. 1).

60 See the relevant sources above n. 13.

61 *Al-Skeini* (HL), *passim* (n. 16).

62 *Al-Skeini* (ECtHR), para. 136 (n. 13).

the mere physical presence in an Embassy, without any reference to additional, more direct 'physical power and control'.<sup>63</sup>

Perhaps the Court had in mind a different consideration: that states should not ordinarily be made responsible for the human rights of all individuals within their foreign premises, simply by virtue of presence on such premises – there has to be a more direct connection to a rights violation, which is established through the requirement of physical power and control. Such a consideration is, however, about the substance of rights and obligations, not whether they should be applicable. Specifically, it seeks to secure negative rights concerned with non-interference exclusively, without also the broader provision of positive rights.

### 3.4.3 Being shot renders an individual within the jurisdiction?

A 2008 decision of the European Court of Human Rights appears to suggest that merely being subject to lethal armed force could be sufficient to fall within the extraterritorial jurisdiction of the state responsible for that action. At the same event in and around the UN buffer zone in between the TRNC and the rest of Cyprus which led to the aforementioned shooting of Mrs Andreou, another Greek Cypriot, Solomos Solomou, broke through the UN cordon from the Greek side into the UN buffer zone, crossed in to the TRNC side of the buffer zone, and climbed a flagpole, to protest at the Turkish occupation of the north.<sup>64</sup> He was hit by shots fired from the TRNC side of the buffer zone.<sup>65</sup> This might have been treated as taking place within Turkish jurisdiction on the basis of effective overall control of the TRNC. However, curiously the European Court of Human Rights focused on not the opening of fire, but the experience of being shot, treating this as an exercise of state agent control.<sup>66</sup> The emphasis was thus on control exercised over the individual, rather than on control exercised over the territory within which the individual and/or the soldiers are located. In the context of the case, the only direct nexus of control is being in receipt of a lethal bullet. Indeed, it is logical to conclude that a concept of effective control over individuals that has been found to encompass abduction (as mentioned, in the *Lopez Burgos* and *Celiberti de Casariego* decisions) would also cover lethal armed force (and, indeed, a contrary conclusion would be perverse).

The other decisions on bombing and shooting – *Banković* and *Andreou* – ultimately turned on whether the bombing and shooting in question took place in foreign-state-controlled territory, or themselves constituted the exercise of such territorial control by the states involved. The shift away from territory to the individual in *Solomou* suggests a new approach to the applicability of human rights law to such action, with potentially broad consequences. If it is possible to bring this action within the 'individual' heading of jurisdiction, whether or not the alternative 'territorial' basis for applicability is met is no longer exclusively determinative of applicability. Even if the 'sliding scale' or 'cause and effect' conception of jurisdiction as control over territory is supposedly ruled out by *Banković* (a conclusion which is, as mentioned, placed in question by *Issa*), a test of jurisdiction as control over individuals understood in this way would be sufficient to trigger human rights obligations.

63 *WM*, p. 196, Section 'The Law', para. 1 (n. 13).

64 *Solomou*, *passim*, esp. para. 48 (n. 13).

65 *Ibid.* at para. 12.

66 *Ibid.* at paras 49–51.

### 3.5 A new hybrid test from *Al-Skeini*?

The *Al-Skeini* decision of the European Court of Human Rights in 2011 introduces a treatment of extraterritorial jurisdiction that appears to combine both the ‘territorial’ and ‘individual’ triggers that had hitherto been treated separately. The decision concerned the shooting of individuals by UK soldiers in streets and houses where the soldiers were temporarily present, in the context of the broader UK military presence in Iraq. The Court placed emphasis on the fact that the United Kingdom:

assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.<sup>67</sup>

This leaves open the question of whether killing outside the broader context of the territorially defined exercise of authority and responsibility would be sufficient to establish a jurisdictional link. There is no specific reference to such a broader role in *Solomou*; but an equivalent activity by Turkey in northern Cyprus had already been determined to exist, and to constitute the exercise of jurisdiction, in the earlier, canonical cases relating to that situation.

### 3.6 No trigger – what if no exercise of jurisdiction in own territory?

In the *Ilascu* case mentioned earlier, the Court was asked to determine both Russian and Moldovan responsibility for the acts of the MRT authorities. As far as Moldova was concerned, the issue was not extraterritorial applicability – the MRT was part of Moldovan territory, even if it was a breakaway republic – but whether the loss of control within that territory somehow altered the understanding of jurisdiction for the purposes of applying the Convention as far as Moldova was concerned.

This implicates a broader issue: should jurisdiction always be assumed to exist within a state’s territory? How is this reconciled with notions of extraterritorial jurisdiction based on territorial control, which make the foreign state obliged to implement all the rights in the treaty in a generalised sense? Is the host state nonetheless also responsible for doing the same thing with respect to its obligations?

In *Ilascu*, the Grand Chamber of the European Court of Human Rights held that there was a ‘presumption’ that jurisdiction is exercised normally throughout state territory, but that:

This presumption may be limited in exceptional circumstances, particularly where a state is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another state which effectively controls the territory concerned . . . acts of war or rebellion, or the acts of a foreign state supporting the installation of a separatist state within the territory of the state concerned.<sup>68</sup>

<sup>67</sup> *Al-Skeini* (ECtHR), para. 149 (n. 13).

<sup>68</sup> *Ilascu*, para. 312 (n. 13).

This suggests that in some instances a finding of the extraterritorial exercise of jurisdiction on the part of one state will necessarily denote (whether or not it is addressed) some sort of diminution in the liability for securing rights in the territorial jurisdiction for another state. The Grand Chamber also concluded that:

even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.<sup>69</sup>

This is significant because it suggests a ‘sliding scale’ of territorial jurisdiction – the state must do what it can – which the Court in *Banković* had appeared to reject *extraterritorially* as far as the test based on territorial control was concerned. It might be speculated that this reflects a greater need to subject the state to obligations in its own territory and with respect to its own nationals (most of whom reside in that territory and few of whom reside extraterritorially). But such a need relates to what the obligations mean in substance rather than whether they apply. As with what was mentioned earlier regarding the dictum from *Al-Skeini* on the exercise of physical power and control over individuals in state-run facilities, the distinction between applicability and the meaning of substantive obligations (here, it seems, they should be limited to positive obligations) is blurred.

### 3.7 Does the ‘jurisdiction’ clause apply as an alternative basis for extraterritorial applicability for treaties with ‘colonial’ clauses?

It will be recalled that certain early human rights treaties, notably the ECHR and its Protocols, contain a ‘colonial clause’ through which states parties can declare that they will extend the rights in the treaties to their colonies. In many cases, states that had and/or still have such overseas territories exercised and/or exercise the degree of control over such territories and/or the people within them on an individual level so as to meet the ‘jurisdiction’ test for applicability contained in separate clauses of the ECHR and its Protocols. This raises the question as to whether these treaties would apply on ‘jurisdictional’ grounds even if a ‘colonial clause’ declaration has *not* been made.

This issue came before the European Court of Human Rights in two cases related to Macau and Hong Kong before the handovers to China, when these territories were subject to Portuguese and UK sovereignty. The European Court of Human Rights held that for overseas territories, the only way ECHR obligations can apply is through a ‘colonial clause’ declaration.<sup>70</sup>

This position on the exclusive determinacy of ‘colonial clause’ extension or non-extension as far as applicability is concerned creates the potential for a divergent situation under the ECHR and its Protocols when compared with the ICCPR, because of the different basis on which those treaties apply extraterritorially. Given the overlap in the rights covered as between the ECHR and its Protocols, on the one hand, and the ICCPR, on the other, a situation may arise where the nature of the state action in an overseas territory meets the jurisdictional test, and on the facts impacts on the enjoyment of a particular right common to both

<sup>69</sup> *Ilascu*, paras 361–65 (n. 13).

<sup>70</sup> *Bui Van Thanh*, pp. 4–5 (n. 13); *Yonghong*, p. 3 (n. 13). See also *Gillow*, para. 62 (n. 13).

sets of treaties, but only the obligation in the ICCPR applies because the state has not made an express extension of the relevant part of the ECHR or its Protocols.

#### 4 Treaties with free-standing models of applicability: approaches from CEDAW and CERD

Earlier it was explained that in the case of some of the human rights instruments that have a conception of scope of application or responsibility not linked to the exercise of ‘jurisdiction’ (i.e. a ‘free-standing’ conception), the treaties have nonetheless been treated for the purposes of extraterritorial applicability as if they contained the ‘jurisdiction’ provision. This was the approach taken by the Inter-American Commission on Human Rights as far as the (Inter-) American Declaration on Human Rights was concerned, and the International Court of Justice as far as the ACHPR and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict of 2000 were concerned.

A second approach to the extraterritorial scope of treaties with a free-standing conception of applicability provisions is simpler. It was adopted by the UK House of Lords (as it was then) in the *Roma Rights* case of 2004 concerning the posting of UK immigration officials at Prague airport, a policy intended to prevent individuals from travelling to the United Kingdom who would then make a claim for refugee protection there.<sup>71</sup> The complainants argued that the officials applied the immigration regulations in a manner that discriminated against the Roma people, and therefore constituted unlawful racial discrimination. Lady Hale, in her conclusions on discrimination with which the majority agreed, seemed to assume that the prohibition of discrimination on grounds of race in CERD applied extraterritorially,<sup>72</sup> and Lord Steyn in the same decision held that the discriminatory nature of the UK immigration operation at Prague Airport involved a ‘breach’ of the United Kingdom’s obligations under CERD.<sup>73</sup> Both judges appeared to assume applicability, without recourse to a particular factual doctrine such as the exercise of ‘jurisdiction’ which had to be met in order for the obligations to be in play.

The effect of the International Court of Justice’s 1998 order for provisional measures in the *Georgia v Russia* case is to offer further support to this ‘free-standing’ approach to applicability. The Court held that the CERD provisions at issue ‘appear to apply’ extraterritorially because there is no express restriction on territorial application in relation to either the treaty generally or the provisions at issue in particular.<sup>74</sup> The Court’s Order called upon ‘Both Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia’ to take certain acts to comply with the Convention, a determination that assumed the extraterritorial application of CERD to Russian forces in Georgia.<sup>75</sup>

This decision offers a particular approach to understanding the extraterritorial application of treaties such as the CERD which have free-standing models of applicability not expressly qualified by jurisdiction: the absence of a restriction on applicability, whether of a general character, or specific to the particular obligations in the treaty at issue, should be taken to suggest that the provisions *should* apply. In other words, as far as the significance of

71 See Opinion of Lord Bingham, *Roma Rights* case, para. 4 (n. 16).

72 See Opinion of Lady Hale, *Roma Rights* case, paras 97–102 (n. 16).

73 Opinion of Lord Steyn, *Roma Rights* case, para. 44 (on CERD) and para. 46 (n. 16).

74 *Georgia v Russia* (Provisional Measures), para. 109 (n. 11).

75 *Ibid.* at para. 149.

treaty provisions is concerned, the enquiry on extraterritorial applicability depends on not establishing this in a positive sense, but, rather, establishing whether it has been ruled out negatively though restrictive provisions. Such an approach to treaties with free-standing provisions can be seen as offering a potential explanation for the approach adopted by the UK House of Lords in *Roma Rights*, and a general doctrine to be followed in relation to such treaties, as an alternative to the approach of reading a concept of 'jurisdiction' into them.

## **5 Broader normative ideas and their relevance to the legal framework**

### *5.1 Introduction*

As with any area of law, the question of whether and to what extent international human rights law on civil and political rights should and does apply extraterritoriality implicates broader political ideas. Considering these ideas has the potential to deepen understandings of the debates around the value and the meaning of the legal framework. The merit of such an approach is acute when, as is the case here, the very applicability of the law itself is in question. The following section addresses the relevance of two broader sets of normative ideas: first, those concerned with the political relationship between the individual and the state as it is understood in human rights law and, second, those associated with the notion of a 'legal black hole'.

### *5.2 The political relationship between the individual and the state*

Political ideas about the relationship between the individual and the state place into question assumptions that underpin certain important general concepts of international human rights law, when the operation of these concepts is considered in the extraterritorial context. The ideas at issue concern the state's existential claim to legitimacy insofar as it exercises control over its citizens and the territory in which they live and over which the state enjoys sovereignty. Although international human rights law is ostensibly concerned not with the relationship between the state and its nationals exclusively (although some political rights in particular are), but, rather, the state and all individuals in its 'jurisdiction',<sup>76</sup> an assumption that jurisdiction is usually exercised in a state's territory, and that most individuals there are the state's own nationals, would seem to explain approaches to the substance of the law, referred to further below, which assume, reference and depend on the state's claim to legitimacy in the particular context of its own sovereign territory and nationals. How, then, should human rights be understood in the light of the profoundly different political basis on which a state acts extraterritorially – outside its sovereign territory, and in a context where most, if not all individuals affected by its acts, are non-nationals – where ideas of the legitimacy of its presence are understood very differently compared to ideas underpinning the political basis for its actions at 'home'? The significance of this general question is illustrated through the following three examples of different aspects of international human rights law.

76 On the non-nationality basis for human rights law, see, e.g., N. Rodley, 'Non-State Actors and Human Rights' in this volume.

### 5.2.1 Deference to the state, including the 'margin of appreciation'

In the first place, the substantive rules of international human rights law often incorporate a degree of deference to the state's own determination of local cultural and societal traditions when accommodation to these traditions is accepted as a legitimate limitation on human rights, such as in the 'margin of appreciation' doctrine particularly associated with the European Convention on Human Rights.<sup>77</sup> Such ideas necessarily assume and depend on political concepts about the particular link between the state and the people in its territory. How should such ideas be understood when the state acts abroad, and the political link between it and the people affected by its actions is of a different character?

### 5.2.2 Remedies

In the second place, the extraterritorial context raises distinct questions about the character of remedies for human rights violations.<sup>78</sup> The conventional wisdom in international human rights law is that there should be an effective 'domestic remedy' for such violations, and that the primary means through which the remedy is realised is through the state's legal system, with international human rights complaint mechanisms performing a subsidiary role to provide a remedy as a last resort (usually requiring the exhaustion of domestic remedies as an admissibility requirement).<sup>79</sup> The application of this requirement in the extraterritorial context implicates broader constitutional theories about the role of national courts in operating checks and balances against the executive.

Such theories emphasise the ideas of legitimacy that underpin the function of the courts in challenging the executive, rooted in part in the role they play as part of a constitutional system within the state, aimed ultimately at protecting that state and its people. They foreground the potential for tensions to arise when national courts are called up on to adjudicate conformity to human rights standards by the executive branch of their state when it is acting abroad, outside the overall polity and national population the courts and the executive form part of and serve. By the same token, they also draw attention to the tensions that exist with the idea of national courts of one state operating as a 'domestic remedy' in relation to a foreign state acting in the territorial space within which these courts operate. Ultimately, they place into question the primacy accorded to a domestic remedy, and the subsidiary status given to an international remedy, in the context of a violation of human rights law extraterritorially.

77 On the margin of appreciation, see, e.g., Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', (1999) 31 *INT'L L. & POL.* 843, 844–45 and sources cited therein.

78 On such remedies generally, see e.g. Dinah Shelton, *Remedies in International Human Rights Law* (OUP, 2006) and sources cited therein.

79 On the legal obligation to provide a domestic remedy, see, e.g. ICCPR, Art. 2, para. 3(a), ECHR, Art. 13 (nn. 20 and 17 respectively). On the exhaustion of domestic remedies as an admissibility requirement for a case to be heard before an international complaints mechanism, see e.g. (First) Optional Protocol to the International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), 999 UNTS 302, opened for signature 16 Dec. 1966, entry into force 23 March 1976 (ICCPR Optional Protocol 1), Art. 2; ECHR, Art. 35, para. 1 (n. 17).

### 5.2.3 Emergencies/derogations in the extraterritorial context

In the third place, the political and legal mismatch between the identity of the state acting extraterritorially, and the identity of the people and territory in which it is acting, has important implications for normative concepts crafted to regulate the circumstances in which a state can and should be permitted take ‘emergency’ measures limiting rights when its survival is threatened. Certain international human rights treaties, such as the ICCPR and the ECHR, enshrine these concepts in ‘derogation’ provisions.<sup>80</sup>

There is a question as to whether or not the test for activating a derogation – the existence of a ‘public emergency’ (ICCPR) or ‘war or other public emergency’ (ECHR) which ‘threatens’ (ICCPR)/is ‘threatening’ (ECHR) the ‘life of the nation’ (both instruments) covers all forms of extraterritorial security threats in relation to which a derogation would be needed in order for necessary responsive action to be compatible with human rights law.<sup>81</sup> The question arises because of the reference to the ‘life of the nation’. If that nation is defined as the foreign state acting extraterritorially (and the nationals it claims to act on behalf of), and not also the state/non-state territory in which it is acting, and the affected population, does the test only cover threats extraterritorially which can be linked back to the foreign state as their object/target? If so, would only war, occupation and other forms of military action relating to self-defence be covered, leaving outside the test other military action, for example that pursuant to Security Council authorisation under Chapter VII of the United Nations Charter outside of self-defence, including for reasons concerned with the protection of human rights, and even action that is defensive, but of another state/population, not the state taking the action?

There is a potentially highly important linkage here between the legitimacy of derogations, of limiting rights in emergency situations, on the one hand, and the legitimacy of intervention/foreign war, occupation and other forms of military action, on the other, the latter normative question being addressed by other areas of international law (e.g. the law on the use of force, United Nations law) rather than human rights law (although the law of self-determination is clearly relevant here). At the root of the derogations regime is an assumption of entitlement on the part of the state to take extreme measures limiting rights, because of ideas associated with the legitimacy of the cause: that the state needs to be able to ensure its continued survival, to maintain the state institutions that protect the rights of its people.<sup>82</sup> Equivalent ideas also underpin the international legal rules concerned with whether a state has the right to go to war in self-defence, unilaterally, without any multilateral approval.<sup>83</sup>

That said, international law and public policy now enshrines, to a certain extent, the cosmopolitan notion of ‘community obligations’ which seek to move the position of states away from an exclusive concern with their own survival and that of their people, to also being interested in the welfare of others extraterritorially.<sup>84</sup> If a state acts abroad ostensibly on this

80 See ICCPR (n. 20), Art. 4; ECHR (n. 17), Art. 15; ACHR (n. 17), Art. 27; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press, 1994), and sources cited therein.

81 ICCPR, Art. 15.1 (n. 20); ECHR, Art. 4.1 (n. 17). On this issue, see also *Banković* (n. 13), paras 41, 62.

82 See Fitzpatrick (n. 80), *passim*, and sources cited therein.

83 See e.g. the discussion and sources cited in Christine Gray, *International Law and the Use of Force*, 3rd edn (OUP, 2008) (Gray).

84 See, e.g., Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, 2010), and sources cited therein.

basis, for example to end gross violations of human rights, then a new ground for a legitimate 'threat' as far as it is concerned – to another nation, or people, not itself at all, or at least not exclusively – is necessarily in play. Similarly, if a state acts pursuant to a request for assistance from another state, then the object of the threat this action relates to is necessarily 'other' than it. For international law to allow action of this kind as a matter of the law on the use of force and/or UN law, on the one hand, but then assume its illegitimacy in the law of human rights as far as the derogations test is concerned, on the other, would be perverse.

That said, whether and in what circumstances international law allows the use of force extraterritorially outside the context self-defence is a relatively contested and complex matter when compared to self-defence.<sup>85</sup> Many argue that the default position in international law is a limit to self-defence, with extraterritorial military action for other purposes, including to protect human rights, only permissible if Security Council authorisation under Chapter VII of the UN Charter is forthcoming, and/or at the invitation of the state in whose territory the action is taken.<sup>86</sup> Here, then, the notion of the interest of 'others' – the 'international community', the state in whose territory the action is taken – is promoted, but requiring a form of sanction derived from those identified with this other interest – the Security Council in the case of the 'international community', the other state in the case of the invitation – in order for action pursuant to the interest to be lawful. It could be said, then, that a derogation regime which affirms a default position of permissible limitations only for wars of self-defence would be compatible with a somewhat equivalent presumption, in terms of legitimate grounds, in the law on the use of force.

The question then would be how this default position could or would be departed from in circumstances where military action for non-self-defence purposes was lawfully conducted as a matter of the law on the use of force – through UN Security Council Chapter VII authority and/or agreement by the host state. This issue lay behind the *Al-Jedda* case before the courts of England and Wales and the European Court of Human Rights, concerning the practice of security detention or internment by the UK military in Iraq.<sup>87</sup> The UK government had not entered a derogation to the ECHR relating to this or any other aspect of its military action in Iraq. It claimed that the Security Council had authorised it to conduct this practice as part of the broader mandate given to certain foreign forces in Iraq under Chapter VII of the UN Charter, and that the authorisation had the legal effect of modifying any inconsistent obligations under the ECHR. Put differently, it was claimed that there was in the manner of what might be called a 'constructive' or 'effective' derogation (having an effect like a derogation but not operating through the derogation regime) enabled by Security Council authority. It was suggested that this was possible through Article 103 of the United Nations Charter, which provides that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.<sup>88</sup>

The idea was that the supposed authorisation of internment made by the Security Council in a resolution passed under Chapter VII of the UN Charter, enjoying normative status as a

85 See Gray (n. 83), and sources cited therein.

86 Ibid.

87 *Al-Jedda v The United Kingdom* App. No. 27021/08 (ECtHR, 7 July 2011) (*Al-Jedda*).

88 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 103.

matter of UN law, constituted an ‘obligation’ under the Charter for Article 103 purposes, thereby trumping any conflicting obligations the UK had under the ECHR.<sup>89</sup>

The European Court of Human Rights sidestepped the question of whether the Security Council might be able to make determinations with this legal effect in human rights law (including whether this was based on a correct interpretation of Article 103), by focusing on a prior matter: there was a presumption that the Security Council would not intend to modify member states’ human rights obligations, and this could not be rebutted when the supposed authority at issue was, as here, ambiguous.<sup>90</sup>

The case did not, therefore, resolve the broader question of whether the Security Council can and should have the role the UK claimed it performed in *Al-Jedda*, to perform an equivalent function in limiting human rights obligations in the context of extraterritorial security threats as derogation provisions play in the context of security threats in a state’s own territory – proactive, ad hoc law-changing as a substitute for the operation of existing normative regulations.

One might begin to consider the answer to this question through a comparison in the different ways each normative regime would operate. The human rights regime operates as a regulatory framework grafted onto state behaviour, regardless, as addressed earlier, of whether or not the behaviour is itself pursuant to a legal entitlement more broadly in international law. It is, moreover, relational and context-specific in its application in any given case: is there an emergency, does it constitute a threat to the nation, is the restriction for a legitimate purpose, is it proportionate to that purpose and so on.<sup>91</sup> The Security Council authorisation regime, by contrast, is not regulatory and context-specific but authoritative and absolute in nature: the test is not whether or not the restriction is compatible with particular standards in the circumstances, but whether or not an entitlement to operate it has been granted by the Council. Is there something special about the extraterritorial context when compared to the territorial context that necessitates the operation of this different normative approach to the question of how restrictions on individual rights should be treated as a matter of law? More broadly, what are the relative merits of these two different legal strategies for legitimising restrictions on human rights?

It may be that the Security Council approach has only been considered because of a concern that the ‘life of the nation’ test in derogations law would be interpreted to cover only direct threats to the state acting extraterritorially. Accepting this view, the drastic step of seeking to argue that the Council could and did modify human rights obligations extraterritorially could be seen as the only means of ensuring restrictions which might, in principle, have been compatible with human rights law, *mutatis mutandis*, in the domestic context, but could not fit within the test extraterritorially because the test itself did not encompass extraterritorial situations. The law-making role asserted by the UN Security Council is deployed to remedy a defect in human rights treaty law: that the law on derogations cannot encompass extraterritorial situations.

It has to be asked how likely it is that courts and other authoritative interpretation bodies would define the ‘life of the nation’ test so as to render the derogations regime incapable of fair and effective operation extraterritorially, thereby placing into question the viability of the extraterritorial application of human rights law in general, even when, as addressed above, the latter issue has long been accepted and affirmed by them. Is there a serious prospect of such

<sup>89</sup> See *Al-Jedda* (n. 87), *passim*.

<sup>90</sup> *Al-Jedda* (n. 87), para. 102.

<sup>91</sup> See the sources cited above n. 80.

bodies adopting an approach to interpreting human rights law that would render inoperable to military action abroad the special regime of limitations conceived for emergency situations? Given the generous latitude that has been given to states by courts in applying the derogations rules, addressed further below,<sup>92</sup> it seems more probable that the ‘threat to the nation’ in the derogations test would be interpreted so as to encompass security threats faced by states acting extraterritorially.

However, bearing in mind the foregoing analysis on the links between the legitimacy of extraterritorial military action itself (the law on the use of force issue) and the legitimacy of restrictions on human rights taken in response to extraterritorial security threats (the derogations law issue), it may be that a court or other interpretation body considering the question of whether there is a ‘threat to the nation’ for the purposes of the law of derogations might deem it necessary to go into the cognate question of the legitimacy of the military action itself. This might be especially the case for military action outside of self-defence where, as reviewed earlier, there is a general view that international law requires special authority, whether through the consent of the host state or authorisation by the UN Security Council.

It might be argued that the human rights law ‘threat to the nation’ only covers threats that the state has the legal right to respond to: that the permissibility of an extra opportunity to limit rights (beyond the standard opportunity provided by limitation clauses) presupposes a legitimate entitlement to respond to the ‘emergency’ that supposedly provides the underlying rationale for the extra opportunity in the first place.<sup>93</sup> Whereas with domestic security threats, such a right is, as reviewed earlier, assumed by a legal regime that accepts the state’s monopoly on the use of violence and affirms its existential rationale to secure the kind of ordered society within which rights can be protected. For extraterritorial security threats, however, there is no such assumption outside of self-defence. A court might be persuaded to take the view that a state taking military action extraterritorially in order to respond to a non-self-defence threat would need to establish its legal entitlement to do so in order to be able to avail itself of the derogation provisions of human rights law.

Earlier, it was remarked that it would be perverse for one area of international law – the law on the use of force – to permit certain forms of extraterritorial military action, but then another area of international law – human rights law – to operate (in the derogations rules) as if such action lacked legitimacy. Equally, it might be said that it would be peculiar if military action that was illegal as a matter of the law on the use of force would be treated as legitimate when it came to the operation of human rights law, in the particular sense that the state taking the action, although actually lacking a lawful basis for doing so, would be granted extra privileges to restrict rights on the basis that it has a legitimate role in responding to a security threat.

The upshot of an approach that would graft the law on the use of force onto an aspect of the law of derogations would be that a state taking extraterritorial military action would only be able to avail itself of the operation of the derogations regime in international human rights law if the action at issue was lawful as a matter of the law on the use of force. This takes things back to the earlier discussion of the link with the concept of ‘jurisdiction’ in general public international law: the point that human rights law applies extraterritorially regardless of whether the state action at issue is or is not lawful as a matter of general international law. Here, it is not that human rights law would not apply if the state has no lawful right to be

92 See Fitzpatrick (n. 80), and sources cited therein.

93 On the rationale for derogations, see Fitzpatrick (n. 80), and sources cited therein.

acting extraterritorially; rather, the state would not be able to benefit from the extra ability to restrict rights provided by the derogations regime in particular. In other words, it is, as it were, the applicability of the derogations regime that would be contingent on the broader legality of the extraterritorial action at issue; the applicability of human rights law in a general sense would be unaffected by the wider question of legality.

This approach would create a significant new issue for those states that engage in military action extraterritorially and which are subject to the kind of judicial scrutiny of conformity to human rights law through national and international mechanisms that is of a more pronounced character when compared to the nature of such scrutiny when the application of the law on the use of force is concerned. Of course, for states seeking to avoid judicial scrutiny of the lawfulness of military action by courts applying human rights law, the alternative route to legal justification of Security Council authority – such as it is, actually, possible – can be seen as offering a way to restrict rights without having the ‘threat to the life of the nation’ test in derogations law considered. In one sense there is an irony in such an approach, in that a body with primary responsibility for issues of international peace and security, and so the international law rules on the use of force, can supposedly be deployed in an attempt to modify another area of international law – human rights law – in a manner that could ensure that other bodies that have a primary responsibility for the enforcement of that other area of international law – human rights courts – do not stray into the law on the use of force as part of their analysis. The UK lost in *Al-Jedda* on the narrow question of the lawfulness of security detentions/internment in Iraq. However, in its strategy of framing this question as being a matter of whether authority had been forthcoming from the UN Security Council, the UK avoided the risk of the considerably broader question of the legality of its military presence in Iraq being brought before the Court as part of a consideration of the law of derogations.

### 5.3 The ‘legal black hole’ – what is at stake?

As mentioned earlier, the issue of the extraterritorial application of human rights law has become foregrounded by the popular concern that certain extraterritorial arrangements – the most prominently invoked situation being the US detention and interrogation facilities in Guantánamo Bay – constitute ‘legal black holes’, and that this situation is problematic in a fashion that justifies an important, sometimes pre-eminent, position on the agenda of global human rights concerns. What are the merits of this portrayal of the question of whether international human rights law should apply extraterritorially?

The notion that the facility in Guantánamo Bay, and other forms of extraterritorial activities by foreign states, are legal vacuums is absurd: the states involved in them claim that the law plays a major role in constituting these arrangements. In Guantánamo, for example, most fundamentally international law provides, through treaties between Cuba and the US, the entitlement of the US to administer the area on which it operates the Naval Base housing the detainees.<sup>94</sup> In Iraq, the site of the Abu Ghraib abuses that also led to ‘legal vacuum’ concerns, and the actions of UK soldiers that led to the *Al-Skeini* and *Al-Jedda* decisions addressed above that form part of some of the canonical case law in this area, UN Security Council resolutions, and later agreements with the post-occupation Iraqi government, were invoked by the

94 Agreements Between the United States of America and Cuba: 16–23 February 1903, Art. I, UST No. 418, (available at [http://avalon.law.yale.edu/20th\\_century/dip\\_cuba002.asp](http://avalon.law.yale.edu/20th_century/dip_cuba002.asp)); 2 July 1903, UST No. 426 (available at [http://avalon.law.yale.edu/20th\\_century/dip\\_cuba003.asp](http://avalon.law.yale.edu/20th_century/dip_cuba003.asp)); 29 May 1934, UTS No. 866 (available at [http://avalon.law.yale.edu/20th\\_century/dip\\_cuba001.asp](http://avalon.law.yale.edu/20th_century/dip_cuba001.asp)).

foreign military powers in their claim to a lawful entitlement to engage in the invasion, occupation and post-occupation military presence in the state.<sup>95</sup>

As scholars such as Susan Marks point out, representing situations like Guantánamo as lacking law as a mode of criticism is problematic: the role of the law in potentially facilitating these situations is concealed.<sup>96</sup> In what in critical theory – specifically, ideology critique – is termed a ‘strategy of inversion’, such representations suggest that with the application of law these problematic situations will be brought to an end. The portrayal is descriptively inaccurate and normatively problematic, implying a political role for the law in relation to such situations different from that which it actually performs. By way of what is termed ‘dissimulation’ in critical theory, the law is presented in an inherently redemptive rather than normatively complex and ambivalent manner.

That said, despite the absolutist implication of terms like ‘legal black hole,’ as mentioned earlier such terms are mostly invoked to articulate a concern with the absence of not all law but a particular area of it: the full range of necessary legal standards that should apply whenever the state exercises control over territory and the individuals within it, including those standards governing the detention of individuals, and independent remedies for enforcing those standards. As a term of critique, the ‘legal black hole’ idea speaks to a fear that, when states move away from their own sovereign territories, they somehow also effect a partial or complete move away from the arena of necessary legal regulation as far as the treatment of individuals is concerned.

This constitutes one of the main arguments implicated in the question of whether human rights law should apply extraterritorially: the notion that a ‘legal black hole’ of this nature would otherwise prevail, that such a situation is undesirable, and so efforts – political, activist, judicial – to remedy such a situation are meritorious.

Indeed, some of the advocacy in this area comes close to suggesting that international human rights law is somehow the pre-eminent means of realising effective checks and balances against states; that all it would take to bring an end to certain objectionable practices is the application and enforcement of international human rights law. Here, then, is the general redemptionist idea earlier associated with all law applied to human rights law, which is invested with a transformatory capacity.

This is a difficult thesis to maintain, given the various devices that exist within human rights law permitting the state to limit rights, from the attenuated way rights themselves are defined, to reservations, restriction clauses, derogation provisions and the concept mentioned earlier of the ‘margin of appreciation’, through which the state’s own view of what limitations on rights are necessary is deferred to.<sup>97</sup>

Even for non-derogable rules like the prohibition on torture and inhuman and degrading treatment there is debate about which practices fall within the scope of what is prohibited.<sup>98</sup> The rules concerning the application of human rights in emergency situations have been criticised for according too much latitude to states because of the generous interpretations of derogation provisions made by international review mechanisms, especially the ECHR

95 See Marc Weller, *Iraq and the Use of Force in International Law* (OUP, 2010); Stefan Talmon, *The Occupation of Iraq*, two volumes (Hart, forthcoming 2014), and the sources cited therein.

96 Susan Marks, ‘State-Centrism, International Law, and the Anxieties of Influence’ (2006) 19 *Leiden Journal of International Law* 339.

97 See above, nn. 77 and 80.

98 See Nigel S. Rodley with Matt Pollard, *The Treatment of Prisoners Under International Law*, 3rd edn (OUP, 2013), ch. 3, and sources cited therein.

Strasbourg machinery with its invocation of a broad ‘margin of appreciation’ involving deference to states’ own decisions as to the existence of an ‘emergency’ situation and the necessity and proportionality of restrictions introduced to respond to this threat.<sup>99</sup> The challenge here is whether the inadequate nature of the test applied to state action renders this area of the law incapable of delivering what it promises, thereby serving ironically to legitimate infringements on individual rights without having actually placed the states involved under any meaningful constraints.

One cannot help wondering, then, whether the application of human rights law extra-territorially fully addresses the political objectives that lead those calling for it to make their arguments. For example, would international human rights law properly applied actually require the US to release or prosecute all the detainees in Guantánamo Bay, Bagram and other extraterritorial detention and interrogation centres, the policy that has been advocated by most mainstream opponents and an expert panel in its report to the United Nations Commission on Human Rights?<sup>100</sup> Not only does the call to ‘release or prosecute’ perhaps miss the point of many of the Guantánamo detentions; it is far from clear that some form of security detention would necessarily be impermissible in international human rights law.<sup>101</sup> Critics may thus be placing faith in a normative regime that even on its own terms may not speak fully to their agenda.

Alongside concerns relating to the substantive content of international human rights law are other worries relating to the value of this regime of law as an effective review mechanism, notably relating to enforcement. Whereas the European Court of Human Rights can hear complaints from individuals against all Council of Europe member states,<sup>102</sup> many of whom being engaged in extraterritorial activity, the UN Human Rights Committee’s (somewhat) equivalent jurisdiction of issuing Views on individual communications making complaints about non-compliance with the ICCPR does not operate with respect to the United States nor to some other states acting extraterritorially.<sup>103</sup> And even when some form of scrutiny mechanism does operate, for example through the reporting procedure to the Human Rights Committee under the ICCPR,<sup>104</sup> the limited remit of some country-specific NGOs can mean that the crucial assistance role that NGOs play in the operation of human rights mechanisms can be relatively minimal when extraterritorial activity is under evaluation.

Beyond these and other limitations with the law, the nature of extraterritorial activities means that many of them take place in conditions of near total secrecy. Whatever the truth of the ‘legal black hole’ designations, it is certainly true that certain extraterritorial activities take place in circumstances where the opportunities for scrutiny by third parties are markedly constrained and sometimes entirely absent. In the light of these concerns, one should not be too sanguine as to the value of international human rights law to provide meaningful and effective review of extraterritorial state action.

99 See the citations above nn. 77 and 80, and the sources cited therein.

100 On the expert panel, see UN Commission on Human Rights, *Situation of Detainees at Guantánamo Bay – Report*, UN doc. E/CN.4/2006/120, 15 February 2006, obtainable from <http://www.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>, para. 95.

101 See, e.g. symposium edition *Security Detention in (2009) 40(3) Case Western Reserve Journal of International Law* 315, and sources cited therein.

102 See ECHR (n. 17), Art. 34.

103 Because the US has not ratified the Optional Protocol to the ICCPR allowing for this. See ICCPR Optional Protocol 1 (n. 79).

104 See ICCPR (n. 20), Art. 40.

That said, is there not a legitimate purpose to calling for the application of human rights law even without an exaggerated view of the difference it would make? Even allowing for concerns about the derogation test, for example, at a bare minimum the law here still provides an absolute prohibition on breaches of non-derogable rights such as the right to be free from torture.<sup>105</sup>

It is also significant that, as mentioned earlier, certain states seek to deny the applicability of human rights treaties: this would surely be unnecessary if such states considered the substantive content of these instruments and/or the associated modes of enforcement as placing them under no meaningful constraint.

It should be asked how helpful it is to seek to counter the essentialism that the application of human rights law would bring about a transformation in the fate of people subject to the extraterritorial actions of states with its opposite, that such application would be of no benefit whatsoever. Another option exists, of course, which is to be concerned with extraterritorial applicability as a modest initiative to serve certain policy objectives.

In assessing the merits of such a position, one must place the particular set of policy concerns at issue in a broader context, and consider the validity of focusing on them in the light of what is left outside the frame of analysis. The operation of extraterritorial detention facilities and the conduct of military actions in Afghanistan and Iraq form part of a broader process of the projection of power abroad by states and the complex interrelationship between the activities of powerful states and the welfare of individuals outside their territory.

One might ask what is at stake when what was even at the high point a situation involving only a few hundred men in Guantánamo seemed to occupy a more prominent position as a global human rights cause célèbre than, for example, the tens of millions of women, men and children infected with HIV in developing countries who lack access to affordable anti-retroviral drugs. This focus implicates the skewed agenda of much mainstream human rights policy, with its pattern of dominant and subaltern issues: the focus on civil and political rights more than economic, social and cultural rights (as reflected in this chapter); on the exceptional and the extreme more than the pervasive and everyday; on the male more than the female; on the public more than the private; and on particularly dramatic incidents more than broader, long-term structural problems.<sup>106</sup>

This skewed agenda takes things back to the earlier point about the ideological representation of international law. When one moves beyond the law's role in offering some safeguards, for example the right to a public enquiry established in *Al-Skeini*, one sees the law, for example, having initially been invoked as a bar preventing the production of affordable generic HIV anti-retroviral drugs through intellectual property rights.<sup>107</sup>

Not only, then, could it be said that the fetishisation of the arrangements in Guantánamo and other situations involving extreme violations of civil and political rights reinforce the

105 See the sources cited above n. 98. On the absolute nature of the prohibition on torture, see e.g. Nigel S. Rodley with Matt Pollard, *The Treatment of Prisoners Under International Law*, 3rd edn (OUP, 2013), ch. 2, and sources cited therein.

106 For an excellent review of many of the main critiques of international human rights law, see Frédéric Mégrét, 'Where Does the Critique of International Human Rights Law Stand? An Exploration in 18 Vignettes', in David Kennedy and José María Benyeto (eds), *New Approaches to International Law: Lessons from the European experience* (TMC Asser Press, 2012).

107 See, e.g., M. Westerhaus and A. Castro, 'How Do Intellectual Property Law and International Trade Agreements Affect Access to Antiretroviral Therapy?', (2006) 3(8) *PLoS Med*: e332, obtainable from <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0030332>.

unjustified dominance of certain political causes over others. Also, a greater focus on an area of public policy where to a certain extent the law may make a positive difference, albeit a marginal one, when compared to the level of focus on an issue where the law may be more squarely part of the problem, brings with it the risk, as in the aforementioned use of the term 'legal black hole', of fostering a misleading presentation of the role of law as necessarily redemptive.

Indeed, it would be an irony if the silence or active support of the law on many of the most important causes of human misery in today's world has led to a strategy to turn away from these causes to relatively minor human rights problems like the situation of a few hundred men in Guantánamo, because it is here that the law might make more of a positive difference; in other words, for a broader political agenda on human rights to be determined by what is realisable through the law. Another approach to this problem would of course be to step outside the worldview of the law and be freed of its limitations.

To a certain extent, though, this challenge relates to matters internal to the law, which can be addressed within it. The problem that issues concerned with the civil rights of a few hundred men in Guantánamo seemed to be given greater attention than the right to health of tens of millions of women, men and children infected with HIV could be countered by a greater focus on the extraterritorial applicability of those areas of human rights law concerned with economic, social and cultural rights.<sup>108</sup> Equally, the problem that international legal standards concerned with intellectual property were operating as an impediment to the production of affordable anti-retroviral drugs for people in the global south could be, and is being, countered by initiatives to change this area of international law.<sup>109</sup>

But an internal recalibration of priorities within a law-determined agenda still ultimately retains the limitations of such an agenda. There is no escape from a need to be more modest in the claims made about the value of the law, acknowledging its potential to make differences in certain discrete areas, but not holding it out to be more than it is worth, as somehow a substitute for the more complex and broad-ranging business of transforming the political culture both nationally and internationally in order to create greater transparency and accountability in relation to state actions overseas. A consideration of the applicability of international human rights law may ultimately be a valid response to the need for greater scrutiny of extraterritorial action, provided that as such it is understood to be but one relatively minor part of a much wider necessary initiative. Such broader political ideas are being generated and movements being built around them, but to rely on that and continue to focus on legal strategies is, in one sense, perverse: free-riding on work by others addressing ultimately more significant matters, in favour of work focusing on relatively marginal issues. Moreover, this does nothing to challenge, and indeed may worsen, the dominance within parts of the mainstream human rights policy agenda of issues peripheral to the lives of most people in the world.

## 6 Conclusion

Whether and to what extent states bear international legal obligations with respect to the civil and political rights of people outside their sovereign territories has been subject to piecemeal treatment by certain courts such as the International Court of Justice and European Court of

108 See the sources cited above, n. 5.

109 See the source cited above, n. 107.

Human Rights, and other interpretative bodies such as the UN Committee on Human Rights. This chapter has sought to identify and critically evaluate the significance of the general concepts potentially suggested in these key texts, as well as some of the broader political ideas which underpin the general topic and illuminate what is at stake when choices are made as to the legal approaches to it. Much remains unclear, and the scope for the normative regime to develop in the future, as new situations are addressed and the ideas in existing texts are revisited, challenged and built upon, is significant.

### Select bibliography

- Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004).
- Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Brill, 2012).
- Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010).
- Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009).
- Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP, 2011).