Addressing global environmental concerns through trade: extraterritoriality under WTO law from a comparative perspective

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6 Extraterritoriality under international human rights law

6.1 INTRODUCTION

Extraterritoriality under international human rights law refers to an extension of states' obligations to respect and protect human rights not only within their own territory, but also when acting outside their territory. International human rights obligations stem from regional and international human rights treaties, which have been interpreted by regional and international human rights bodies to also apply outside the territory of the state party to the human rights treaty. Also when acting outside their home state territory, state actors remain bound by their duty to respect human rights. Even though such a concept of extraterritoriality (extension of a state's own obligations to its own actions abroad) differs from the concept of extraterritorial effect of npr-PPMs (extending a national measure to apply outside the regulating state's territory with the objective to address concerns outside its territory), the analysis of human rights law is relevant as it raises a number of questions that may be useful to assessing environmental npr-PPMs: why did the regional and international human rights bodies opt for a broad scope of application of the treaties? What is the legal ground for such extraterritorial application? How far do these extraterritorial obligations extend? Are states willing to stretch the boundaries of traditional territorial jurisdiction and sovereignty when transboundary or global concerns are at issue?

The debate on extraterritorial human rights obligations has been steered by the case law of the regional and international human rights bodies, which will be the object of study of this chapter. The purpose of this chapter is to give an overview of when obligations have been applied extraterritorially and upon which grounds.

The chapter will first outline the development of regional and international human rights law. Secondly, an overview of the existing legal framework will be given. Thirdly, the question of jurisdiction will be discussed through the case law of human rights bodies: the meaning of jurisdiction in a human rights context, the jurisdictional clauses in the treaties and the interpretations thereof by the respective human rights bodies. The analysis will not be exhaustive, but will focus on the common patterns discernible throughout the decisions

of the different bodies.[1] After the formal discussion on jurisdiction, a closer look will be taken at the substantive content of the rights and at the question whether a correlation can be found between the substantive obligation and its extraterritorial application. Lastly, a possible transposition of the human rights findings to a trade-environment context will be explored upon which the extraterritoriality decision model as proposed in chapter 6 could build.

6.2 States protecting individuals' rights

Throughout history, religious and secular 'human rights' advocates have made pleas for the protection of a variety of rights of individuals.[2] The term 'human rights' itself, however, is a relatively recent notion. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, marks the beginning of contemporary international human rights protection.[3] The focus of human rights protection hitherto had been on the protection of citizens as an internal state matter in which interference by other states was not acceptable.[4] After World War II this perception changed: human rights were so massively violated during this war that a different approach was very much needed.[5] The Universal Declaration contains a wide range of rights to be protected, including basic rights such as the right to life, civil liberties such as freedom of opinion, and a series of economic, social and cultural rights such as the right to education. For the first time in history, states agreed at a global level on a list of core guarantees that serve

1 For a more comprehensive and in-depth analysis of extraterritoriality and human rights, see among others, Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, vol 11 (Martinus Nijhoff Publishers 2013).; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011).; Fons Coomans and Rolf Künneman (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012).

2 Michael Haas, *International Human Rights: A Comprehensive Introduction* (2 edn, Routledge 2014) chapter 2. Haas gives an interesting overview of human rights in religions from Hinduism to Islam, as well as human rights advocated by philosophers from Aristotle to Marx. In chapter 3 an overview is given of early documents of human rights, starting with the Code of Hammurabi in 1780BCE.

3 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

4 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 6. For an overview of the historical development of human rights protection, see Kälin and Künzli, chapter 1.

5 The preamble of the Charter of the United Nations, adopted in 1945, states that "we the peoples of the United Nations, determined to save succeeding generations from the scourge of war, (…) and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom…".

to protect the dignity of human beings, regardless of their nationality, race or gender.[6] The Declaration itself is a non-binding instrument, but its content is now firmly established in a number of legally binding conventions, such as the international UN human rights treaties;[7] in regional instruments, such as the European Convention on Human Rights (ECHR); and in domestic law, often via Bills of Rights in constitutions.

These international and regional instruments impose obligations on states, meaning they can be invoked only against states.[8] As they cannot be directly invoked against private actors, international human rights in this sense differ from the fundamental rights that can be guaranteed in national constitutions.[9] In principle, depending on the jurisdictional scope of the treaty in question,[10] all individuals within a state's jurisdiction can rely upon the state's obligation to protect human rights. As will be discussed below, in certain circumstances also individuals beyond a state's jurisdiction – in the general public international law sense referring to sovereign territory – can invoke human rights obligations against a state: this in cases where the human rights obligations of states are applied to state actions outside their territory, i.e. extraterritorially.

International human rights obligations entail both positive and negative obligations. States must refrain from interfering with the enjoyment of rights

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6 Kälin and Künzli(2009), 3.

7 International Covenant of Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3; International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85; Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2715 UNTS; Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137; Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13; Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, A/RES/45/158; Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106.

8 Kälin and Künzli(2009), 31.

9 If national law does not ensure sufficient protection of its obligations it has signed onto, then that failure could lead to a claim against the state before the regional or international human rights bodies. For an interesting overview of the status of human rights violations by private persons and entities, see Ineta Ziemele, 'Human Rights Violations by Private Persons and Entities: The Case Law of International Human Rights Courts and Monitoring Bodies' 2009, EUI Working Papers.

10 The jurisdictional scope of the main treaties will be discussed in more detail below. While most treaties explicitly refer to the 'jurisdiction' or 'territory' of states, the European Charter of Fundamental Rights for instance, as a *sui generis* human rights treaty is only applicable to acts of EU institutions and Member States when implementing EU law. Because of the special character of the European Charter of Fundamental Rights that is characteristic for the EU context, the Charter will not be discussed further within this chapter.

(negative obligations) as well as take action to ensure protection of human rights (positive obligations). In other terms, the obligations of states can be classified as the duty to respect (no interference), the duty to protect (through both preventive and remedial action) and the duty to fulfil (ensure the fulfilment of rights).[11] For instance, a state is respecting the freedom of press when not interfering with the press. A state complies with its duty to protect by ensuring police protection where necessary, or by taking the required safety measures in order to limit possible damage that can occur through natural disasters. The duty to fulfil adds an additional layer to the duty to protect as it requires the adoption of wide-ranging legislative or administrative measures to ensure human rights protection.[12] For instance, in order to ensure a fair trial, the state has to provide for operative investigative authorities and an independent judiciary; in order to realize of the right to education, the state has to provide schools; with regard to the right to health, the state has to provide adequate health services. The availability of resources can then determine the actual scope of the right, which can be different for each state.

A violation by a state of an international obligation can lead to state responsibility. The ILC Articles on State Responsibility[13] can give guidance on the determination of the state organs or agents whose conduct can be attributed to the state. The Articles establish that a state is accountable for all its organs in legislative, executive or judicial functions, including at regional or local level.[14] Even when state agents are not implementing state policy, but are exceeding their official authority (*ultra vires*), the actions are still attributable to the state as long as the agents are acting in an official capacity.[15] When private persons perform public functions, their actions can also be attributable to the state. *De facto* agents, not formally entrusted with public functions, but acting under the direction or control of a state, will be seen as state agents for the purpose of state responsibility.[16] Groups revolting against a state in the context of civil war and thereby committing civil war, will not be seen as emanations of the state, unless they exercise *de facto* governmental power: in that case the state will be accountable for their actions.[17] Also when

11 For a comprehensive overview of the different obligations, see among others Kälin and Künzli(2009), 96.
12 Ibid 112.
13 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), Report of the ILC on its fifty-third session, 2001, UN Doc A/56/10, Supplement no.10.
14 ARSIWA, Article 4.
15 ARSIWA, Article 7.
16 ARSIWA, Article 5.
17 ARSIWA, Article 9.

insurgent groups take over the control of the country or create a new state, that state will be accountable for their actions retrospectively.[18]

Strictly private actions,[19] including human rights violations by insurgents who are not under the control of a foreign state or who do not assume any (*de facto)* governmental power, are not attributable to the state (unless the state failed to take the necessary steps to protect the victims against these private actors, in which case the omission can lead to a breach of the state's human rights obligations).[20] Undoubtedly, private entities can pose threats to human rights protection as well, but it is then up to states to take the appropriate (national) measures.[21] The question whether international organizations should become subject to human rights obligations is very relevant in a time where such organizations can make binding decisions which can violate human rights. The *Kadi* case where the European Court of Justice indirectly reviewed a UN Security Council Resolution by reviewing the Commission's implementing measure and found that the measures in question did not sufficiently respect fundamental rights, supports that point.[22] The legal adoption of the European Charter of Fundamental rights imposes human rights obligations on the EU institutions as well as the EU Member States in their implementation of EU law.[23] The ongoing accession negotiations of the EU to the ECHR shows the willingness on the one hand to become accountable as an (*sui generis)* organization, but also the practical difficulties of such action, such as the appointment of a 'national' judge.[24]

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18 ARSIWA, Article 10. For an overview with references to jurisprudence, see Kälin and Künzli(2009), 78.

19 Private actions are usually remedied under domestic (civil and criminal) law. These traditional remedies are seriously tested where private entities operate on a transnational or global scale.

20 Kälin and Künzli(2009), 81.

21 The 1981 African Charter does address individuals, but with little legal impact. Article 27 of the African Charter for instance states that 'every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community'. Article 28 then states that 'every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance'. Despite an arguable lack of clarity content wise, the Charter does not foresee in any complaint mechanism against individuals, so the duties laid down in Articles 27 and 28 lack enforcement options.

22 Court of Justice of the European Union, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P, 2008. See also Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' 2012, 23 European Journal of International Law 1015.

23 Charter of Fundamental Rights of the European Union (2000/C 364/01). The Charter became legally binding when the Treaty of Lisbon entered into force on 1 Dec. 2009.

24 See for an overview of the issues Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' 2013, 36 Fordham International Law Journal 1114. See also the CJEU's Opinion on the EU's accession to the ECHR in which the court held that the Draft Agreement on the accession is incompatible with E law: CJEU, Opinion 2/13, 18 December

From the perspective of individuals, the internationalization of human rights protection has created individual rights under international law that can be invoked against states, rather than being dependent on the (at times arbitrary) will of the state as a protector of rights. Nevertheless, despite the creation of mechanisms for individuals to complain to international bodies about human rights violations, protection remains deficient in a number of ways.[25] Firstly, these mechanisms are principally only available to individuals in those states who have ratified a relevant treaty. Secondly, not all decisions of treaty bodies have binding value. Even though the decisions of the UN human rights bodies are often seen as authoritative,[26] there are no enforcement options in respect of non-complying states. The ECtHR,[27] the IACtHR[28] and the ACtHPR[29] can issue binding decisions and impose penalties, but these courts have little leeway to 'force' persistent states to change their behavior, apart from political pressure – a 'pitfall' common under international law. Thirdly, the invocation of the internationally recognized rights before domestic bodies depends on the domestically regulated relationship between international and national law (monism v dualism).[30] While the domestic laws of some states contain substantive human rights obligations that need to be respected by the state and individuals alike, other states have not transposed these obligations, allowing the direct applicability of the treaties.[31] In contrast to for instance trade law, individuals and private entities are significantly more empowered in the field of human rights law.

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25 Kälin and Künzli(2009), 15.

26 Rosanne van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2011).

27 European Convention on Human Rights, Article 46.

28 American Convention on Human Rights, Article 68. Individuals cannot bring a complaint directly to the Court, but only to the Inter-American Commission on Human Rights (who can herself lodge complaints to the Court after the prescribed procedures). See ACHR, Articles 41; 44; 61.

29 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 30. Individuals have no direct right to submit complaints to the Court, but the Court may entitle them to institute cases directly before it (Article 5(3) of the Protocol). Individuals cannot petition the African Commission, but the Commission's mandate include ensuring the protection of human rights as laid down by the Charter (Article 45 of the African Charter on Human and Peoples' Rights).

30 Kälin and Künzli(2009), 15. None of the human rights treaties contains a clause that it is directly applicable in the national legal orders.

31 Marc Bossuyt, 'The Direct Applicability of International Instruments on Human Rights' 1980, 15 Revue belge de droit international 317.

6.3 LEGAL FRAMEWORK

This section will discuss the main international and regional human rights courts and monitoring bodies[32] and their (quasi-)judicial decisions to discuss the extraterritorial application of human rights law.

6.3.1 International human rights treaties

The UN treaty system consists of nine core international human rights treaties. Next to the International Covenant on Economic, Social and Cultural Rights 1966[33] (ICESCR) and the International Covenant on Civil and Political Rights 1966[34] (ICCPR), they include the International Convention on the Elimination of All Forms of Racial Discrimination 1965;[35] the Convention on the Elimination of All Forms of Discrimination against Women 1979;[36] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984;[37] the Convention on the Rights of the Child 1989;[38] the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990;[39] the Convention for the Protection of All Persons from Enforced Disappearance 2006;[40] and the Convention on the Rights of Persons with Disabilities 2006.[41] All treaties have their own monitoring bodies, however, for the purpose of this chapter only the decisions of the International Court of Justice (ICJ), the Human Rights Committee (HRC) (monitoring the ICCPR) and the Committee on Economic, Social and Cultural Rights (CESCR) (monitoring the ICESCR) will be discussed. The decisions of these bodies illustrate well their considerations on jurisdiction and an extraterritorial interpretation of the notion.

Both Covenants foresee in an individual petition system and inter-State complaints through optional Protocols.[42] The Committee on Economic, Social and Cultural Rights can initiate inquiries into alleged serious, grave or systematic violations of the Covenant by a State party.[43] The ICESCR has a member-

32 For a very comprehensive overview of regional human rights approaches globally, see Haas(2014), 413.
33 993 UNTS 3.
34 999 UNTS 171.
35 660 UNTS 195.
36 1249 UNTS 13.
37 1465 UNTS 85.
38 1577 UNTS 3.
39 2220 UNTS 3.
40 2715 UNTS.
41 2515 UNTS 3.
42 Optional Protocol of 2008 foresees in the complaint procedure for the ICESCR, whereas Optional Protocol of 1966 provides for a right to individual petition under the ICCPR.
43 Article 11 ICESCR.

ship of 165 State parties. The US has signed the Covenant but has not yet ratified it. The ICCPR has a membership of 169 State parties, including the US and the Russian Federation. China has signed but not yet ratified. The ICJ is not a human rights court, but in the state-to-state contentious cases before it and in its advisory opinions, it has dealt with and interpreted the scope of human rights obligations.[44] Some human rights treaties such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contain provisions referring disputes to the Court,[45] whereas the Convention on Racial Discrimination permits referral to the Court after the exhaustion of its own treaty-specific dispute settlement procedure.[46]

6.3.2 Regional human rights treaties

6.3.2.1 Europe

The European Convention on Human Rights (ECHR) was adopted by the Council of Europe on 4 November 1950.[47] It remains the most important human rights instrument in Europe today. The rights protected in the Convention are complemented by 16 additional protocols. Next to the ECHR, the European Social Charter 1961 (revised text 1996) and special conventions[48] complement human rights protection in Europe. Under the ECHR, individuals have private standing to bring cases, when national remedies have been exhausted.[49]

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44 Article 36 of the Statute of the International Court of Justice grants the ICJ jurisdiction in dispute on the interpretation of treaties and any question of international law. Article 38 refers to the sources of law the Court shall apply in resolving disputes, including international conventions. Where relevant, those cases with a jurisdictional implication will be discussed below.

45 Article IX. 78 UNTS 227.

46 Article 22 International Convention on the Elimination of All Forms of Racial Discrimination 1965.

47 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

48 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987; Framework Convention for the Protection of National Minorities 1995; European Charter for Regional or Minority Languages 1992; Convention on Human Rights and Biomedicine 1998 and protocols on the Prohibition of Cloning Human Beings 1998, on the Transplantation of Organs and Tissues of Human Origin 2002, on Biomedical Research 2005; Convention on Action Against Trafficking in Human Beings 2005; Convention on the Avoidance of Statelessness in Relation to State Succession 2006; Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse 2007.

49 ECHR, Articles 34, 35.

6.3.2.2 Americas

The Inter-American human rights system was created with the adoption of the American Declaration of the Rights and Duties of Man in 1948, as the first formal international human rights catalogue.[50] At the same time the Charter of the Organization of American States (OAS) was adopted, foreseeing among others the establishment of the Inter-American Commission on Human Rights in order to promote the observance and protection of human rights. In 1959 the Commission was established, but the opportunity for the Commission to examine state and individual claims was only introduced in 1965.

In 1969 the American Convention on Human Rights (ACHR) was adopted,[51] establishing the Inter-American Court of Human Rights. The Convention is an important human rights instrument in the Americas – despite the lack of ratification by the US, Canada, Brazil and a number of Caribbean states and the withdrawal by Venezuela in 2013.[52] Content-wise, the ACHR is largely identical to the ECHR and contains some additional rights such as nationality rights (article 20) and the right to minimum social rights (article 26). Next to the ACHR other conventions exist in the region dealing with specific human rights, such as the Inter-American Convention to Prevent and Punish Torture of 1985.[53]

Either the Commission or a state party can refer cases to the Court. Individuals cannot bring complaints before the Court, in contrast to the individual complaint procedure under the ECHR. Individuals can, however, lodge their complaint with the Commission, which will consider its admissibility. If the Commission finds the claim to be admissible and the state is deemed at fault, the Commission can issue recommendations. Only when those recommendations are not adhered to, can the Commission refer the case to the Court. The Court can furthermore issue advisory opinions regarding the interpretation of human rights protection in the Americas.

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50 The Universal Declaration of Human Rights was adopted by the UN approximately eight months later.

51 The Convention entered into force in 1978.

52 The US signed but never ratified the Convention. Brazil and Canada have not signed the Convention. The American Commission on Human Rights has stated on several occasions that even if states are not party to the Convention, the Commission can still investigate based on their Membership to the American Declaration. (see among others *Armando Alejandro Jr. and others v Cuba (Brothers to the rescue)*, IACHR Report o 86/99, case no 11.589, 29 September 1999, Ann. Rep. IACHR 1999, 586, para 23.)

53 Also the Inter-American Convention on the Forced Disappearance of Persons 1994; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 1994; the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities 1999.

6.3.2.3 *Africa*

The African Charter on Human and Peoples' Rights (the Banjul Charter) was adopted on 26 June 1981 by the Organization of African Unity (the African Union as from 2002).[54] In addition to a list of civil, political, economic, social and cultural rights for individuals, the Charter also contains collective rights, such as the rights of peoples to equality, self-determination, development, peace and a satisfactory environment (articles 22-24). The African Commission for Human and Peoples' Rights is the monitoring body for the Charter, while individuals, but also NGO's, may submit complaints about human rights violations.[55] In 1998 a Protocol on the establishment of an African Court was adopted,[56] which entered into force in 2004. The Court and the Commission have complementary tasks, and both institutions can refer cases to one another where they consider that appropriate.[57]

6.3.2.4 *Middle East*

The Council of the League of Arab States adopted the Arab Charter on Human Rights on 15 September 1994.[58] Its provisions mainly correspond to the Universal Declaration of Human Rights and the two UN Human Rights covenants. The Charter entered into force in 2008 after the seventh ratification. The Charter lays down basic rights, as well as economic, social and cultural rights. Specific minority rights are also recognized. The Charter is monitored by the Arab Human Rights Committee, which can only review state reports and cannot deal with individual or state complaints. The League is currently in the process of strengthening its human rights system by establishing an Arab Court of Human Rights.[59]

6.3.2.5 *Asia*

South and South-East Asia have no regional human rights convention. The Association of Southeast Asian Nations (ASEAN) is mainly concerned with issues of stability and economic integration. However, in 2007 a new ASEAN

54 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
55 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, Article 5(3).
56 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998.
57 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, Article 6(3).
58 League of Arab States, Arab Charter on Human Rights, 15 September 1994.
59 The Stature for the Human Rights Court is criticized for not including individual complaint procedures, see International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court* (2015).

Charter has been adopted,[60] establishing a human rights body (the ASEAN Intergovernmental Commission on Human Rights) that can review human rights standards among ASEAN members, without however adopting a specific human rights catalogue.[61] This implies that the human rights situation will be reviewed in accordance with the standard set by the UN Conventions, to which the ASEAN members are parties.

The South Asian Association for Regional Cooperation (SAARC) refers in its Charter to 'providing all individuals the opportunity to live in dignity',[62] without including a specific list of human rights either. In 2002, the SAARC adopted the Convention on Regional Arrangements for the Promotion of Child Welfare[63] and the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.[64] Under the Child Protection Convention, members must ensure that national laws protect children and that the UN standards are adhered to. In 2004, a Social Charter was adopted, obliging members to take measures in the areas covered by economic, social and cultural rights.[65] None of these instruments, however, establish an adjudicatory body that can receive complaints and issue binding decisions.

6.4 JURISDICTIONAL SCOPE

6.4.1 The concept of jurisdiction in a human rights context

The extraterritorial application of human rights treaties depends on the jurisdictional scope of those treaties. Most treaties have jurisdictional clauses that limit their reach. These clauses will be discussed below, but first a clear understanding of the term 'jurisdiction' in the human rights context needs to be ensured.

Different notions of jurisdiction can be distinguished.[66] The international human rights jurisprudence builds on a concept of jurisdiction distinct from the general international law understanding of jurisdiction. Whereas the latter refers to the lawful or unlawful exercise of jurisdiction (prescriptive, enforcement, judicial) by a state within or outside its territory (*de jure* jurisdiction),

60 ASEAN, Charter of the Association of Southeast Asian Nations, 20 November 2007 at http://www.asean.org/storage/images/ASEAN_RTK_2014/ASEAN_Charter.pdf.
61 ASEAN Charter, Article 14.
62 SAARC Charter of 8 December 1985, Art 1(b).
63 SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 5 January 2002.
64 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 5 January 2002.
65 Social Charter of the South Asian Association for Regional Cooperation, SAARC/SUMMIT.12/SC.29/27 – annex V.
66 For a thorough analysis of the different notions of jurisdiction, see Milanovic(2011), chapter II.

the human rights courts and monitoring bodies use jurisdiction as a *factual* concept, in which the factual authority or control over a territory and persons forms the basis for a state's obligations, both within and outside its sovereign territory. *De jure* jurisdiction refers to the *right* and the power to regulate and enforce regulation, whereas jurisdiction as factual control refers to the *duty* to respect human rights. If states would only have human rights obligations when lawfully exercising their jurisdiction abroad, this would create an unacceptable legal vacuum, whereby states would have no human rights obligations when they are not acting lawfully. In that case, bombings, abductions, killings etc. would not be covered under the human rights treaties to which the responsible states are a party.[67] *De jure* and *de facto* jurisdiction can of course fully overlap: where states have sovereignty over a territory, it is obvious that their human rights obligations apply.

Jurisdiction as factual authority is no judicial invention by the human rights courts and monitoring bodies, as other treaties show that international law has more than one *ordinary* meanings of the word 'jurisdiction'.[68] An example can be found in Article 9(2) of the Disappearances Convention:

> 'Each State Party shall likewise take such measures as may be necessary to establish its *jurisdiction* over the offence of enforced disappearance when the alleged offender is present in any territory under its *jurisdiction*, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose *jurisdiction* it has recognized.'

The first use of jurisdiction refers to the lawful jurisdiction to prescribe and enforce; the second use of jurisdiction refers to a factual authority; the third refers to the competence of an international court.[69] This second notion of jurisdiction is also found in human rights treaties, and it is this concept of jurisdiction upon which the doctrines of effective control over territory or physical control over persons are built – as will be discussed below.

Duttwiler has argued that while jurisdiction under the human rights treaties indeed differs from the general international law concept of jurisdiction as the legitimate power to prescribe and enforce, it entails more than just 'factual control'.[70] In order to 'exercise actual authority', a state must aim at prescribing conduct (irrelevant whether it has the legal power to do so under international law): it imposes orders on individuals, whereby the territory is not

67 Hugh King, 'The Extraterritorial Human Rights Obligations of States' 2009, 9 Human Rights Law Review 521, 536.
68 Milanovic(2011), 30.
69 Ibid 31.
70 Michael Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' 2012, 30 Netherlands Quarterly of Human Rights 137, 157.

relevant. By enforcing such orders, the state is exercising actual authority over a person. The 'control' thus refers to the enforcement of orders. However, as the legitimacy of an exercise of jurisdiction is irrelevant, it remains unclear when a state is 'prescribing' and 'enforcing'. Are orders such as 'do not cross this line', or 'do as I say' sufficient to be seen as prescribing orders? If so, is there any difference from 'factual control'? Besson refers to an additional requirement of 'normative guidance' or authority to assess whether an act or omissions falls within the jurisdiction of state party, next to the elements of effective power and overall control over a person or territory.[71] She argues that the state's power should be effective and exercised, and not merely claimed; should be exercised not one time only and over a single matter only; and it should be exercised with a normative, rather than solely coercive, approach.

In *Bankovic v Belgium et al,* the ECtHR the notion of jurisdiction as 'factual control' was seriously challenged as the Court held that jurisdiction must be understood as defined in public international law,[72] contradicting its earlier position on the matter.[73] According to the Court, only territories where a state would be lawfully exercising its prescriptive and enforcement jurisdiction (i.e. when it is authorized to so either by the territorial state or by international law) would fall within the scope of Article 1 ECHR. The applicants were victims of a NATO missile strike on *Radio Televizije Srbije* that killed 16 and injured 16 persons during NATO's campaign against the Federal Republic of Yugoslavia in 1999 and argued that the NATO states had effective control through their actions.[74] The question at issue was whether the victims fell within the jurisdiction of the NATO Member States parties to the ECHR. The Court first considered jurisdiction as a notion under general international law, referring to the power to prescribe and to enforce. The Court then interpreted its previous case law very narrowly by stating that extraterritorial application of the ECHR is exceptional because it is only possible when the respondent State 'exercises all or some of the public powers normally to be exercised by' the territorial State.[75] Effective control cannot be interpreted in such a way that it would amount to a 'cause-and-effect' notion of jurisdiction, in which any

71 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 2012, 25 Leiden Journal of International Law 857, 873.

72 ECHR, *Bankovic et al v Belgium et al* Grand Chamber (Adm Dec) 12 December 2001, 52207/99, para.59.

73 See below at 4.4.3. Before *Bankovic,* extraterritorial jurisdiction in the ECtHR's case law was accepted in cases such as *Cyprus v Turkey* (ECHR, *Cyprus v Turkey* Grand Chamber 10 May 2001, 25781/94.), *Loizidou v Turkey* (ECHR, *Loizidou v Turkey* Grand Chamber 23 March 1995, 15318/89.) or *Ramirez Sanchez v France* (ECHR, *Ramirez Sanchez v France* Adm Dec 1996, 28780/95.).

74 Grand Chamber (Adm Dec) *Bankovic* 12 December 2001, para.46.

75 Ibid para.71.

adverse effect of a state act (such a bombing and the killing of innocent people in this case) could lead to jurisdiction.[76]

The Court then introduced the notable concept of '*espace juridique*' or 'legal space', meaning that ECHR obligations could only apply extraterritorially within the legal space of the ECHR.[77] According to the Court, extraterritorial obligations can extend only to the territory of another ECHR party (within the ECHR legal space), because of the 'essentially regional context' of the ECHR.[78] This reasoning makes little sense. Since jurisdiction in the human rights treaties refers to a factual situation of control over persons or territory, entailing a duty to respect human rights, why would it matter whether that control is exercised on the territory of another state party to the ECHR or not? The territorial state is irrelevant, as it is the state exercising the extraterritorial control whose obligations are at stake. Either the protection is purely territorial and thus regional, or protection extends extraterritorially and then the location will be determined by the location of the actions of ECHR party states. Any other interpretation would lead to a legal vacuum in human rights protection. The distinction is basically a non-issue, and despite the attention it received in literature,[79] has not been reiterated in later jurisprudence.[80]

It seems that the ECtHR in *Bankovic* cut corners in order to avoid more difficult questions due to the complex facts of the case, such as attribution of conduct to an international organization (NATO) or whether a bombing can lead to sufficient control over an individual, rather than over a territory, to

76 Ibid para.75.

77 Ibid para.80. See also amongst others Ralph Wilde, 'The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights: Is It Relevant for Extraterritorial State Action?' 2005, 10 European Human Rights Law Review 115.

78 Grand Chamber (Adm Dec) *Bankovic* 12 December 2001, para.80.

79 See among others Rick Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Milanovic(2011).

80 In an analysis of ECHR jurisprudence, since *Bankovic* in 2001 until end of 2013, 18 cases can be identified in which acts occurring outside a state territory were subject of claims brought before the ECtHR, and where the Court addressed jurisdiction. In 15 of them the extraterritoriality claim was accepted, while in three cases the Court held there was no jurisdiction, for different reasons. In ECHR, *Behrami and Behrami v France* AdmDec 2007, 71412/01.the Court had determined that the acts were not attributable to the defendant country, but to an international organization such as the UN who had control over the operations. In ECHR, *Mohamed Ben Al Mahi v Denmark* AdmDec 2006, 5853/06. and ECHR, *Djokabi Lambi Longa v the Netherlands* AdmDec 2012, 33917/12.the Court did not find any jurisdictional link between the act and the complaint. The facts of *Behrami* took place in Kosovo as was the case in *Bankovic*, but the Court did not make reference to the 'legal space'. If it had wanted to make the argument, it should have been addressed as part of the jurisdiction assessment, before addressing attribution. In the cases where the Court did accept extraterritorial jurisdiction, eight cases took place within the legal space, while another seven took place outside the legal space. Based on these findings, one can likely conclude that the *Bankovic* judgment served as an exception rather than establishing a new rule.

determine jurisdiction. Through the legal space argument, the Court did not have to answer whether the states would have been held 'in control' if the actions had taken place within the ECHR's legal space, in for instance Amsterdam, Brussels or Berlin. The Court's very narrow interpretation in *Bankovic* on extraterritorial human rights protection is rather ironic seeing that the main stated purpose of the NATO's involvement in Yugoslavia was to defend the human rights of the people in Yugoslavia.[81] Later Strasbourg case law rightly left this line of reasoning and confirmed that jurisdiction under Article 1 ECHR indeed refers to a situation of *factual* control, being either over territory or over persons.[82]

6.4.2 Jurisdictional treaty clauses

Most, but not all, human rights treaties contain a jurisdictional clause. The African Charter, for instance, does not contain an explicit provision limiting the states parties' obligations to realizing the rights and freedoms in their respective territories or jurisdictions. Rather Article 1 states that

> 'The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.'

Despite the absence of a clause, it is not to be understood that states assume obligations to assist other states to fulfil their obligations without limits, nor that there is an implicit limitation to state territory. The lack of a limiting clause might just imply that the Drafters left open the option for extraterritorial guarantees of rights.[83] There are, however, substantive provisions with an extraterritorial reach, such as the right for an individual abroad to return to his state of origin.[84] For the interpretation of the Charter and its jurisdictional scope, the Charter mandates the African Commission to 'draw inspiration' from rules of international law and international human rights law.[85] It is thus no surprise that the Commission has repeatedly referred to the case law

81 Eric Roxstrom, Mark Gibney and Terje Einarsen, 'The NATO Bombing Case (*Bankovic et al v Belgium et al*) and The Limits of Western Human Rights Protection' 2005, 23 Boston University International Law Journal 55, 62.

82 ECHR, *Al-Skeini v UK* Grand Chamber 7 July 2011, 55721/07, paras.133. For an interesting discussion of the case, see Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' 2012, 23 European Journal of International Law 121. See also *infra* at 6.4.3.

83 Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' 2011, 27 South African Journal on Human Rights 249, 259.

84 Article 12(2) African Charter.

85 Articles 60 and 61 African Charter.

of the other regional and international human rights bodies, which do have jurisdictional clauses.[86]

The common limit of a state's jurisdiction (in the context of factual control of a state) is the national territory of that state. However, none of the regional or international human rights treaties refer to 'national territory' as the sole frame of reference. Article 1 ECHR and Article 1 ACHR refer to persons 'within their jurisdiction', whereas Article 2(1) ICCPR refers to 'individuals within its territory and subject to its jurisdiction'. It is up to the treaty bodies to interpret the scope of that 'jurisdiction'. Under international law and the rules on treaty interpretation, there is neither a presumption *against* an extraterritorial interpretation of the scope of a treaty, nor is there any presumption in *favour* of extraterritoriality.[87] Therefore one can only look at the text, object and purpose of each particular treaty.

The first draft of the ECHR provided that 'the Member States shall undertake to ensure to *all persons residing within* their territory' the protection of human rights.[88] In order to 'widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention', it was proposed and accepted to replace the words 'residing within' by 'within its jurisdiction' in the current Article 1 ECHR.[89] Article 1(2) ACHR refers to the rights of 'all persons subject to [the States Parties'] jurisdiction'. Article 2(1) ICCPR is stricter then Article 1 ECHR as it obliges the state parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant'. These conditions can be read conjunctively by requiring states to ensure the protection of rights only to those individuals who are in its territory and hence subject to its jurisdiction. This is the position long held by the US.[90] A second interpretation is disjunctive, followed by the

86 Bulto (2011), 264.

87 Milanovic(2011), 10.

88 A.H. Robertson (ed.), *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (1975), part II, 276 (8 Sept. 1949).

89 Travaux ECHR, 200 (5 Feb. 1950); For an in-depth discussion of the drafting history, see Barbara Miltner, 'Revisiting Extraterritoriality After *Al-Skeini*: The ECHR and Its Lessons' 2012, 33 Michigan Journal of International Law 693, 717.

90 See Da Costa(2013), 66. The US position has been highly criticized from within and outside. The US Legal Adviser Harold Koh issued a Memorandum Opinion on the jurisdictional scope of the ICCPR, arguing that an analysis of text, travaux, jurisprudence and state practice cannot require the "extraordinarily strict territorial interpretation that the United States has asserted". He suggested that the obligation to *respect* human rights should apply outside the territory, while the positive obligation to *ensure* rights should only apply to individuals within the territory and subject to its jurisdiction. (Office of the Legal Advisor, Memorandum Opinion on the Geographic Scope of the ICCPR, October 19, 2010, p.3; p.56) The Government did not follow his opinion though and did not alter its official position. In its Concluding Observation of the US Periodic Review in March 2014, the Human Rights Committee reiterated its regret over the US' position 'despite the contrary interpretation of article 2(1) supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and state practice'. It thereby added that the US should

Human Rights Committee and the International Court of Justice.[91] In *Lopez-Burgos*, a claim brought by a former Uruguayan trade-union leader living in Argentina, who was kidnapped in Buenos Aires and then tortured by Uruguayan security forces, the Human Rights Committee considered that despite the language in Article 2(1) ICCPR it could review the case:

Article 2(1) does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant, which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. (…) It would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[92]

In its General Comment 31, the Human Rights Committee reiterated its position, stating that

> 'A State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party.'[93]

The ICJ has held that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory',[94] both with regard to Israel and the Palestinian territories[95] and with regard to armed activities perpetrated by Uganda on Congolese territory.[96] It would be wrong if states could do abroad what they have undertaken not to do at home. As the ECtHR noted in *Cyprus v Turkey*, 'any other finding would result in a regrettable vacuum in the system of human rights protection'.[97]

'review its legal position so as to acknowledge the extraterritorial application of the Covenant'. (Concluding Observations on the Fourth Report of the United States of America, adopted by the Committee at its 110th session (10-28 March 2014). See also Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' 2014, 90 International Law Studies 20.

91 For a comprehensive overview of cases, general comments and observations by the HRC, see Da Costa(2013), 41.

92 *Lopez-Burgos*, views of 29 July 1981, Communication no. R.12/52, UN doc. A/36/40, 176, para.12.3.

93 HRC General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHHR 905 (2004) at para.10.

94 ICJ, *Legal Consequences of the construction of a wall in the occupied Palestinian territory* Advisory Opinion 2004, ICJ Reports 2004, 136, para.111.

95 Ibid paras.109;113.

96 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 19 December 2005, paras.179; 216.

97 Grand Chamber *Cyprus v Turkey* 10 May 2001, para.78.

Treaties in the field of economic, social and cultural rights, such as the ICESCR, seem to have better anticipated potential extraterritorial application. The ICESCR for instance does not contain a jurisdictional limitation, but Article 2(1) ICESCR obliges states parties 'to take steps individually and through international assistance and cooperation' with a view to achieve the full realization of the rights laid down in the Covenant. No reference is made that measures taken should be limited to the territory of a state, nor that states should only aim at realizing human rights protection within their territory. Rather, the emphasis on international assistance and cooperation supports that states must also contribute to *realizing* protection of economic, social and cultural rights (ESC rights) outside their territory. The extraterritoriality debate in the context of ESC rights focuses more on the *type* and *extent* of extraterritorial obligations: are these limited to negative obligations – should states only *respect* ESC rights abroad –, or do they include positive obligations (obligation to *fulfill*) as well? This will be discussed in greater detail under title 4.5 of this chapter on the nature of extraterritorial human rights obligations.

6.4.3 Jurisdictional grounds for extraterritoriality

The grounds upon which the international and regional human rights bodies have based their extraterritorial application of the treaties can be classified under two main headings. The first ground is founded upon a link with the territory such as control over territory, and can be classified as spatial jurisdiction.[98] The second ground refers to a relationship of control over an individual, and can be classified as personal jurisdiction.[99] In the section below the two jurisdictional grounds will be discussed, with references to jurisprudence from the different bodies.

6.4.3.1 Spatial Jurisdiction: Effective control over an area

6.4.3.1.1 Effective control and public powers

Loizidou was the first case for the ECtHR (rather than the Human Rights Commission) to take a clear stand on the extraterritorial reach of the Convention. The applicant, the Greek-Cypriot Mrs. Loizidou, had been forced out of her home during Turkey's invasion in 1974. During more than twenty years, she attempted to return to her home but was denied entry into the Turkish occupied part of Cyprus by the Turkish army. The Court found that Turkey could be held responsible for its actions in Cyprus, as Turkey had 'effective overall control' over the *territory*. The Court elaborated on this control:

98 Grand Chamber 7 July 2011, paras.138ff.
99 Ibid paras.133ff.

> 'Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus, but must also be engaged by virtue of the acts of the local administration, which survives by virtue of Turkish military and other support.'[100]

The Court made clear in *Loizidou* that in order to determine jurisdiction it is irrelevant whether such control is legitimate, but that it depends upon a factual situation.[101]

In *Ilascu et al v Moldova and Russia*, the ECtHR introduced the notion of 'decisive influence'. The events took place in Transdniestria, where Moldovan citizens were arrested and convicted and their property confiscated because of their political activities supporting the unification of Moldova and Romania. They were detained in the Transdniestrian part of Moldova. The applicants complained that they did not have a fair trial and that they were subject to inhuman prison conditions. The Court determined that the applicants fell within the jurisdiction of Moldova because of the detainment on Moldovan territory, but that they fell within the jurisdiction of Russia as well. The Court motivated its decision by stating that the authorities of the Moldovian Republic of Transdniestria, in whose detention the applicants found themselves,

> 'remained under the effective authority, or at the very least *under the decisive influence*, of the Russian Federation, and in any event that it survived by virtue of the military, economic, financial and political support given to it by the Russian Federation.'[102] (emphasis added)

In *Victor Saldaño v Argentina* the Inter-American Commission cited the European Commission for Human Rights and the ECtHR for expanding the concept of jurisdiction to include extraterritorial obligations of the ACHR to situations of effective control.[103] The victim, an Argentine citizen, was sentenced to death by a US court and detained in a Texas prison. His mother lodged a complaint against Argentina for failure to protect his human rights. Despite recognizing the possibility of extraterritorial obligations, the Inter-American Commission found Argentina's obligations did not extend extraterritorially in this case, as the violations occurred in the US, carried out by US authorities.

The African Commission considered in the *DRC Invasion* case that Burundi, Rwanda and Uganda had violated a number of rights under the African Charter in the territory of the Democratic Republic of the Congo. Even without an explicit jurisdiction clause, the Commission held the defendant states responsible for the violations within DRC territory that they brought under

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100 Grand Chamber *Cyprus v Turkey* 10 May 2001, para.77.
101 Grand Chamber *Loizidou v Turkey* 23 March 1995, para.62.
102 ECHR, *Ilascu and others v Moldova and Russia* Grand Chamber 8 July 2004, 48787/99, para.392.
103 IACHR, *Victor Saldano v Argentina* Petition 11 March 1999, IACHR Report No 38/99, para.19.

their effective control.[104] The ICJ also referred to effective control where it dealt with the extraterritorial scope of the ICCPR. In the *Wall Advisory Opinion*, the question was whether Israel was under any human rights obligations in the Occupied Palestinian Territories. The Court referred to the object and purpose of the ICCPR, the 'constant practice of the Human Rights Committee' on extraterritoriality, and the *travaux préparatoires* of the Covenant. These show, according to the Court, that

> 'in the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.'[105]

The Court concluded that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.[106] The ICJ reiterated this position in the case of *Democratic Republic of the Congo v Uganda*, where it confirmed that human rights law may extend extraterritorially, also where that factual jurisdiction is exercised in a much shorter time frame and might thus not equate to effective control over territory. Furthermore, the Human Rights Committee, in its 2003 Concluding Observations on Israel, held that Israel's obligations under the ICCPR applied to the Occupied Palestinian Territories:

> 'The provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant (…).'[107]

6.4.3.1.2 Loss of de facto *control over* de jure *territory*

Related to spatial jurisdiction is the question whether states that have lost *de facto* control over their *de jure* territory can still hold human rights obligations. While that would not be an extraterritorial application of obligations in the narrow legal sense, it only seems a logical consequence of the effective control doctrine that where states lose control they also cannot hold the same duties regarding human rights protection. As Cassel contended, 'if responsibility is

104 Communication 227/1999, *Democratic Republic of the Congo (DRC) v Burundi, Rwanda and Uganda*, 20th Annual Activity Report (2006), para 93.
105 Advisory Opinion 2004, para.109.
106 Ibid para.111.
107 Concluding Observations of the Human Rights Committee regarding Israel, 21 august 2003, CCPR/CO/78/ISR, para.11.

to follow blame, it should depend more on conduct than territorial sovereignty'.[108]

In the admissibility decision in *Ilascu,* the Grand Chamber of the ECtHR declared the case admissible regarding both Moldova and Russia.[109] Despite the fact that Transdniestra was under *de facto* Russian control, because of military presence and support given by the Russian Federation to the Moldovan Republic of Trandsdniestria (MRT), the Court found that Moldova, both in *Ilascu* and the later case of *Catan*,[110] still held some positive obligations (which it violated). The Court thereby stated that it

> 'must examine all the objective facts capable of limiting the effective exercise of a State's authority over its territory as well as the State's positive obligations under the Convention to take all the appropriate measures which are still within its power to take to ensure respect for the Convention's rights and freedoms within its territory.'[111]

While it makes sense, on the one hand, to indeed look at the factual situation of control, on the other hand, it seems that the Court is holding on to a contorted notion of territoriality. As Judge Loucaides stated in his dissent:

> 'It seems to me incomprehensible and certainly very odd for a High Contracting Party to escape responsibility under the Convention on the ground that the throwing of bombs from its aeroplanes over an inhabited area in any part of the world does not bring the victims of such bombing within its 'jurisdiction' (i.e. authority) but a failure on the part of such Party 'to take all the measures in its power whether political, diplomatic, economic, judicial or other measures … to secure the rights guaranteed by the Convention to those formally [*de jure*] within its jurisdiction' but in actual fact outside its effective authority ascribes jurisdiction to that State and imposes positive duties towards them.'[112]

One can indeed wonder about how to reconcile the finding of jurisdiction for Moldova compared to the outcome of *Bankovic* if a state's actual control (over persons or territory) is the reference point.

The Court seemed to have moderated its position in a later admissibility decision, *Azemi v Serbia*,[113] where it found that the applicant in Kosovo was not within Serbia's jurisdiction as Serbia lacked effective control over Kosovo

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108 Douglass Cassel, 'Extraterritorial Application of Inter-American Human Rights Instruments' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 178.

109 See above 5.2.1.

110 ECHR, *Catan and others v Moldova and Russia* Grand Chamber 19 October 2012, 43370/04, 8252/05 and 18454/06.

111 Grand Chamber *Ilascu v Moldova and Russa* 8 July 2004, paras.313;331.

112 Ibid Dissenting opinion of Judge Loucaides.

113 ECHR, *Azemi v Serbia* 5 November 2013, 11209/09.

after its 1999 withdrawal. The applicant claimed a violation of his right to fair trial under Article 6§1 ECHR. The Court did not find sufficient evidence to conclude that Serbia exercised any control over Kosovo's judiciary or support to Kosovo's institutions, neither during nor after the presence of the United Nations Interim Administration Mission in Kosovo (UNMIK).[114]

6.4.3.2 Personal Jurisdiction: Authority and control by state agents

In *Cyprus v Turkey*, the European Commission on Human Rights expressed for the first time that Turkey's actual authority over persons may bring them within Turkey's jurisdiction.[115] Unfortunately, the Commission did not elaborate on the nature of 'actual authority'. It did state, however, that 'these armed forces (…) bring any other persons or property within the jurisdiction of Turkey (…) to the extent that they exercise control over such persons or property'.[116] Control over persons was also the ground for extraterritorial obligations in detention cases. In *Medvedyev et al v France,* the applicants were on board of a Cambodian ship and arrested by the French authorities because of drug trafficking. The ECtHR held that as soon as the prisoners were detained by a state (in casu France), they fell under the control, and therefore the jurisdiction, of that state.[117] In *Öcalan v Turkey*, Öcalan had been arrested in Kenya and handed over to Turkish agents. The ECtHR held that, once handed over, he was under 'effective Turkish authority' and thus within Turkey's jurisdiction under Article 1 ECHR.[118]

In the case of *Al-Saadoon v UK* the applicants were detained in Iraq and held in UK-run prisons before being handed over to the Iraqi authorities. The ECtHR found that the UK had had *de facto* control over the detention facilities, which was sufficient ground to bring the applicants within the UK's jurisdiction.[119] The Inter-American Commission adopted this position of 'control' with regard to Guantanamo.[120] One can question whether control over detention facilities should be seen as control over territory or an area, or whether it should be classified as control over persons. The classification of a detention facility, or even a cell as 'territory' or an 'area' can be rather artificial, especially

114 UN Mission in Kosovo established resulting UNSC Resolution 1244, assuming all executive, legislative and judicial powers after 1999.
115 ECHR, *Cyprus v Turkey* Adm Dec 1975, 6780/74 and 6950/75.
116 Ibid para.10.
117 ECHR, *Medvedyev and others v France* Grand Chamber 29 March 2010, 3394/03, para.67.
118 ECHR, *Öcalan v. Turkey* 12 March 2003, 46221/99, para.93.
119 ECHR, *Al-Saadoon and Mufhdi v United Kingdom* AdmDec 30 June 2009, 61498/08, para.88.
120 Christina M. Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 264.; For instance IACHR, *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba* 12 March 2002, 41 ILM (2002) 532.

if jurisdiction can also be established through control over the persons within that room or detention facility.

In *Al-Skeini v UK*, one Iraqi national was killed while in custody in a UK detention facility in Iraq, while five others were killed by British troops on patrol. The complaint was lodged by their relatives, who claimed the victims were within UK jurisdiction when killed and that there had been no effective investigation into their deaths. The UK House of Lords held that detention facilities run by states, such as the detention facility in Basrah run by the UK, fell within the scope of 'effective control over an area'.[121] The ECtHR avoided the question of spatial jurisdiction over the 'area' (including the 'area' of detention facilities), but noted that the UK exercised some of the public powers in the region through its military presence, leading to exercising 'authority and control over individuals killed in the course of such security operations'.[122] The Court thus combined personal jurisdiction with spatial jurisdiction by emphasizing the exercise of public powers, which would make the exercise of personal jurisdiction more exceptional. The Court had earlier referred to its previous case law where it had found that 'what is decisive … is the exercise of physical power and control over the person in question'.[123] While overruling *Bankovic* with regard to the 'espace juridique' of the ECHR,[124] the Court also seemed to have wanted to achieve a harmonious interpretation of its earlier case law. By explicitly referring to the exercise of public powers, the Court seemed to hang on to *Bankovic*, allowing confusion on the grounds of extraterritorial application of the ECHR to remain, and leaving important issues unresolved. If the exercise of public powers is indeed a condition to extend obligations extraterritorially, how would one then assess attacks by drones, when they are fired from another continent, without any exercise of public powers in the target state? In *Hassan v UK*, the case concerned an earlier period in Iraq in which the UK did not yet hold the same public powers as in *Al-Skeini*. The ECtHR found that Hassan was within 'the physical power and control of the UK soldiers' when taken into custody.[125] No reference was made to public powers anymore.

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121 House of Lords, Great Britain (UK), *Al-Skeini and others v Secretary of State for Defence* 13 June 2007, [2007] UKHL 26.

122 Grand Chamber 7 July 2011, para.150. At this point, the Court combined a concept of spatial jurisdiction through exercising public powers in the area with a concept of personal jurisdiction (physical control over a person), as will be further discussed below.

123 Ibid para.136.

124 Ibid para.142.

125 ECHR, *Hassan v UK* Grand Chamber 16 September 2014, 29750/09, para.76. The case of *Hassan* is also of importance with regard to the relationship between international human rights law and international humanitarian law. For a discussion see Rosalind English, 'Law of armed conflict means that anti-detention provision in ECHR may be disapplied by Iraqi detainee'' 16 September 2014, UK Human Rights Blog; Lawrence Hill-Cawthorne, 'The Grand Chamber Judgment in Hassan v UK' 16 September 2014, EJIL Talk.

Furthermore, with regard to one of the victims in *Al-Skeini*, it could not be determined who had killed her, as the woman had been killed during an exchange of fire between British troops and unidentified gunmen. The fact that it was unknown which side had fired the fatal shot could not withhold jurisdiction to be established. The firing occurred during a UK security operation, and British soldiers had taken part in the fight.[126] This example shows the difficulty in distinguishing jurisdiction from attribution. While it is true that in establishing personal jurisdiction, the link between the acts at stake and the state agents need to be assessed at the same time,[127] the control over an individual that is necessary to establish jurisdiction does not require that the act (*in casu* firing a shot) is attributable to the state. It can very well be that in exercising control over an individual, the state or state agent failed to sufficiently protect the individual's rights from violence by third parties.

In *Jaloud v Netherlands*, a fatal shooting had occurred by Dutch troops at a checkpoint in Iraq.[128] The Netherlands denied jurisdiction, arguing that public authority was in the hands of the US and the UK as the occupying powers.[129] The ECtHR found, however, that the Dutch troops retained full command over their contingent, even though the contingent was under the operational control of a British officer. Despite the lack of 'public powers' as seemingly required by *Al Skeini*, jurisdiction could thus be established.[130] This interpretation risks to be over-inclusive: when are national troops deemed in command, and when are they exercising powers which do not belong to their sending States?[131]

In *Issa v Turkey*, the ECtHR had to consider whether Iraqi shepherds allegedly killed by Turkish forces on Iraqi territory close to the Turkish border fell within Turkey's jurisdiction.[132] The Court found that there was insufficient proof that the Turkish forces were responsible for the deaths of the shepherds (a question of attribution) but did not mention that the shepherds would have been outside of Turkey's jurisdiction. The events clearly occurred outside of Turkish territory, in an area over which Turkey did not have effective control. The mere act of killing the shepherds would apparently have been enough for the Court to establish jurisdiction, because it implied sufficient control over an individual. In the case of *Isaak v Turkey*, a Cypriot was assaulted in the neutral UN buffer zone in Cyprus, and later died of his injuries. As Turkish-Cypriot police officers had taken part in the assault, the Court held that the

126 Grand Chamber 7 July 2011, para.150.
127 Besson (2012), 867.
128 ECHR, *Jaloud v Netherlands* Grand Chamber 20 November 2014, 47708/08.
129 In accordance with UN Security Council Resolution 1483.
130 Grand Chamber *Jaloud v Netherlands* 20 November 2014, paras.143;149.
131 Aurel Sari, 'Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations' 21 November 2014, EJIL Talk.
132 ECHR, *Issa and others v Turkey* 16 November 2004, 31821/96.

victim 'was under the authority and/or effective control of the respondent state through its agents'.[133]

Extraterritorial jurisdiction based on control and authority over persons is not unique to the ECtHR. The Human Rights Committee in *Lopez Burgos* adopted a similar position. A Uruguayan trade-union leader was kidnapped and detained in Argentina by Uruguayan security and intelligence forces. The HRC observed that the reference to jurisdiction in the ICCPR is

> 'not to the place where the violation occurred, but rather to the *relationship between the individual and the State in relation to a violation* of any of the rights set forth in the Covenant, wherever they occurred. (…) Article 2(1) … does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition of it.'[134]

The question is then how such a relationship between State and individual is triggered. Is the mere fact that the state (by its agents) causes the human rights violation sufficient to trigger jurisdiction? In its General Comment 31, the HRC referred to 'those within the power or effective control of the forces of a State Party acting outside its territory'.[135] The Committee on Economic, Social and Cultural Rights affirmed the effective control test,[136] as did the ICJ in its Advisory Opinion on the Palestinian wall.[137] Also the Inter-American Commission has confirmed the extraterritorial application of rights for persons subject to a state's authority and control.[138]

In *Brothers to the Rescue*, the Inter-American Commission regarded victims that were shot by Cuban state agents outside Cuba's territory (the aircraft they were flying was shot down in international air space) as to fall within the authority and control, and thus jurisdiction, of the Cuban agents.[139] The Commission thereby held that extraterritorial obligations can apply 'when the person is present in the territory of a State but subject to the control of another State, generally through the actions of that State's agents abroad'.[140] Control thus seems to be equated with sufficient power over that person to violate

133 ECHR, *Isaak v Turkey* AdmDec 28 September 2006, 44587/98, p.21.
134 Human Rights Committee, *Lopez Burgos v Uruguay* 29 July 1981, Communication No 52/1979, UN Doc CCPR/C/13/D/52/1979, IHRL 2796 (UNHRC 1981), para.12.2.
135 General Comment 31, para.10.
136 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 23 May 2003, para 31 (E/C.12/1/Add.90).
137 Advisory Opinion 2004, paras.102;113.
138 See for instance IACHR, *Coard et al v the United States* 29 September 1999, Report No 109/99, Case No 10.951, para.41.
139 IACHR, *Armando Alejandro Jr. and others v Cuba (Brothers to the rescue)* 29 September 1999, IACHR Report no 86/99, Case no 11.589.
140 Ibid para.23.

his rights. In its Report on the US Military Intervention in Panama, the Commission stated

> 'Where it is asserted that a use of military force has resulted in non-combatant deaths, personal injury, and property loss, the human rights of the noncombatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case set forth allegations cognizable within the framework of the Declaration. Thus the Commission is authorized to consider the subject matter of the case.'[141]

This overview of personal jurisdiction cases shows the difficulty to determine the exact meaning of authority or control over persons. Can one say that the fact that a state has the capacity to hurt another person suffices to establish authority over that person, as there is *de facto* control over that person?[142] Or is a more legal relationship required?[143] Is it sufficient that a person is *affected* by a state act? Lawson suggests a direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual's right to trigger jurisdiction. He argues it would go too far to assume that anybody who is in some way 'affected' by the conduct of states would fall within the scope of jurisdiction within the context of for instance Article 1 ECHR. The decision to cut development aid for instance should not be sufficient ground to fall within the scope of the Convention. On the other hand, it would be too restrictive to require a formal legal or structural relationship, as this would unjustifiably exclude jurisdiction in situations of factual control.[144]

6.4.3.3 Effects of state acts

An interesting, but to my knowledge unique, case to note is the *Burundi Embargo* case, whereby the African Commission considered alleged human rights violations by Ethiopia, Kenya, Tanzania, Rwanda, Uganda, Zaire and Zambia for imposing an embargo against Burundi, protesting the coup d'état by the retired military ruler Major Pierre Buyoya in 1996.[145] At a summit in 1996, the respondent states adopted the embargo following the unconstitu-

141 IACHR, *US Military Intervention in Panama* 14 October 1993, IACHR Report No 31/93, case No 10.573.

142 Would an attack by drones lead to sufficient control to establish jurisdiction? See Jordan J. Paust, 'The Bush-Cheney Legacy: Serial Torture and Forced Disappearance in Manifest Violation of Global Human Rights Law.' 2012, 18 Barry Law Review 61.

143 Lawson(2004), 95.

144 Rick Lawson, 'The Concept of Jurisdiction and Extraterritorial Acts of State' in Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002) 294.

145 African Commission, *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia* 2004, Communication 157/96 – 17th Annual Activity Report (2004).

tional change of government, out of an interest in peace and stability in the region. Burundi argued that the embargo violated among others the right to life and right to education. Even though the defendants were held not to have violated the Charter, the Commission emphasized the importance of taking the effect of state acts into account and carefully monitor them.[146] If the actions (the trade embargo) would have been 'disproportionate', the Commission was apparently ready to find the states responsible for human rights violations.

6.4.4 A normative perspective on extraterritorial human rights protection

After having discussed the legal reasoning on extraterritoriality by the courts and monitoring bodies, it is worth considering the policy reasons behind the idea that states can indeed be bound by human rights obligations outside of their territory, in order to determine whether similar reasoning can be applied in a trade context.

The protection of human rights is an (almost) universal concern, affirmed in binding treaties and non-binding declarations. That universality should, however, be taken with a sense of perspective and is not absolute. Relativists argue that some societies are not developed enough, economically or politically, to allow for an application of human rights standards as developed in more 'advanced' countries.[147] A variation is that Western norms cannot just be transposed in different cultures, with differing norms and values,[148] or that they should not, as this would lead to human rights imperialism.[149]

While there is certainly some validity in these arguments – one can think of rights that are more culturally-sensitive (non-discrimination of homosexuals for instance) – they do not hold for the full range of human rights. Rights such as the right not to be killed (right to life) or the prohibition on torture are not culture-related and are more absolute (even though other aspects of the right

146 Ibid para.75.

147 Milanovic(2011), 83.

148 This argument was even brought up by the ECtHR in *Bankovic* stating that "the Convention is a multi-lateral treaty operating (…) in an essentially regional context and notably in the legal space of the contracting states. (…) The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the court in favour of establishing jurisdiction only when the territory in question was one that (…) would normally be covered by the convention." (para.80) The Court's highly criticized reliance on the legal space of the Convention has been discussed above.

149 For an interesting overview of fundamental human rights in different cultures, see Stefan Kadelbach, 'The Territoriality and Migration of Fundamental Rights' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 308 et al.

to life such as abortion or euthanasia raise much more controversy). Furthermore, human rights protection is no longer a 'Western issue': many non-Western states are parties to the international human rights treaties as well as to a regional system, thereby recognizing the universal importance of human rights protection.

Milanovic rightly observes that 'the issue is not so much whether the ECHR and its case law are contrary to the cultural mores of the territory where it is to be applied, but whether the obligations arising from this treaty can be realistically complied with'.[150] The answer can only lay in a reasonable approach towards the substantive obligation, taking into account a margin of appreciation, with respect for the local culture, circumstances and both the domestic and international legal framework. Or, as Milanovic puts it, universality should be balanced with considerations of effectiveness and reasonableness in order to persuade governments and courts.[151]

Another reason supporting an extraterritorial application of human rights obligations based on factual control is that such approach can prevent arbitrariness:[152] the lack of sovereignty over territory cannot become a tool for states to shield off human rights responsibilities and obligations. Without a factual understanding of jurisdiction, States could escape their obligations by denying sovereignty. For instance, if the US does not have formal sovereignty over Guantanamo, but it does have full effective control over it, would it be acceptable that its international obligations were not to apply?[153]

Through an extraterritorial application of human rights obligations, the regional and international human rights bodies can offer remedies where victims would otherwise be left without any domestic remedy. Instances where states fail to respect human rights obligations outside their territory can occur without the knowledge or involvement of the state on whose territory human rights violations are committed. It can be that these states do not adhere to the same human rights standards or that the violations have occurred fully beyond the control of the territorial state. Whatever the reason, individuals can be left without domestic remedy. They cannot in those instances rely upon the territorial state's responsibility. Bringing a complaint against the committing

150 Milanovic(2011), 94.

151 Ibid 110. He identifies four main considerations: flexibility, real impact, regime integrity and clarity and predictability. A proportionality requirement as suggested by the African Commission in the *Burundi Embargo* case (*supra* note 989) could be considered as well.

152 Ibid 96.

153 As also stated by the Justice Kennedy in *Boumedienne v Bush (*US Supreme Court, *Boumedienne v Bush* 12 June 2008, 553 US 723; 128 S Ct 2229.*)*: 'Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint'. (Opinion of the Court, p.35)

state (that was acting outside its legal territory) increases the victim's chances to a remedy – if, apart from jurisdiction, the conditions of attribution and responsibility have been met.

Miller has made a practical, but normatively weak, argument for a narrow interpretation of extraterritorial jurisdiction under the ECHR. She argues that a 'control entails responsibility' approach would lead to an increase of cases that would transform the current character of the system:

> 'to give thousands, if not millions, of individuals round the world the ability to mount a challenge to such practices [violations of individuals' rights abroad] in the forum of the European Court would strain the Court's already stretched resources to breaking point.'[154]

These cases would furthermore take the Court's focus away from human rights violations within the signatory states.[155] While these comments are certainly valid, they cannot support any legal analysis of the jurisdiction debate.

6.4.5 Application of lessons learned to a trade context

As has already been noted, the concept and use of extraterritoriality in a human rights context differs from that in a trade context. Whereas the extraterritorial application of international human rights treaties relates to an extension of the *own* human rights obligations of a state when acting abroad – obligations that a state has committed to within its own sovereign territory –, extraterritoriality through npr-PPMs imposes obligations *on others*. In a human rights context, a state's own obligations are 'activated extraterritorially' to apply to its own actions abroad in cases of factual control over persons or territory, whereas in a trade context, a state's rules are extended to apply to the actions of others (foreign producers), through the trigger of market access. While clearly different, there is a common element: concerns about human rights and concerns about the environment can arguably be seen as shared, global or universal concerns. The purpose of protecting human rights as well as the environment in an extraterritorial manner envisages the protection of those who are not immediately linked to the sovereign territory of the acting state in the traditional sense, but are undeniably linked through a common 'concern'. A lack of human rights protection can lead to abuse of state power, insecurity and instability, which can have an impact beyond state borders – either factually, through spill-over effects, or morally. Likewise, a lack of environmental

154 Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' 2009, 20 European Journal of International Law 1223, 1235.

155 Ibid.

protection does not only affect one state, and environmental harm does not stop at the border. Depending on the environmental concerns at issue, their impact will spread more or less quickly and will cause more or less harm, but it is without doubt that we have to share our planet, and are thus all affected by a lack of environmental protection. The common element in the human rights case law, and in what this thesis seeks to demonstrate, is the need for an extension of jurisdictional boundaries in case of common, transboundary or global concerns.

The analysis of jurisdictional clauses in human rights treaties will be of little help to the interpretation of the scope of the WTO agreements, as these do not contain a jurisdictional clause. The jurisdictional limits of the WTO agreements seem to coincide with the jurisdictional limits of sovereign states: the *de jure* demarcation of territory in which a state can exercise prescriptive and enforcement jurisdiction. The interpretation of jurisdiction by the human rights bodies as *factual* jurisdiction (linked to control over either territory or individuals) makes little sense in a trade context: the question in the latter is whether it is lawful to 'regulate' over actions occurring abroad through npr-PPMs with the objective address non-trade concerns located outside the territory of the regulating state, without any factual control over the territory in which production is occurring or over the producers: the only control is exercised through conditioning market access. The human rights law analysis is nevertheless relevant, because human rights courts and tribunals have shown willingness to think creatively in order to address transboundary concerns so as to avoid a legal vacuum in human rights protection. That willingness and creativity could be applied in a trade-and-environment context as well, because of the current legal vacuum in (certain areas of) environmental protection.

The recourse to npr-PPMs should be seen as a second-best alternative, as binding international agreements on environmental commitments should be the preferred solution. However, npr-PPMs for environmental purposes can be useful instruments when international agreement is still lacking. In that way environmental npr-PPMs aim to fill a legal vacuum that exists because common environmental concerns cannot be dealt with by one state alone. International cooperation is required in order to protect our planet, and to protect those most vulnerable to the consequences of, for example, climate change. Under international and regional human rights law, the legal vacuum originates from attribution challenges (if a state has no effective control over a territory or its residents, can human rights violations be attributed to that state?), and without an extraterritorial application, human rights victims could effectively fall without any means to redress. In an environmental context, environmental victims cannot hold states accountable if they are not able or willing to protect the environment.

The need to fill the legal vacuum in international human rights protection, – and the consequent attempt to push jurisdictional boundaries –, stems from the urgent need to protect the common values that have been recognized by

such a number of states through the regional and international human rights treaties. Precisely because states have committed themselves to respect those rights within their jurisdiction, they should accept an extension of their obligations through an extraterritorial application of the human rights treaties. The functional equivalent to human rights treaties in environmental protection is the large body of soft law, complemented with some binding agreements laying down objectives and targets, such as the 2015 Paris Agreement on Climate Change. The small number of binding environmental agreements is not necessarily due to an ignorance or denial of environmental threats, but may be more related to the practical interpretation and execution of commitments, such as historical responsibilities, common but differentiated responsibilities, measuring methods etc. Even though states cannot be coerced into complying with obligations that have not agreed to, the question is whether this large body of soft law could – in addition to binding environmental agreements –, be considered as a strengthening factor for the justification of the extraterritorial effects of npr-PPMs that address environmental concerns located (partly) outside the territory of the regulating state, when the urgency of the concern at issue has been recognized in soft law instruments.

6.5 THE NATURE OF EXTRATERRITORIAL OBLIGATIONS

6.5.1 Respect, protect and fulfill?

Human rights ordinarily apply to subjects situated within the territorial boundaries of the state, but there are circumstances in which they *can and should* also apply outside those boundaries.[156] The remaining question relates to the extent of those extraterritorial obligations. Could it be that some rights can be applied extraterritorially and others not? Do substantive rights only extend extraterritorially when they can logically and practically be applied?[157] Do extraterritorial obligations extend to all degrees of protection, negative and positive, namely to duties respect, protect, *and* fulfill rights? Nearly all jurisprudence is limited to the duty to *respect* human rights obligations, or in other words, the negative obligation not to interfere with the enjoyment of rights. A state shall not do abroad what it cannot do at home. What about the positive obligations, the duty to fulfill? Article 1 ECHR states that states must *secure* the protection of rights within their jurisdiction. But what is the exact scope of 'securing' rights? The title of Article 1 ECHR furthermore refers to 'the obligation to respect', even though there is a clear difference between 'securing rights' and 'respecting rights'. The latter is much more narrow in scope than the former. Surprisingly, this distinction has not been addressed in great detail

156 Besson (2012), 862.
157 Van Schaack (2014), 49.

in the jurisprudence. This can, at least partly, be explained by the fact that most claims brought to the regional or global bodies dealt with a violation to respect a right, or in other words, factual circumstances in which the state interfered with an individual's enjoyment of her/his human rights. The majority of cases involving an extraterritorial claim concerned negative human rights obligations in a military context such as the failure to respect the right to life and the prohibition on torture.[158]

In the *DRC v Uganda* case, the ICJ held that Uganda's human rights obligation as an occupying power comprised

> 'the duty to *secure respect* for the applicable rules of international human rights law and international humanitarian law, to *protect the inhabitants* of the occupied territory against acts of violence, and *not to tolerate such violence* by any third party.'[159]

In *Loizidou v Turkey*, a case concerning the enjoyment of property in the occupied territory of Northern Cyprus brought by a Cypriot national, the ECtHR referred to an 'obligation to secure', as in Article 1:

> '[b]earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The *obligation to secure*, in such an area, *the rights and freedoms* set out in the Convention derives from the fact of such control (…).'[160]

In *Cyprus v Turkey*, the Court further elaborated that because of the Turkish military and other support to the local administration:

> 'Turkey's 'jurisdiction' must be considered to extend to securing *the entire range of substantive rights* set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.'[161]

What does this entail exactly? Is this case particular to the overall control of Turkey over Northern Cyprus, including control over the local administration, or does the Court believe that states in general have positive obligations as well in an extraterritorial context? While this has not been explicitly clarified yet by the ECtHR, it seems logical that the extent of positive obligations would

158 Note that in a situation of belligerent occupation, a second layer of rules international humanitarian law applies as well and can overlap. See Andreas Zimmermann, 'Extraterritorial Application of Human Rights Treaties – The Case of Israel and the Palestinian Territories Revisited.' in Isabelle Buffard and others (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff 2008) 766.

159 *Congo v Uganda* 19 December 2005, para.178.

160 Grand Chamber *Loizidou v Turkey* 23 March 1995, para.62.

161 Grand Chamber *Cyprus v Turkey* 10 May 2001, para.77.

be proportional to the administrative control that is being exercised as positive obligations require administrative power (which normally belongs to the sovereign territorial state).[162]

Extraterritorial obligations of states differ from the full range of human rights obligations within a state's territory. Where a state holds all public powers, it must comply with its treaty obligations, without exceptions, including ensuring that a legal framework is in place to protect citizens from human rights violations by private parties. However, the nature of some obligations makes it difficult, if not impossible, for a state to provide protection without that same degree of public powers. Positive rights require positive action by a state, and hence require a different degree of control over a territory, whereby full control would equal annexation. Only in instances of full control could one expect the controlling state to bear responsibilities regarding, for instance, education or health care. Could there be a legal as well as moral duty to, for instance, alleviate worldwide human suffering and eliminate poverty for states who would have the capabilities to contribute to those goals?[163] That seems a serious stretch of the legally enforceable human rights obligations. De Schutter has argued that where a state does not hold governmental powers in a territory abroad, only the negative obligation not to violate the rights of the Convention could be imposed on that state.[164] However, if extraterritorial obligations differ between circumstances and degrees of power held by states, how will a state know what precise obligations it owes in particular circumstances?[165]

The ECtHR already stated that even within a territorial situation the positive obligations on states shall not be disproportionate:

> 'The scope of the positive obligations *must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities*. Not every claimed risk to life can therefore entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of existence of a real and immediate risk to the life of an identified individuals from the criminal acts of third part and that they failed to take measures

162 See also the requirement of reasonableness in determining the substantive obligation, supra note 994.

163 Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' 2011, 11 Human Rights Law Review 1, 6. See for a discussion of moral human rights, Thomas Pogge, 'Severe Poverty as a Human Rights Violation' 2004, UNESCO Poverty Portal.

164 Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' 2006, 6 Baltic Yearbook on International Law 185, 245.

165 Chimene I. Keitner, 'Rights Beyond Borders' 2011, 36 Yale Journal of International Law 55, 67.

within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'[166]

In *Gentilhomme v France*, three French women, married to Algerian nationals and living in Algeria, whose children formerly attended a French state school in Algiers, brought a complaint against France.[167] In 1988, Algeria decided that the French state school could no longer enroll Algerian children. The applicants complained that France violated their rights to family life and education by refusing to provide their children with an education.[168] The ECtHR, however, found that the unilateral decision by Algeria to limit the provision of French education was a sovereign decision within its own territory. In such a situation, France could not owe human rights obligations to these children, as its control was restricted by the lawful and sovereign authority of Algeria.[169] The case was therefore declared inadmissible. If the decision to no longer enroll Algerian children had been taken by France, then most likely the applicants would have fallen within France's 'jurisdiction'.

Positive obligations, requiring positive action, are more intrusive of the sovereignty of the territorial state than negative obligations.[170] The provisions on the territorial scope of human rights treaties were most likely drafted with a 'normal' situation in mind of people within a territory seeking protection against the state ruling over that territory. Through its treaty obligations, the state has committed itself to ensuring protection of human rights in all aspects of public action. Some rights can only be sufficiently protected where a state indeed has full control over all public powers and tasks; other rights only have to be protected where a state has effective control over territory. For instance, where personal jurisdiction through factual control over a person is established extraterritorially, the state cannot be required to secure rights dependent on judicial institutions.[171] States must still respect the lawful authority of the sovereign territorial state, and if an extraterritorial right to fulfill would exist, these duties should then always be complementary to domestic state obligations.[172] A gradual scope of obligations that is proportionate to the degree of control seems the most reasonable and realistic solution. The level of control and exercise of public powers determines how much an individual can be

166 ECHR, *Osman v United Kingdom* 28 October 1998, 23452/94, para.116.
167 ECHR, *Gentilhomme, Schaff-Benhadji et Zerouki v France* 14 May 2002, 48205/99, 48207/99 and 48209/99.
168 Ibid para.20.
169 Ibid.
170 King (2009), 538.
171 Ibid.
172 Wouter Vandenhole, 'EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights' in Margot Salomon, Arne Tostensen and Wouter Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007) 87.

affected by state action and thus what obligations the state has in relation to such control.[173]

In *Ilascu*, the ECtHR recognized that Convention obligations can be 'divided and tailored' by holding both Russia and Moldova responsible for different violations (even though Moldova did not have control over the territory or over the individuals).[174] The Court seemed to take a different stance in *Bankovic*, where it held that

> 'the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure 'the rights and freedoms defined in section I of the Convention' can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question.[175]

The UK House of Lords in the domestic procedures of *Al-Skeini* relied upon this statement and found that the victims who were shot in the course of fire exchanges during patrols (rather than in detention) did not fall within the UK's jurisdiction.[176] As the applicants did not only complain of the unlawful killings under Article 2, but also relied on the positive obligation of states to conduct an investigation into a killing, their Lordships found that if the UK did not have sufficient control to secure the entire package of rights, its acts cannot fall within the scope of the UK's 'jurisdiction'.[177] The ECtHR in its judgment in *Al-Skeini* did not follow this all-or-nothing approach. The Court reiterated its earlier position that where a state has effective control, it must secure the entire range of substantive rights of the Convention. The Court added, however, that where a state only had control over an individual (rather than holding actual public powers over an entire population), the protection of rights would depend on the factual circumstances:

> '[t]he State is under an obligation (…) to secure to that individual the *rights and freedoms (…) that are relevant to the situation of that individual*. In this sense, therefore, the Convention rights can be divided and tailored.'[178]

An interesting case is pending before the Human Rights Committee between Palestinian citizens and Canada. Canadian contractors and builders in the Occupied Palestinian territories are alleged to have acted in violation of human

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173 Francoise Hampson, 'The Scope of the Extraterritorial Applicability of International Human Rights Law' in Geoff Gilbert, Francoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011) 169; Van Schaack (2014), 51.

174 Grand Chamber *Ilascu v Moldova and Russa* 8 July 2004, paras.441ff.

175 Grand Chamber (Adm Dec) *Bankovic* 12 December 2001, para.75.

176 *Al-Skeini and others v Secretary of State for Defence* 13 June 2007.

177 Ibid para.83 (per Lord Rodger); para.129 (per Lord Brown); para.97 (per Lord Carswell).

178 Grand Chamber *Al-Skeini v UK* 7 July 2011, para.139.

rights law, and the complainants wish to hold Canada accountable for not ensuring respect for human rights obligations.[179] If the Committee were to find that by not prescribing their companies how to act, Canada was acting in breach of its human rights obligations, that decision would be groundbreaking for an extraterritorial duty to respect and protect, as this would broaden the scope of state's extraterritorial obligations considerably – basically requiring states to regulate (and to ensure adequate enforcement) for the extraterritorial behaviour of their nationals (non-state agents). Whereas from a human rights perspective, extraterritorial regulation of nationals – including corporations – may be encouraged, it is unlikely that the Committee will reach this conclusion.

In summary, the following substantive obligations can be discerned: within the sovereign territory over which a state has full control, the full range of both negative and positive obligations applies. Outside the sovereign territory of a state, but where a state exercises effective control over territory, the range of rights depends on the extent of public powers exercised by the foreign state. A state will in any case have the negative obligation to *respect* all human rights, but will only have positive obligations where that can reasonably be expected. Where a state has physical control over an individual, only those rights that are relevant to the situation of that individual apply.

6.5.2 Economic, social and cultural rights

The jurisprudence discussed above stems mostly from human rights bodies under civil and political rights treaties (the so-called first generation rights that mainly focus on individual liberties and act as a counterweight to state excesses). Economic, social and cultural rights (ECS rights, the so-called second generation rights) are mainly related to equal conditions and treatment. Unless a state is effectively occupying foreign territory with full public power, examples where a foreign state would be the sole duty bearer of ECS obligations are difficult to imagine. When states cooperate (e.g. in a development cooperation project) the facts of the case will determine which state is in effective control and whose ECS obligations would be triggered.[180]

In case of military occupation, the question is whether the occupying state is under a legal obligation to also observe the economic, social and cultural rights of the people residing in the occupied territory. International human-

179 The complainants argue for instance that Canada has violated its extraterritorial obligations to ensure respect by failing to provide effective remedies to hold the building companies accountable for their violations, as well as by failing to adequately regulate the companies in order to ensure that their activities would not violate the ICCPR. (Individual Complaint to the Human Rights Committee under the Optional Protocol to the ICCPR, Bil'in et al v Canada, 28 February 2013, p.8).

180 Coomans (2011), 6.

itarian law undoubtedly applies in those situations,[181] but do occupying states also have obligations towards education or working environments for instance? The Committee on Economic, Social and Cultural Rights (CESCR) has to some extent dealt with this question when discussing the State reports of Israel regarding the Occupied Palestinian Territories. The Committee was of the view that Israel's ECS obligations applied also to the Occupied Palestinian Territories as 'the State's obligations under the Covenant apply to all territories and populations under its effective control'.[182] Israel denied it had such effective control over the Occupied Palestinian Territories.[183] Setting aside whether or not Israel had effective control, this discussion suggests that also ECS obligations follow the effective control doctrine, both over territory or people. The Committee, however, did not elaborate on the substantive obligations that would apply. Is it only the obligation to respect, or in other words, refrain from interfering in the free enjoyment of rights, or also the obligations to protect and fulfil? Can development aid be considered an obligation or only a commitment and a moral responsibility? It is reasonable that the degree of control would determine the scope of the obligations, whereby it is unlikely that obligations to *fulfill* ECS obligations outside a state's territory could lead to state responsibility under international law. The Committee on Economic, Social and Cultural Rights has, as of yet, never engaged in a detailed analysis of the different types of obligations.

Coomans describes how the taking of sanctions under Chapter VII of the UN Charter might have serious human rights implications (apart from the human rights violations that the sanctions intend to punish).[184] Without stating explicitly that sanctions can be seen as acts giving rise to the extraterritorial application of the ICESCR, the Committee on Economic, Social and Cultural Rights has strongly hinted at this point of view in its General Comments.[185] In General Comment no 8 on the relationship between economic sanctions and respect for economic and social rights, the Committee argued that when imposing sanctions states are still bound by their own human rights stand-

181 In particular the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

182 Concluding Observations regarding Israel's Initial Report, 4 December 1998, E/C.12/1/Add27, para.8.

183 Summary Record of the 18th Meeting, 4 June 2003, E/C.12/2003/SR.18, paras.22-24. Israel argued that the ICESCR cannot apply in a context of armed conflict because of the distinction under international law between human rights and humanitarian law. (Israel, Additional information submitted by State Parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, 14 May 2001, E/1989/5/Add14) The Committee did not agree with that statement and held that the CESCR applied notwithstanding.

184 Coomans (2011), 11.

185 See General Comment no 8; Ibid 12.

ards.[186] Hence states have to take into account the extraterritorial effects of the imposed sanctions. For instance, they cannot impose sanctions that restrict the supply of medicines and medical equipment.[187] States (or the international organization) imposing sanctions also have an obligation to respond to 'any disproportionate suffering experienced by vulnerable groups within the targeted country'.[188] This does not mean, however, that the sanctioned state no longer has to comply with its own obligations: its obligations to realize ESC rights for its citizens continue to apply.[189]

Interpretative guidance for the extraterritorial scope of ECS rights can be found in the non-binding Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural rights.[190] The principles aim to bridge a divide between civil and political rights, and economic, social and cultural rights. Most jurisprudence on extraterritorial human rights obligations deals with civil and political rights, and focuses on the effective control doctrine. The Maastricht Principles suggest a broader scope of extraterritorial obligations for ECS rights. The Principles do not claim to be a codification of existing international law: apart from the preamble stating that the principles are 'drawn from international law', no clear references are made to the legal basis for extraterritorial obligations.
The Maastricht Principles define extraterritorial obligations as

> 'a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and

186 General Comment no 8: The relationship between economic sanctions and respect for economic and social rights, 4 December 1997, E/C.12/1997/8; 5 IHHR 302 (1998).
187 General Comment no 14: The right to highest attainable standard of health (art.12), 4 July 2000, E/C.12/2000/4; 8 IHRR 1 (2001), para 41.
188 General Comment no 8, para 14.
189 General Comment no 8, para 10.
190 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2012. The Maastricht Principles were developed over a two-year period between 2009 and 2011 and subsequently adopted by human rights experts at a meeting in 2011 convened by Maastricht University and the International Commission of Jurists. Signatories include current and former members of UN human rights treaty bodies, former and current Special Rapporteurs of the Human Rights Council, along with academics and legal advisers of leading non-governmental organizations. The Extraterritorial Obligations Consortium, created in 2007 and composed to date of leading academics and NGO's played a pivotal role throughout the process. (Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' 2012, 34 Human Rights Quarterly 1084, 3.) They are the opinion of an international group of experts suggesting extraterritorial obligations needed to fill a legal vacuum in the sphere of economic, social and cultural rights.

> b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately and jointly through international cooperation, to realize human rights universally.'[191]

Paragraph (a) refers to situations where states would be able to regulate activities within their territory and abroad that have effects outside of their territory. An effect could be, for example, that a state ensures that a corporate actor within its jurisdiction does not provide loans to projects leading to forced evictions.[192] Paragraph (b) refers to obligations as, for instance, laid down in Article 55 of the UN Charter, referring to non-discrimination based on race, sex or religion, but to which no legal consequences can be attached as assistance and cooperation cannot be enforced.[193] How far could and should states go in their unilateral action to realize human rights universally? From an international law perspective states can only prescribe and enforce norms within their own jurisdiction, so the obligations seem to refer mainly to international cooperation.

With regard to the jurisdictional grounds, Principle 9 lists three grounds establishing jurisdiction. Firstly, the exercise of authority or effective control; secondly, where state acts or omissions bring about foreseeable *effect* on the enjoyment of rights within or outside its territory; and thirdly, and very notably,

> 'situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is *in a position* to exercise *decisive influence* or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.'[194]

It is not clear what the drafters meant exactly with 'in a position to exercise decisive influence'. Do they refer to influence over activities abroad? The Commentary to the Maastricht Principles does not elaborate on this point. Can powerful markets that are in a position to address non-trade concerns through trade measures be seen as being 'in a position to exercise decisive influence'? Even though it would be unlikely that the failure to take such measures could lead to state responsibility on the basis of omission, could this be seen as a duty nonetheless for powerful states?

This latter basis for jurisdiction seems to open endless opportunities (for success and for abuse) but is very much limited again by the addition of 'in accordance with international law', reiterated by Principle 10, explicitly stating that extraterritorial obligations cannot be exercised in violation of general

191 Maastricht Principles, 2012, Principle 8.
192 De Schutter and others (2012), 1101.
193 Ibid 1102.
194 Maastricht Principles, 2012, Principle 9.

international law.[195] As long as there is no clarity on what *is* exactly in accordance with international law, the third base for jurisdiction remains vague. In the Commentary to Principle 24, it seems as if one of the situations envisaged by the drafters is the control and influence over transnational corporations with their main seat under a state's jurisdiction, but operating abroad.[196] While the legal status of npr-PPMs within WTO law remains unclear, as has been pointed out in chapter 4, it is very unlikely that imposing PPMs would be *per se* in direct violation international law.[197]

Principle 25 sets out 'the relevant bases to exercise extraterritorial (prescriptive) jurisdiction by a state'.[198] It reads that 'States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means' when among others 'the harm or threat of harm originates or occurs on its territory' (as a codification of the active personality principle).[199] This would indeed imply a double task for states: firstly, avoid any violations occurring within a state's territory, also those violations which could result in harm outside that territory (environmental harm as an obvious example); and secondly, prevent harm from activities abroad. The Commentary to Principle 25 confirms that the restrictions on extraterritorial jurisdiction remain debated. However, the 'specific nature of state regulations that seek to impose compliance with human rights or that seek to contribute to multilaterally agreed goals such as the Millennium Development Goals' should be taken into account.[200] As these concerns are of interest to all, in such cases 'a more flexible understanding of the limits on prescriptive extraterritorial jurisdiction may be justified'.[201]

Principle 26 expands on the position of states to influence the conduct of non-state actors:

> 'States that are in a position to influence the conduct of non-State actors *even if they are not in a position to regulate such conduct*, such as through their public procurement system or international diplomacy, should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect economic, social and cultural rights.'

Protecting such rights through trade measures, for instance restricting market access unless exporters respect certain environmental standards, seems to fall

195 The Commentary to the Maastricht Principles refers to the example of Article 2(4) of the UN charter, condemning the use of force against the territorial integrity or political independence of states.
196 De Schutter and others (2012), 1137.
197 The trigger of market access or market activation creates a territorial link allowing states to impose measures on goods that seek access to its territory. See chapter 3.
198 De Schutter and others (2012), 1139.
199 Ibid.
200 Ibid 1142.
201 Ibid.

within the scope of this Principle: a state is not actually regulating conduct, but exercising its influence if certain values are not respected. As both regulation and enforcement would then happen within the territory of the imposing member state, there seems to be no breach of international law.[202]

In summary, the non-binding Maastricht Principles have suggested a framework of extraterritorial ECS obligations. The effective control doctrine that applies to civil and political rights also counts as a starting point for ECS rights – where a state has control, it needs to protect human rights to the extent possible –, but the Principles extend the scope of ECS obligations to also take into account the effects of state action outside that state's territory, as well as the need to prevent the effects of acts by other states within the state's territory. While they emphasize the need for international cooperation and assistance, it is unclear to what extent states could take unilateral action to ensure a higher protection of rights abroad. How else, if not through international agreement, can a state influence activities abroad that have effect within a state's territory? Principles 25 and 26 imply that as long as states are acting in accordance with international law, they should use the tools available to influence conduct that may affect the enjoyment and protection of ECS rights.

6.5.3 Application of lessons learned to a trade context

As a general rule, the substantive obligations of states depend upon their factual control and powers: what is practically feasible? The greater the extent of public powers, the greater the positive human rights obligations on a state acting outside of its territory. However, the exercise of public powers in foreign territory is irrelevant in a trade context with respect to npr-PPMs. The Maastricht Principles make suggestions concerning the scope of international obligations with regard to ECS rights that could be more useful to our analysis of npr-PPMs. Firstly, the Principles point to a possible duty for states that are in a position to influence to help to realize ECS rights extraterritorially. This could be translated into a duty for states with a powerful market to use their market power to help realize transboundary or global environmental protection. Secondly, the Principles refer not only to a state's duty to avoid violations and harm within its own territory, but also to prevent harm from activities abroad. The specific nature of common goals, such as the Millennium Development Goals (MDGs), should be taken into account in order to allow for a more flexible understanding of jurisdictional limits. MDG 7, the goal to ensure environmental sustainability, emphasizes the common nature of environmental threats. In light of this common goal, npr-PPMs with the objective of environmental protection could contribute to preventing harm from activities abroad. Thirdly, according to the Principles, states should also aim at influencing the

202 See chapter 4.

conduct of non-state-actors to help realizing ECS rights. By targeting producers and their production processes, npr-PPMs are a preeminent example of such influence on non-state-actors.

Surely, the exercise of these powers requires a sound system of checks and balances to avoid abuse. In a trading context, these checks can be found in the non-discrimination principles, both in the substantive obligations and under the general exceptions (e.g. the *chapeau* to Article XX). The use of power by strong actors – whether economic, diplomatic or military –, may have a flavour of 'imperialism'. Even for 'good' and 'legitimate' causes, such as human rights or environmental protection, a powerful actor is likely to base its actions on its own beliefs and perspective. It is thus key that the common nature of the objective pursued by a PPM is emphasized and that a unilateral trade measure is based to the extent possible upon multilaterally agreed norms, standards or concerns, relying to the extent possible on international hard or soft law.[203] Considering the inadequate legal framework for environmental protection, it is submitted that international support can also be found through scientific reports or widely-supported initiatives of environmental NGO's. While less effective and not a legal basis to act upon against another state, these sources may nevertheless demonstrate an urgency and concern felt by society. A npr-PPM cannot be qualified as an act against another state though when it targets private producers through the odious production process, rather than states.[204] Furthermore, not being a true extraterritorial measure through the link of market access, the relevant question is whether the extraterritorial *effect* of a npr-PPM can be justified (as a substantive question rather than a jurisdictional question). In such a context, it is submitted that, in addition to international soft and hard law instruments, non-legal norms can also be taken into consideration to determine the common sense of urgency with regard to a particular environmental threat.

6.6 Conclusion

This chapter has shown that human rights treaty bodies have frequently applied obligations as laid down in regional and international human rights treaties to extra-territorial state conduct. Based on the shared and universal value of human rights protection, and in order to avoid a legal vacuum, regional and international human rights bodies have interpreted the juris-

203 See among others Ian Manners, 'The Normative Ethics of the European Union' 2008, 84 International Affairs 45. (arguing that the EU promotes a series of normative principles that are generally acknowledged to be universally applicable). Questioning the real normative model of the EU, see Kalypso Nicolaidis and Robert Howse, ''This Is My EUtopia...': Narrative as Power' 2002, 40 Journal of Common Market Studies 767.

204 See chapter 7 where a distinction is made between process-based PPMs, and the much more controversial country-based PPMs.

dictional scope of their respective treaties broadly. Jurisdiction is thereby interpreted as a *factual* situation of power, extending the scope of the treaties to territories and individuals abroad, where states exercise authority and control over these territories and/or individuals.

Little attention has been given in the jurisprudence to the type of right and the question whether extraterritorial obligations for certain rights can be triggered more easily than others. Nevertheless, a form of legal-functional reasonableness can be identified with respect to the substantive scope of the obligations: one can only require from a state acting outside its territory what is reasonable in relation to the control exercised, thereby also respecting the sovereign rights (prescriptive and enforcement jurisdiction) of the territorial state. Whereas respecting human rights obligations can hardly be seen as an intrusion on any state's sovereignty, positive obligations to fulfill will increase proportionally to the extent of the authority and control of a state over foreign territory: some obligations require a higher degree of public powers than others.

With regard to positive obligations a moral duty can be more easily discerned than an actual enforceable legal obligation. The Maastricht Principles advocate extraterritorial obligations for states to contribute to the universal realization of economic, social and cultural rights. Jurisprudence is still lacking on this point, but moral obligations definitely raise a number of questions: who carries that moral duty? States that have 'effective control' over territory, or also those states that are in a position to influence human rights protection (as suggested in the Maastricht Principles) through, for instance, their market power? Is there a duty on the states *able* to act or only on the *willing* – which may turn that duty into a *right*? And if the willing states are able to ensure better human rights protection – and by analogy, environmental protection – extraterritorially, with respect for the sovereignty of the foreign state, is there any legal ground to deny this? For each separate right the parameters will have to be analyzed separately. The variety in the substantive rights does not allow a generalization or oversimplification of the substance of their extraterritorial application.

Despite the obvious differences between the extraterritorial application of international human rights and the territorial extension of environmental policy through trade measures, the analysis of human rights practice can still be of guidance for npr-PPMs. The human rights perspective offers valuable insight on the general willingness to protect common values and concerns. By the creative interpretation of the human rights treaty bodies of jurisdiction as factual control, these bodies have shown that where necessary, the notions of jurisdiction and sovereignty can be elastic. The extraterritorial application enshrines the 'normative basis for the protection of fundamental rights as rights

of human beings rather than as rights of citizens',[205] a statement that could be equally applied to the right to a cleaner environment. Where the common nature of human rights is evidenced by the almost universal membership of the UN human rights treaties, as well as by the extensive membership of regional human rights treaties, the common nature of environmental concerns can be evidenced by hard law and soft law, but also, in lack thereof, by civil society and science.[206] A more lenient approach in this regard is justified with respect to environmental standards prescribed by a npr-PPM, as npr-PPMs do not impose any legal duty on states – in contrast to the human rights context, where an extraterritorial application of human rights obligations does impose a legal duty on the state that is bound by those obligations.

Thus, even though the human rights bodies' factual interpretation of jurisdiction as 'effective control' is not relevant to a trade context, the willingness to move towards a more flexible understanding of jurisdiction is. As will be further discussed in chapter 7, this elasticity of jurisdictional limits in light of common values and concerns seems to add support for a broad interpretation of the jurisdictional limits of GATT with respect to PPMs addressing common environmental concerns. In addition to environmental effects on the territory, as discussed in chapter 5, international support that evidences the common nature of an environmental concern could further justify the extraterritorial effect of a npr-PPM addressing that concern.

205 Stephen Gardbaum, 'Human Rights and International Constitutionalism' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling The World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 233.

206 See e.g. common concern of mankind (UN General Assembly Resolution 43/53 Para.1 (climate change)); IPPC Fifth Assessment Report 2014.