16. Extraterritoriality in international human rights law: back to the jurisdictional drawing board[1]

Samantha Besson

INTRODUCTION

The extraterritoriality or extraterritorial application (as opposed to the mere extraterritorial impact or effects) of international human rights law – that is, the grounding, under international law, of a given State's duties[2] to individual persons situated outside of its territory and of the correlative rights of those persons vis-à-vis that State – is controversial.

It has been so for a while, of course. Most of the controversy pertains to the notion of 'jurisdiction' (understood here as a normative relationship between a duty-bearing State and a right-holding person)[3] that works as both a normative threshold criterion and a practical condition for the application of human rights under international law.[4] More specifically, what is debated is the circumstances under which persons situated outside of the territory of a State may still be considered to be under the (extraterritorial) jurisdiction of that State for purposes of human rights protection.[5] However, as extraterritorial human rights application has gone,

[1] Many thanks to Cédric Ryngaert and Austen Parrish for their generous comments, to Nadia Signorell for her excellent research assistance and to Manon Fabre for the careful editing.

[2] 'Duties' and 'obligations' are used interchangeably. On the (remedial) 'responsibilities' for the breach of those extraterritorial human rights obligations, see Samantha Besson, 'Shared Responsibilities under the ECHR – Concurrent Jurisdictions, Duties and Responsibilities' in Iulia Motoc and Anne van Aaken (eds), *The European Convention on Human Rights and General International Law* (OUP 2018).

[3] See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 LJIL 857, 863.

[4] Most international human rights treaties refer to jurisdiction as a threshold criterion for the application of human rights, except the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Convention on Human and Peoples' Rights (ACHPR). The latter treaties' authoritative interpretation, however, including by the International Court of Justice (ICJ)'s (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 109, 112, 180), relies on jurisdiction. See also Antal Berkes, *International Human Rights Law beyond State Territorial Control* (CUP 2021) 21–22.

[5] See eg Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78; Olivier de Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic YB Intl L 185; Ralph Wilde, 'Triggering State Obligations Extraterritoriality: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Israel L Rev 503; Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20 EJIL 1223; Besson (n 3); Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 L & Ethics Human Rights 47; Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcom Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013); Marko Milanovic, 'Extraterritoriality and Human Rights: Prospects and Challenges' in Thomas

with the development of the transnational[6] or even global[7] circumstances of contemporary political and social life, from 'exceptional'[8] to routine under international human rights law, the controversy is now fiercer than ever. Indeed, the multiplication of cases has not only led to a higher complexity of the international case law,[9] rendering it more unpredictable and overall less principled, but has also, as of late, given rise to a radical expansion[10] of the extraterritorial scope of international human rights therein[11] – albeit to a lesser extent within the case law of regional human rights courts[12] – and hence to growing resistance on the part of duty-bearing States.

This alone would justify a critical assessment of the current regime of extraterritoriality of international human rights law. Providing an exhaustive critical survey of the vast and rich

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Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017).

6 On those (eg military, digital, economic or financial) circumstances, see Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 EJIL 581; Marko Milanovic, 'Surveillance and Cyber Operations' in Mark Gibney and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021).

7 On those (eg environmental or sanitary) circumstances, see Samantha Besson, 'The Human Right to Science' (2015) 4 Eur J Human Rights 403; Antal Berkes, 'Cross-Border Pollution' in Mark Gibney and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021).

8 See eg *Banković and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001), para 59, to be contrasted with *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), paras 130–40, 133 and its sequels. See, however, *MN v Belgium* App no 3599/18 (ECtHR, 5 May 2020), paras 101, 113 for the return of the 'exceptional circumstances' discourse. See Conall Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights' (2021) 82 QIL, Zoom-in 31; Mark Gibney, 'The Historical Development of Extraterritorial Obligations' in Mark Gibney and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021).

9 'Case law' refers here loosely to the interpretative practice of international human rights bodies, be they regional courts like the European Court of Human Rights (ECtHR), Interamerican Court of Human Rights (IACtHR) or African Court of Human and People's Rights (ACtHPR), or universal or regional treaty bodies, like the Human Rights Committee (HRC), Committee on the Rights of the Child (CRC) or Committee on Economic, Social and Cultural Rights (CESCR).

10 See eg CESCR, 'General Comment no 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (2017) UN Doc E/C.12/GC/24, paras 15–16, 30–32; *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of articles 4(1) and 5(1) of the American Convention on Human Rights),* Advisory Opinion OC-23/17, IACtHR (2017) Series A no 23, paras 104.a–104.h; HRC, 'General Comment no 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (2018) UN Doc CCPR/C/GC/36, paras 21–22.

11 See Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (2020) 9 *ESIL Reflections*<https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/>accessed 13 September 2021.

12 The main exception is the ECtHR's (and, to some extent, the ACtHR's) case law. See Lea A Raible, 'Extraterritoriality Between a Rock and Hard Place' (2021) 82 QIL, Zoom-in 7.

literature on the extraterritoriality of human rights would go beyond this chapter's scope, however.[13] The same applies to a detailed review of the fast-developing international case law.[14]

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[13] For the most relevant studies, see eg Pasquale de Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (G Giappichelli 2002); Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009); Guillaume Grisel, *Application extraterritoriale du droit international des droits de l'homme* (Helbing Lichtenhahn 2010); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP 2011); Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Nijhoff 2013); Yuval Shany, *The Extraterritorial Application of International Human Rights Law*, Collected Courses of the Hague Academy of International Law (vol 409, Brill 2020); Lea A Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020); Berkes (n 4).

[14] For the most relevant case law, see eg *Al-Skeini* (n 8) paras 130–40; *Hirsi Jamaa and Others v Italy* App no 27765/09 (EtCHR, 23 February 2012), para 81; *Jaloud v the Netherlands* App no 47708/08 (ECtHR, 20 November 2014), paras 139, 152; *Güzelyurtlu and Others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019), paras 178, 191–97; *Romeo Castaño v Belgium* App no 8351/17 (ECtHR, 9 July 2019), paras 36–43*; MN* (n 8) paras 104–6, 112–26; *Makuchyan and Minasyan v Azerbaijan and Hungary* App no 17247/13 (ECtHR, 26 May 2020), paras 47–52; *Hanan v Germany* App no 4871/16 (ECtHR, 16 February 2021), paras 130, 134–45; *Georgia v Russia (II)* App no 38263/08 (ECtHR, 21 January 2021), paras 81, 109–44; *Ukraine v Russia (IV)* App no 39611/18 (ECtHR, 22 August 2018), para 303; *Aarrass v Belgium* App no 16371/18 (ECtHR, 7 September 2021), paras 40–41; *Carter v Russia* App no 20914/07 (ECtHR, 21 September 2021), paras 123–30; *SS and Others v Italy* App no 21660/18 (ECtHR, 3 May 2018), pending; *Ukraine v Russia (IX*) App no 10691/21 (ECtHR, 19 February 2021), pending; *HF and Others v France* App nos 24384/19 and 44234/1 (ECtHR, 14 September 2022) (see Yves Haeck, Clara B Herrera and Hannah G Farag, 'Extraterritorial Obligations in the European Human Rights System' in Mark Gibney and others [eds], *Routledge Handbook on Extraterritorial Human Rights Obligations* [Routledge 2021]). See eg Advisory Opinion OC-23/17 (n 10) paras 72–82; *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, IACtHR (2018) Series A no 25 paras 13–45 (see Yves Haeck and Clara B Herrera, 'Extraterritorial Obligations in the Inter-American Human Rights System' in Mark Gibney and others [eds], *The Routledge Handbook on Extraterritorial Human Rights Obligations* [Routledge 2021]). See eg *Mohammed Abdullah Saleh Al-Asad v The Republic of Djibouti,* Communication no 383/10, ACtHPR (2014), paras 134–39 (see Anne Oloo and Wouter Vandenhole, 'Enforcement of Extraterritorial Obligations in the African Human Rights System' in Mark Gibney and others [eds], *The Routledge Handbook on Extraterritorial Human Rights Obligations* [Routledge 2021]). See eg General Comment no 36 (n 10) para 63; HRC, 'Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication no 2285/2013 (*Basem Ahmed Issa Yassin v Canada*)' (2017) UN Doc CCPR/C/120/D/2285/2013, paras 6.5–6.7; HRC, 'Decision adopted by the Committee under the Optional Protocol, concerning communication no 3043/2017 (*A.S. and others v Malta*)' (2020) UN Doc CCPR/C/128/D/3043/2017, paras 7.4–7.5, 7.8; General Comment no 24 (n 10) paras 15–16, 30–33; CRC, 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communication procedure, concerning communications no 79/2019 and no 109/2019 (*LH and others v France*)' (2020) CRC/C/85/D/79/2019 – CRC/C/85/D/109/2019, paras 2.9, 9.7; CRC, 'Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication no 104/2019 (*Chiara Sacchi and others v Argentina*)' (2021) CRC/C/88/D/104/2019, paras 4.3, 10.12 (see Elena Pribytkova, 'Extraterritorial Obligations in the United Nations System: U.N. Treaty-Based Bodies' in Mark Gibney and others [eds], *The Routledge Handbook on Extraterritorial Human Rights Obligations* [Routledge 2021]). See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 4) para 112; *Democratic Republic of the Congo v Uganda* (Judgment) [2005] ICJ Rep 2005, paras 239–40.

Instead, and to the extent that this volume addresses the equally contentious but more general question of extraterritoriality – that is, the extraterritorial application[15] (as opposed to mere impact or effects) of domestic law under international law – the chapter proposes to address another vexed (albeit more rarely discussed)[16] issue: the relationship between the two 'extraterritoriality' questions and, more specifically, between their respective underpinning notions of (extraterritorial) 'jurisdiction'.

What the question of the extraterritorial application of domestic law under international law pertains to, indeed, is the international legality of a State's 'jurisdiction' *stricto sensu* (understood here as the right or power, constituted and constrained by domestic and international law, to prescribe, enforce or adjudicate domestic law)[17] over people situated outside its territorial boundaries. Because they bear the same name, those two different concepts of State[18] jurisdiction (referred to below respectively as 'human rights jurisdiction' and 'jurisdiction *stricto sensu*') are often conflated with one another or, at least, invoked to ground each other. It is important, however, to understand that they are distinct and to clarify their relationship.

The proposed argument is four-pronged. First, it distinguishes between the 'extraterritoriality' of international human rights law and the 'extraterritoriality' of domestic law under international law. Second, it revisits the notion of (territorial and extraterritorial) human rights jurisdiction under international law. Third, the chapter explores the relations between human rights jurisdiction thus interpreted and jurisdiction *stricto sensu* in general. Finally, it addresses those relations in the extraterritorial context more specifically.

The chapter concludes by briefly reflecting on the co-evolution of both notions of jurisdiction in recent practice with respect to their concurrent, and maybe mutual, individualization and de-territorialization at first and, more recently, to their re-territorialization.[19] What one observes in practice indeed is that both understandings of State jurisdiction under international law have become the object of similar criticism and re-interpretations: they are increasingly grounded in 'functional' connection or control instead of territorial or even personal connec-

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[15] Note that 'application' (and, by extension, 'jurisdiction' *stricto sensu*) may refer as much to the right to apply domestic law as to its exercise and effective application: Samantha Besson, 'Why and What (State) Jurisdiction: Legal Plurality, Individual Equality and Territorial Legitimacy' in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (OUP 2019), 100–01. In what follows, I will distinguish between a State 'having' jurisdiction *stricto sensu* and 'exercising' it. In international human rights law, by contrast, a State 'has' human rights jurisdiction, ie effective control.

[16] See, however, Milanovic (n 13) 19–41; Besson (n 3) 868–70; Raible (n 13) 176–80; Cedric Ryngaert, *Selfless Intervention: Exercising Jurisdiction in the Common Interest* (OUP 2020), 138–208.

[17] See Besson (n 15) 100–08.

[18] The two kinds of extraterritoriality and respective 'jurisdiction' pertain to States' duties or rights under contemporary international law. Hence their 'territorial' (and 'extraterritorial') dimensions, actually. See Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights – A Quiet (R)Evolution' (2015) 32 Social Philosophy & Policy 244; Besson (n 15) 109–18 and 118–24.

[19] See Cedric Ryngaert, Chapter 1, this volume; Ryngaert (n 16) 211–13. For an overview of the practice, see Hannah Buxbaum, 'The Practice(s) of Extraterritoriality' in Hannah Buxbaum and Thibaut Fleury Graff (eds), *Extraterritoriality/L'extraterritorialité* (Brill 2022).

tion or control,[20] thereby abandoning 'extraterritorial' for 'global' or 'cosmopolitan'[21] jurisdiction,[22] on the one hand, or even, at times, rejected altogether by conflating a mere 'capacity'[23] to do something (including prescribe, enforce or adjudicate domestic law) with either a duty or a right to do it, on the other.

The proposed argument builds upon, revisits and refines some of my earlier discussions of both extraterritorial human rights jurisdiction[24] and jurisdiction *stricto sensu* under international law.[25] Besides its theoretical contribution, the chapter also addresses some of the most pressing contemporary questions pertaining to the extraterritoriality of international human rights law in practice. Think of the controversy surrounding the human rights duties of France vis-à-vis the French children and spouses of jihadists detained in camps in Iraq,[26] on the one hand, or pertaining to the human rights duties of Switzerland to adapt Swiss corporate law to bind multinationals incorporated under Swiss law through various human rights due diligence duties and hold them responsible for causing human rights violations abroad,[27] on the other. Both cases raise the question of the impact of extraterritorial (active or passive) personal jurisdiction *stricto sensu* – ie jurisdiction grounded in nationality, on the nationality State's extraterritorial human rights duties –, but also, and conversely, the question of its extraterritorial human rights-based duty to exercise extraterritorial personal jurisdiction *stricto sensu* to protect or bind its nationals abroad.

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[20] See under international human rights law, eg Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21 German LJ 385; and under international jurisdiction law, eg Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 EJIL 9, 22.

[21] See under international human rights law, eg Elena Pribytkova, 'What Global Human Rights Obligations Do We Have?' (2020) 20 Chicago J Intl L 384; and under international jurisdiction law, eg Ryngaert (n 16) 138–208.

[22] Unlike what those accounts seem to assume, 'extraterritorial' cannot be identified with 'global' (or 'cosmopolitan'). To start with, the rejection of 'territoriality' in such accounts, that inevitably comes with dispensing with 'extraterritoriality' (see also Besson (n 15) 105–06), comes dangerously close to undermining the legal specificity of statehood, ie separate or bounded legality. Moreover, it is unclear what State 'jurisdiction' could actually mean when it is described as 'global' or 'cosmopolitan', not to mention the counterintuitive term 'cosmopolitan extraterritoriality' sometimes used to refer to universal jurisdiction) (see also Ryngaert (n 16) 211–13). It is best therefore to think of the so-called global human rights duties as an entirely distinct category (see eg Sigrun I Skogly, 'Global Human Rights Obligations' in Mark Gibney and others [eds], *The Routledge Handbook on Extraterritorial Human Rights Obligations* [Routledge 2021], that is, as (universal) 'responsibilities for human rights' (Besson (n 18)).

[23] Under international human rights law, see eg Sigrun I Skogly, 'Causality and Extraterritorial Human Rights Obligations' in Malcom Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013). Under international jurisdiction law, see eg Anthony J Colangelo, 'Spatial Legality' (2012) 107 Northwestern University L Rev 69.

[24] See Besson (n 3).

[25] See Besson (n 15).

[26] See eg *LH and others* (n 14), paras 2.9, 9.7; *HF and Others* (n 14).

[27] See eg Damiano Canapa, Evelyne Schmid and Elena Cima, 'Entreprises responsables: limitations et perspectives' (2021) 141 Revue de droit suisse 557.

EXTRATERRITORIALITIES DISTINGUISHED

Before turning to the relationship between the respective notions of jurisdiction underpinning discussions of extraterritoriality under international law, a brief explanation of the differences between the 'extraterritoriality' of international human rights law and the 'extraterritoriality' of domestic law is in order.

The primary, and obvious, difference is that the extraterritoriality of international human rights pertains to *international* law, and the extraterritoriality of domestic law to *domestic* law. To the extent that international law may have, and usually has, a universal scope of application (and actually even expands that of domestic law in some cases), the question of its extraterritorial application should not even arise. If it does in certain regimes, such as that of international human rights law,[28] however, it is because of the content of the norms at stake.

Indeed, even if international human rights and duties are universal (to the extent that the rights are held by all persons and the duties are owed by all States), they are not owed to all persons by all States at the same time. This is notwithstanding the fact that all States are 'responsible for human rights' protection everywhere in the world (albeit not *to* the respective right-holders), on the one hand, and that all States also owe all other States duties of respect for the human rights duties they owe to persons under their jurisdiction (so-called *erga omnes [partes]* duties), on the other.[29] On the contrary, international human rights duties are only owed, in each and every case, to those individuals and by those States that are bound to one another by a relationship of (human rights) jurisdiction (such a relationship may, of course, include many States at a time in case of concurrent jurisdiction[30] and it may even, in rarer cases, give rise to collective State duties when the effective realization of each State's human rights duties to people under its jurisdiction requires coordination with other States[31]). It is that normative relationship that triggers the application of human rights and that grounds and gives rise to an additional normative relationship between those duty-bearing States and the right-holding individuals,[32] that is, the human rights relationship. In turn, that new relationship contributes to vesting the original relationship of jurisdiction with the justification of the authority it claims, and hence with political and especially democratic legitimacy.[33]

In short, to the extent that, under current international law at least, State authority is, and should remain, territorial, the 'universality' of human rights may be said to be in tension neither with their 'territorial' scope of application (because that scope matches the territorial scope of State authority most of the time) nor, when applicable, with their 'extraterritorial' scope of application (because States happen to exercise their authority over persons situated abroad, whether lawfully or unlawfully).[34]

A second difference between the extraterritoriality of human rights and that of domestic law that is at stake in this book pertains to the type of (international or domestic) legal norms

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[28] On the extraterritoriality of domestic human rights law, see Besson (n 3) 864; Brian Sang Yk, 'Extraterritorial Scope of Constitutional Rights: Instructive Insights from Comparative and International Law' (2018) 1 African J Comparative Constitutional L 71.

[29] See Besson (n 18).

[30] See Besson (n 2).

[31] See Besson (n 7).

[32] See Besson (n 3) 863, 866.

[33] Ibid 859.

[34] Ibid 860, 865–66. See also Raible (n 13) 179.

whose extraterritorial application is under scrutiny. In the case of the extraterritoriality of human rights, the norms applying extraterritorially are the relevant State's *duties* (hence the common reference to 'extraterritorial obligations'), whereas in the case of the extraterritoriality of domestic law, it is usually that State's *rights* (hence the common reference to 'extraterritorial jurisdiction'). By extension, the extraterritoriality of the former norms abroad gives rise to *individuals*' rights as opposed to, in the latter case, triggering *other States*' (and/or their nationals') duties.

Third, the extraterritoriality of human rights, to the extent that it gives rise to international legal duties, is *mandatory* under international law, whereas the extraterritoriality of domestic law under international law is *discretionary*: its relevance under international law is a matter of authorization (to the extent that it gives rise to a right or power to prescribe, enforce or adjudicate domestic law) rather than of obligation. Of course, cases where international law makes the latter or, at least, its exercise mandatory, or where having or, at least, effectively exercising discretionary jurisdiction may give rise to further duties under international law, do exist.[35] However, they are overall rarer.

Fourth, the extraterritoriality of human rights is *collective* or *multilateral* to the extent that international law grounds human rights duties for any State in the same extraterritorial jurisdictional circumstances (even if the duties usually arise separately from each State's individual jurisdiction), whereas the extraterritoriality of domestic law is *unilateral*. Of course, the latter may be coordinated by international law, especially when made mandatory, and hence become multilateral (even when each domestic law applies separately, of course), but this is not necessarily so.

EXTRATERRITORIAL HUMAN RIGHTS JURISDICTION REVISITED

Under contemporary international human rights law, and as mentioned before, a State's 'jurisdiction' over potential human right-holders is a normative relationship between that State and those right-holders that works as a normative threshold or trigger for its human rights duties to arise towards those right-holders.[36] It is also, conversely, a threshold for those persons' correlative human rights to arise vis-à-vis that State. Jurisdiction grounds, in other words, another normative relationship: the human rights relationship.

Besides being a normative threshold, human rights jurisdiction also amounts to a practical condition of human rights protection. Indeed, human rights jurisdiction may be identified with the practical circumstances for those human rights to be feasible rights and duties in practice: it provides the institutional and egalitarian framework necessary to enact and protect human rights, and in particular to specify and allocate the corresponding duties in practice.[37]

It follows that jurisdiction *qua* threshold and condition in international human rights law should be able to track the fundamental egalitarian status and hence the political and, more specifically, democratic status of which human rights, once grounded in jurisdiction, are con-

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[35] See Besson (n 15) 99; Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 British YB Intl L 187.

[36] See Besson (n 3) 863–65.

[37] Ibid 863. Contra: Berkes (n 4) 20–21.

stitutive. As one of the grounds for human rights and duties to arise, human rights jurisdiction has to be a sufficiently inclusive threshold to encompass all persons subjected to political and legal authority and who may, on that basis, claim equal rights of participation in each and every political community. It follows that it may not be reduced to those persons already participating lawfully in that community's decision-making processes, and in particular to those holding a given nationality or having a legal residence in a given State. This is actually one of the reasons why human rights jurisdiction cannot be reduced to that State's exercise of jurisdiction *stricto sensu* as it currently stands under either domestic or international law.

This is true within the territorial boundaries of the State where the jurisdictional grounding of human rights contributes to expanding the internal boundaries of the community of equals (for instance, to ground the human rights of foreigners, unlawful residents or, in the past, women) as much as outside those boundaries where the external boundaries of the community of equals are pushed outwards (for instance, to include, among human right-holders, the people of occupied territories, persons under foreign surveillance or war prisoners).

In turn, this explains why human rights jurisdiction is both territorial within State borders where a State's political and legal authority is mostly exercised, and extraterritorial when the latter is exercised outside State borders. Of course, to the extent that the exercise of political and legal authority outside State borders is rarer in practice, and actually should remain so according to international jurisdiction law that favours territorial jurisdiction, so are the cases of extraterritorial human rights jurisdiction. That difference between territorial and extraterritorial human rights jurisdiction is purely contingent, however. There is nothing to differentiate them in principle once given. This is unless, of course, human rights jurisdiction and jurisdiction *stricto sensu* are identified with one another, on the one hand, and jurisdiction *stricto sensu* is interpreted along the *Lotus* lines, on the other, which is still the case in some of the international human rights case law. This is probably what leads the relevant international human rights bodies and scholars to consider territorial human rights jurisdiction to be the rule and extraterritorial human rights jurisdiction to be the 'exception'.[38] Unpacking and criticizing this kind of identification between human rights jurisdiction and jurisdiction *stricto sensu* will be the object of the next section.

The remainder of this section focuses on three dimensions of the current regime of human rights jurisdiction, with special attention to extraterritorial human rights jurisdiction: its constitutive elements, its types and its normative consequences.

Elements of Extraterritorial Human Rights Jurisdiction

Starting with its constitutive elements, human rights jurisdiction has been interpreted, to date, as requiring 'effective control'[39] (i) by the human rights duty-bearing State over the human right-holder.[40] This requirement corresponds to the factual conditions of the previously mentioned relationship of political and legal authority of a State over its people, which underpins and is then matched by the overlapping human rights relationship for legitimacy purposes.

For related reasons, the requirement of effective control is usually qualified further as also having to be 'regular' or, at least, as having the potential to be (ii), as opposed to singular or

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[38] See eg *Banković* (n 8) paras 56–61, 75; *MN* (n 8) paras 98–101, 112.
[39] See most recently *Carter* (n 14) paras 125–29, 170.
[40] See Besson (n 2) 862–66, 872–74.

one-off control (for example, a single military strike),[41] on the one hand, and sometimes also as having to be government-like[42] or 'normative' (iii), and hence akin to an exercise of public or political power and legal authority, as opposed to unorganized or chaotic coercion (for example, armed hostilities),[43] on the other.

Importantly, one should not confuse a State's effective control over a private person required for human rights jurisdiction over the right-holder, which is at stake here, with two other kinds of State 'control' over a third party that may be relevant in the context respectively of the establishment of responsibility for the breach of human rights duties and of the grounding of further international human rights law standards.

First of all, a State's effective control over the alleged right-holder for the purposes of human rights jurisdiction ought to be distinguished, when applicable, from its 'effective control' over another private person, that is, the one causing the human rights violation.[44] This second kind of effective control is used for the purpose of attribution of private conduct to a State under the law on international responsibility of States (Art. 8 Articles on the Responsibility of States for Internationally Wrongful Acts [ARSIWA]). In international human rights law, it may be applied to establish a State's direct responsibility for a breach of human rights duties caused by that private person.[45]

The latter is an important distinction as confusing the two types of 'effective control' conflates the conditions for the purpose of attribution of the conduct of a private person to a human rights duty-bearing State with the effective control of that State over the alleged right-holders themselves.[46] Of course, the effective control by a State over a private person (including outside its territory) for the purpose of attribution of conduct, and hence of responsibility, could be used, under certain conditions, to establish that State's (territorial or extraterritorial) human rights jurisdiction over the right-holder situated under that private person's control.[47] However, for this to be the case, the strict conditions of attribution of the acts or omissions of that private person to that State need to be met first and independently, which is by no means easy. Unless a State exercises direct control over the operations of a private person, it is difficult to consider it to be in effective control thereof and subsequently to attribute that private person's wrongful acts to that State on that basis, and, eventually, to conclude that that State had human rights jurisdiction over the right-holder controlled and harmed by that private person.

Contrary to what is often held at this stage of the argument, the mere fact that the State knew the right-holder was at risk and was reasonably able to do something about it – a condition for

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[41] This element has been constantly qualified over the years, however, and most recently so by reference to the criterion of 'proximate targeting' in *Carter* (n 14) paras 123–30, 160–61.

[42] See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 4) para 111; *Al-Skeini* (n 8) paras 133ff, 138, 149; *Catan and Others v the Republic of Moldavia and Russia* App nos 43370/04, 18454/06, 8252/05 (ECtHR, 19 October 2012), paras 106ff; *Jaloud* (n 14) paras 139, 152.

[43] See most recently, *Georgia v Russia (II)* (n 14) paras 130–33, 137–38, 144, 326–32.

[44] See Besson (n 11) 3–4.

[45] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment of 26 February 2007) [2007] ICJ Rep 43, paras 401–07.

[46] See eg *Basem Ahmed Issa Yassin* (n 14) para 6.5. See also Berkes (n 4) 48.

[47] See eg *Ilaşcu and Others v Moldavia and Russia* App no 48787/99 (ECtHR, 8 July 2004), paras 314–16; *Jaloud* (n 14) para 138.

the standard of due diligence to arise under international law – does not amount to effective control, neither over the private person at the origin of the harm (as required by international responsibility law) nor over the right-holder (as required by human rights jurisdiction).[48] The role due diligence allegedly plays in the establishment of human rights jurisdiction in fact brings me to the second distinction.

A second kind of 'control' one should distinguish from the effective control underpinning human rights jurisdiction is the one required among the conditions for the standard of due diligence to apply. Indeed, due diligence requires 'control' over a third party or source of harm (i) and control that need not be effective (ii), whereas human rights jurisdiction requires 'control' over the right-holder (i) and control that has to be effective (ii).[49]

This is an important distinction, as confusing them leads to conflating the conditions for the standard of due diligence to apply (and hence for it to qualify the content of positive human rights duties or other kinds of international law duties and responsibilities for that matter), on the one hand, with the existence of jurisdiction itself (and hence the conditions for those qualified human rights duties to arise), on the other.[50] The standard of due diligence, even if it is grounded in those cases as a standard independent from the obligation it is qualifying (in this case a human rights duty), cannot ground that obligation itself, and hence cannot give rise to a human rights duty in the first place. The conditions for that duty to arise have to be met independently, such as the existence of a jurisdictional relationship between a duty-bearing State and a potential right-holder. Any other approach would turn a mere capacity to harm someone (in this case, control over the source of harm and contribution to the causation of the harm) into a duty not to harm that person and, correlatively, into a human right of that person not to be harmed under international human rights law.[51] While it is true that human rights duties require a State's capacity to arise (*ought implies can*), that capacity does not ground human rights duties alone: *can does not imply ought*.

Still, that conflation, and the twisted invocation of the due diligence standard as a self-standing human right duty in this context, actually underpins many contemporary accounts of human rights jurisdiction. Those accounts are referred to as 'causal' or 'capacity-based',[52] and are often even presented as a third type or 'model' of human rights jurisdiction and effective control alongside the two main types discussed in the next section. Those accounts mistake a State's capacity to cause harm to a person for its effective control over that person who may then become a right-holder.[53] Sometimes they even come close to abandoning the requirement of effective control over the right-holder altogether, without, however, proposing anything

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[48] Contra Berkes (n 4) 49.

[49] See Besson (n 11) 3–4.

[50] See Advisory Opinion OC-23/17 (n 10) paras 104.e and 104.h; General Comment no 24 (n 10) paras 30–32.

[51] Of course, as I explain in Besson (n 11) 3–4, there may be other international law duties not to harm by negligence in such cases than human rights duties.

[52] See, albeit with variations, *Basem Ahmed Issa Yassin* (n 14) paras 6.5.ff; General Comment no 24 (n 10) paras 15–16, 30–32; Advisory Opinion OC-23/17 (n 10) paras 101, 104.a–104.h; General Comment no 36 (n 10) paras 21–22, 63; *A.S. and others* (n 14) paras 7.4–7.5, 7–8; *LH and others* (n 14) paras 2.9, 9.7; *Chiara Sacchi and others* (n 14) paras 4.3, 10.12. See also Berkes (n 4) 46–50.

[53] Worse, they also conflate 'causation' and 'attribution' under international responsibility law, and hence the two other types of effective control identified in this section.

in its place to enable jurisdiction to remain a determinate normative threshold and factual condition of human rights.

Types of Extraterritorial Human Rights Jurisdiction

Turning to the various types (sometimes also called 'models') of effective control and, by extension, of human rights jurisdiction, one usually distinguishes, in international human rights law, between 'territorial' and 'personal' control. This applies whether jurisdiction is territorial or extraterritorial.

The first thing to stress, however, is that effective control over the right-holder is, by definition and to the extent that jurisdiction is a relationship between a State and a potential right-holder, always of a 'personal' kind. Jurisdiction being personal by definition, what changes from one case to the next is the criterion used to assess it, and hence the type of control exercised.

Accordingly, there can be no such thing as 'territorial (human rights) jurisdiction' strictly speaking, but only human rights jurisdiction through 'territorial control'. Territorial control is a shorthand in such cases for personal control. Indeed, effective control over a portion of territory, whether on the State's territory (where it is actually presumed, as we will see in the next section) or outside that territory, is assimilated to indirect or general personal control over all the people within that territory. In such a case, no individualized control of those people needs to be established provided effective control over the territory of their location can be. By opposition, 'personal control' exists, and is resorted to when establishing human rights jurisdiction, in cases where a State has direct control over one or more persons individually and does not have any additional control over the territorial area in which she is situated.[54] This distinction between indirect and direct personal control is actually why it is often wrongly assumed that effective control only has to be established in the case of personal control.[55]

Based on this explanation, it may be best to refer to those two types of effective control as 'spatial' and 'individual': first of all, 'spatial' instead of 'territorial' control to avoid any confusion between extraterritorial control over a territorial space outside a State's territory and territorial control inside its territory, both being spatial; and second, 'individual' instead of 'personal' control because all types of effective control relevant for human rights jurisdiction are personal even if some are more direct and individualized than others – not to mention the fact that 'personal' control, and the corresponding human rights jurisdiction, evokes personal or nationality-based jurisdiction *stricto sensu*, whose relationship to human rights jurisdiction is far from self-explaining, as we will see.

Individual control may be 'physical', as in cases where State organs (such as its military or diplomatic personnel) have control over the alleged right-holder's physical integrity. This is what most cases of extraterritorial individual control have been about in international human rights law. However, this need not be the only case. Thus, individual control may be effective despite being non-physical. It suffices here to think of how a State's effective, regular and normative control over a person's data (in case of a surveillance programme) may be considered as individual, whether that person is within the State's territory or not and hence whether

[54] This has been confirmed indirectly by *Georgia v Russia (II)* (n 14) para 114, based on *Al-Skeini* (n 8) para 137.

[55] See eg Berkes (n 4) 23.

control over her data implies physically controlling her or not. Of course, when individual control is not physical, its effectivity (but also its regularity and normativity) becomes more difficult to establish.

In any case, it is best not to refer to this kind of non-physical individual control as 'functional' control and to avoid constructing it as a third type or model of effective control (or, worse, jurisdiction). There is a certain tendency among international human rights scholars, however, to resort to that term to encompass all types of causal connections between a State and a human rights violation which the spatial and individual types or models of effective control cannot cover.[56]

I have already presented in the previous section the reasons why the alleged 'causal model' of human rights jurisdiction, with its focus on capacity to harm the alleged right-holder or solely on impact on her, cannot actually amount to such a model. Furthermore, besides the general caution that should prevail with respect to the use of functionalist terms to refer to the State in international law,[57] one should also mention a risk of confusion. Indeed, referring to State functions when assessing effective control over a given person may lead to conflate the exercise of State functions by State authorities *qua* jurisdiction *stricto sensu* with the exercise of those functions by private persons that may lead to attribution of their conduct to the State and, in case of effective control of the State over those private persons along the lines I presented above, to its human rights jurisdiction.[58]

Finally, in the European Court of Human Rights (ECtHR)'s case law, yet another type or model of effective control seems to have emerged: it may be coined 'procedural'.[59] It is often presented as a third model, and an alternative to the spatial and individual models. However, it may be more accurate to consider it a type of non-physical individual control resulting from a procedural relationship between the State and the alleged right-holder. In short, according to the procedural model, a State may be considered to exercise effective control over people not situated under its (indirect) spatial or (direct) individual control, but controlled effectively through procedural or legal means. Of course, the control is individual in such cases to the extent that it occurs through the law's application to that individual and as the outcome of the exercise of the State's jurisdiction *stricto sensu*. However, it is not (necessarily) physical. This is the case, for instance, in the context of judicial proceedings in which the right-holder is a party, or of a transnational arrest warrant pertaining to a crime where the right-holder is the criminal or even the victim.

There are various difficulties with this type of non-physical individual control. Most importantly, it remains difficult to know what makes it sufficiently effective to reach the jurisdictional threshold, and to that extent it is very indeterminate. For instance, the ECtHR refers to 'special facts' or 'circumstances'[60] that may be present in a given case, albeit not in others, but does not explain what those circumstances have in common and how they may be replicated.

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[56] See eg Shany (n 5); Moreno-Lax (n 20); Berkes (n 4) 46–54.

[57] See Samantha Besson, 'The Public of International Law: A Farewell to Functions' (2021) 115 AJIL Unbound 307.

[58] See eg Moreno-Lax (n 20). See also Berkes (n 4) 48, 52.

[59] See eg *Romeo Castaño* (n 14) paras 36–43. See also *Markovic and Others v Italy* App no 1398/03 (ECtHR, 14 December 2006), paras 54–56; *Güzelyurtlu* (n 14) paras 183, 187ff, 190–97; *Hanan* (n 14) paras 130, 134–45.

[60] See eg *Güzelyurtlu* (n 14) paras 183, 187ff, 190–97; *MN* (n 7) paras 102–07; *Hanan* (n 14) paras 134–45; *Carter* (n 14) paras 131–33.

Consequences of Extraterritorial Human Rights Jurisdiction

As a normative threshold, human rights jurisdiction is an all-or-nothing matter and not a matter of degree: either the State is exercising authority, or it is not. It cannot therefore be split into levels and acquired gradually. This is true whether human rights jurisdiction is territorial or extraterritorial: it does not therefore come in degrees with jurisdiction being stronger territorially and weaker extraterritorially, for instance.

Once jurisdiction has been established concretely, however, the question arises of the exact scope of the human rights and duties it triggers. There are two questions in particular that need to be distinguished: first, the abstract question of the applicable rights and second, the concrete, and hence more variable, question of the type of duties triggered.

Abstractly, all human rights apply in case human rights jurisdiction is given, whether territorial or extraterritorial. The indivisibility of human rights precludes drawing differences. Thus, one may not distinguish between procedural and substantive rights or between civil and political rights and economic, social and cultural rights, and claim that the former apply extraterritorially while the latter do not.[61] The same should be said about positive and negative abstract rights and duties, to the extent that they stem equally from all human rights.[62] Of course, an important degree of control is necessary for positive human rights duties, and especially due diligence duties, to arise, as I explained before, but those duties have to be identified and specified in the concrete circumstances of the case. It is not something that may be excluded abstractly in all cases of extraterritorial human rights jurisdiction or in all cases of extraterritorial jurisdiction exercised though individual control.

To the extent that, unlike abstract rights, duties are always concrete and hence have to be specified in context and in light of the concrete threats posed to the interests protected, there could be variations between territorial and extraterritorial duties owed regarding the same human right. The fact is, however, that there could be such variations inside a State's territory as well, depending on the State's capacity, the right-holder's vulnerability and the threats weighing on them. Failing to draw a distinction between the same abstract rights and the different corresponding concrete duties may explain why some authors are misled into thinking that the rights applicable in extraterritorial circumstances differ in nature, content and scope from those applicable in domestic ones.

Once the necessary variability of all human rights duties, be they territorial or extraterritorial, is accepted, it is also easier to make sense of some of the recent case law on extraterritorial human rights jurisdiction and rebut some of the criticism to which it has been subjected. What is usually at stake in those cases indeed is not so much (or not only) the lack of one form of effective control (be it spatial or individual). One of them is usually given, even if it is not necessarily the one the right-holder is arguing for. To that extent, however, what makes the difference in those cases is the fact that the type of extraterritorial effective control at stake may not necessarily ground all the types of concrete human rights and duties invoked by the right-holder. Thus, inside a State's territory, where spatial control is usually given and, most importantly, where all State authorities are usually exercising their public powers, more concrete duties are likely to arise from the same abstract rights based on that effective control than would be the case outside a territory where spatial control is rarer and where individual control

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[61] Contra Milanovic (n 13) 209–22.
[62] Ibid.

usually pertains to one type of public power such as the judicial,[63] the military or the diplomatic.[64] This is even clearer when extraterritorial effective individual control is not physical, and for instance of a procedural type, and hence may trigger human rights and duties pertaining to that procedure only.[65]

Think, more specifically, of the limited administrative capacities of an embassy or of a criminal investigation into military misconduct abroad, and how this affects not only the threats weighing on a given interest and right, but also the capacity of the State to owe all the duties it would were the same circumstances to arise on its territory. Accordingly, it may be more difficult to consider that a person is under sufficient effective physical control abroad, especially in a consulate or embassy premises, to trigger human rights duties under the non-refoulement principle than it would be domestically or if that person had, at least, reached the border to that State[66] – albeit, yet again, not necessarily so.[67] Further, a State may not be considered to have sufficiently regular and normative effective control during an extraterritorial military intervention itself, but be considered to have it during the criminal investigation that followed,[68] thereby incurring very different human rights duties in each case – albeit, yet again, not necessarily so.[69]

JURISDICTIONAL RELATIONS IN RELATION

It is not uncommon in international human rights case law to see the existence of State jurisdiction *stricto sensu* influence human rights jurisdiction.

As I have explained elsewhere,[70] law binds people (or institutions instituting those people). Accordingly, State jurisdiction *stricto sensu* is exercised over people and not over things, activities or territory, even if it then pertains to what those people do with those things or on that territory. The question then becomes how one should determine, in advance and in a collective or general fashion, what group of people relates to what State and legal order. The 'bases', 'heads' or 'titles' of jurisdiction *stricto sensu* recognized by international law do precisely that: they determine the personal relationship of jurisdiction between a State and its legal order, on the one hand, and a group of people subject to its laws, on the other. They do so by reference to a salient type of general connection or nexus between such a group of people and its institutions, be it territory or nationality.

Under contemporary international jurisdiction law, State (prescriptive, enforcement, adjudicative) jurisdiction *stricto sensu* is primarily territorial and pertains to people within the State's territory. It may also be said to exist extraterritorially when the domestic law pre-

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63 See eg *Markovic* (n 59) para 54.

64 See eg *MN* (n 8) para 123.

65 See eg *Romeo Castaño* (n 14) paras 36–43; *Güzelyurtlu* (n 14) paras 183, 187ff, 190–97; *Hanan* (n 14) paras 130, 134–45.

66 Compare eg *MN* (n 8) para 123 with *ND and NT v Spain* App nos 8675/15, 8697/15 (ECtHR, 13 February 2020), para 109.

67 See eg *Al-Saadoon and Mufdhi v United Kingdom* App no 61498/08 (ECtHR, 2 March 2010), paras 37–39, 94.

68 See eg *Georgia v Russia (II)* (n 14) paras 133–34, 144, 326–32. See also Raible (n 12) 22ff.

69 See eg *Al-Skeini* (n 8) paras 133–40.

70 See Besson (n 15) 102–03.

scribed, enforced or adjudicated pertains to people situated outside its territorial boundaries. Under current international law, extraterritorial (prescriptive) jurisdiction *stricto sensu* may be 'personal', 'protective' or 'universal', depending on whether it is grounded in those people's nationality, the protection of other State interests or the protection of collective interests of all States.

After clarifying the relationship between State jurisdiction *stricto sensu* and human rights jurisdiction and especially whether it is conceptual or factual, this section will focus on the unidirectional evidentiary and normative relationship that goes from jurisdiction *stricto sensu* to human rights jurisdiction, before explaining why the reverse relationship is not justified.

Jurisdictions in Relation

Jurisdiction *stricto sensu* and human rights jurisdiction differ in many respects. First of all, jurisdiction *stricto sensu* is purely normative to the extent that it amounts mainly to a right and, arguably in some cases, to a duty or responsibility. By contrast, human rights jurisdiction is both normative and factual: it is neither a right nor a duty in itself, but it grounds human rights duties while also amounting to a practical condition of the feasibility thereof. Second, jurisdiction *stricto sensu* is legal to the extent that it does not only pertain to law, but also to the internationally and domestically lawful prescription, enforcement or adjudication of domestic law. By contrast, human rights jurisdiction is not necessarily legal: it need relate neither to the prescription, enforcement or adjudication of domestic law nor, in the case that it does, to the internationally lawful prescription, enforcement or adjudication thereof to the extent that it may apply in case of unlawful occupation for instance. Finally, jurisdiction *stricto sensu* is not necessarily exercised in practice, and by extension does not necessarily lead to effective control. By contrast, human rights jurisdiction amounts to effective control and, to that extent, is necessarily exercised.

On a conceptual level, it would be wrong therefore to identify human rights jurisdiction and jurisdiction *stricto sensu* with one another.[71] Their identification is nevertheless quite common in some of the international human rights case law, where human rights jurisdiction is often derived from territorial jurisdiction *stricto sensu*.

As explained before, this misleading conceptual identification with State jurisdiction *stricto sensu*, which is primarily territorial, is probably what has led the relevant international human rights bodies and scholarship to consider to this day territorial human rights jurisdiction to be the rule and extraterritorial human rights jurisdiction to be the 'exception'.[72] Note that, on those accounts, the derivation only applies to territorial jurisdiction *stricto sensu*, however, and not to other heads of (extraterritorial) jurisdiction *stricto sensu* such as personal jurisdiction in particular. Importantly, moreover, even under those accounts, the relationship between the two types of jurisdiction does not work the other way around. State jurisdiction *stricto sensu* is never derived from human rights jurisdiction in the case law.

That being said, when a State exercises its jurisdiction *stricto sensu* over a given person, this may often, although not necessarily, give rise to effective, regular and normative control over that person and hence to human rights jurisdiction, whether territorially or extraterritorially. This is because, as I explained before, the lawful prescription, enforcement or adjudication

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[71] See also Raible (n 13) 166.

[72] See eg *Banković* (n 8) paras 56–61; *MN* (n 8) paras 98–101.

of domestic law is at the core of what States do and actually should be doing under general international law, on the one hand, but also of what democratic States do and should be doing according to international human rights law, on the other. No wonder, then, that the kind of effective control giving rise to human rights jurisdiction is often described by international human rights case law, as explained before, as having to be 'normative' and akin to the 'exercise of public powers' and political and legal authority.[73] The kind of control obtained by the exercise of jurisdiction *stricto sensu*, when it is effective, is therefore paradigmatic of that required for human rights jurisdiction.

To that extent, and despite their conceptual differences, there may, and even should be practical relations between the two types of State jurisdiction under international law. Those relations call for closer scrutiny, however. Indeed, even where there are relations between human rights jurisdiction and jurisdiction *stricto sensu*, as just discussed, their correspondence is not perfect. Jurisdiction *stricto sensu*, once exercised, may indeed be under- and over-inclusive with respect to human rights jurisdiction.

First of all, it may be under-inclusive. Indeed, as I argued earlier, human rights jurisdiction should be able to track circumstances where States' effective control over persons is not yet lawful and does not even rely on law (or not only on domestic law). As a result, human rights jurisdiction does not actually depend on the existence of a State's legal right to exercise the effective control at stake. It should also apply outside the scope of that State's competences under international law, including its territorial or personal competences.[74] This has been the point of international human rights law from the outset. Thus, a State may have no right to do, or not to do, something under international law, but may owe international human rights duties to do, or to not do, so all the same.

Second, jurisdiction *stricto sensu* may also be over-inclusive in other cases where it is not sufficiently effective to amount to human rights jurisdiction. Thus, a State may have jurisdiction under general international law, but no human rights duties for lack of effective control and hence of human rights jurisdiction. As explained in the introduction, States do not necessarily exercise their jurisdiction *stricto sensu* in practice. To that extent, a State's jurisdiction under international law may well lead to its having human rights jurisdiction, but only if it has also brought the State to acquire some form of effective control over the right-holder.

From Jurisdiction *Stricto Sensu* to Human Rights Jurisdiction

In spite of the conceptual differences between the two types of State jurisdiction under international law, there is, as explained before, a factual relationship of correspondence between them, albeit an imperfect one. The existence of that relationship accounts for some of the current international human rights practice. That practice articulates State jurisdiction *stricto sensu* and human rights jurisdiction in two ways: their first articulation is evidentiary, while the second is normative.

First of all, that factual relationship explains why most international human rights bodies rightly consider that human rights jurisdiction may be presumed in case the right-holder is

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[73] See eg *Al-Skeini* (n 8) paras 133ff, 138.

[74] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 4) paras 108ff; *Loizidou v Turkey* App no 15318/89 (ECtHR, 28 July 1998) para 52.

under a given State's territorial jurisdiction *stricto sensu*.[75] True, and strictly speaking, what is presumed from State territorial jurisdiction *stricto sensu* is that State's effective spatial control on its territory, and not so much human rights jurisdiction itself.[76] However, and at the same time, the imperfection of the relationship between jurisdiction *stricto sensu* and human rights jurisdiction also explains why that presumption, which is purely evidentiary, is considered as rebuttable in the absence or loss of effectivity of that State's control in practice.[77]

Second, the relationship between human rights jurisdiction and jurisdiction *stricto sensu* accounts for why some international human rights bodies consider that States that have lost effective control over their territory (and hence may be able to rebut the presumption of effective spatial control) incur a general positive human rights duty to regain it. Regaining it will indeed give rise to human rights jurisdiction and hence trigger various more specific human rights duties.

What this means, then, is that States incur a general human rights positive duty to exercise their jurisdiction *stricto sensu* on their territory (to the benefit of human rights-holders).[78] To that extent, this second relationship between jurisdiction *stricto sensu* and human rights jurisdiction may be described as normative. This is because, as I explained before, the exercise of their jurisdiction *stricto sensu* is at the core of what States do and actually should be doing under general international law, on the one hand, but also of what democratic States do and should be doing according to international human rights law, on the other. In the absence of effective control, however, that general human rights positive duty cannot yet be said to be grounded in human rights jurisdiction (and is not owed to the alleged human rights-holders), but rather in State territorial jurisdiction *stricto sensu*. Moreover, the duty at stake pertains to the effective exercise of jurisdiction *stricto sensu* rather than to its existence in the first place (which has to be given for the human rights duty to exercise it to even arise).

It is important not to conflate that general positive human rights duty to exercise territorial jurisdiction *stricto sensu* in case of loss of effective control with the further positive human rights duty to exercise one's territorial (prescriptive or adjudicative) jurisdiction *stricto sensu*. The latter could arise from extraterritorial spatial effective control and extraterritorial human rights jurisdiction once given, and is currently under discussion in practice. What is at stake in particular is the State's human rights duty to (diligently) exercise its territorial or personal prescriptive jurisdiction with respect to multinational enterprises within its territory or considered as nationals, and especially the adoption of domestic private or criminal law preventing, protecting and remedying harm by those multinationals to human rights-holders situated under the extraterritorial human rights jurisdiction of the concerned State.[79] What such a duty requires, however, is that extraterritorial human rights jurisdiction be given, which is by no means always the case.[80]

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[75] See eg *Al-Skeini* (n 8) paras 131, 138–40. See also Besson (n 3) 876–78; Raible (n 13) 176–80. Contra Berkes (n 4) 69ff.

[76] See eg *MN* (n 8) para 98.

[77] See eg *Ilaşcu* (n 47) paras 312–13.

[78] Ibid 313, 331–35; *Chiragov and Others v Armenia* App no 13216/05 (ECtHR, 16 June 2015).

[79] See Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 BHRJ 41; Besson (n 11).

[80] See Sigrun I Skogly and Philippa Osim, 'Jurisdiction – A Barrier to Compliance with Extraterritorial Obligations to Protect against Human Rights Abuses by Non-State Actors?' (2020) 13 Human Rights & Intl Discourse 99.

In sum, what appears from the (imperfect) relationship between the two types of jurisdiction under international law and its practice is that it is best considered a unidirectional relationship that goes from (either the mere existence or the exercise of) territorial jurisdiction *stricto sensu* to (the presumption of or, at least, the duty to exercise effective control and hence) territorial human rights jurisdiction.

Reversing the Relationship?

The reverse relationship – that is, the one that would go from human rights jurisdiction to jurisdiction *stricto sensu* – cannot be accounted for normatively, however. The fact that a State owes human rights duties to do or not to do something does not, on its own, ground its competences to do or not to do so.[81]

This is clearly the case, first of all, for a relationship leading from (extraterritorial) spatial effective control and (extraterritorial) human rights jurisdiction, on the one hand, to territorial jurisdiction *stricto sensu*, on the other. Here, one should mention the well-known risk of territorialization through non-consensual annexation and occupation of a given territory and through the human rights jurisdiction to which this may give rise later on.[82] Of course, effectivity (of control over territory) is an important dimension of the international law of statehood and title to territory thereunder. To that extent, the effectivity of control underpinning extraterritorial human rights jurisdiction may be used as evidence when ascertaining a State's title to territory. It cannot constitute that title, however. The same conclusion should be drawn about the potential derivation of any other head of extraterritorial jurisdiction *stricto sensu* from the mere existence of spatial effective control and of extraterritorial human rights jurisdiction.

Second, a relationship leading from individual effective control and human rights jurisdiction, on the one hand, to personal jurisdiction *stricto sensu*, on the other, is even less defensible. Of course, under the democratic reading of post-war international nationality law I proposed elsewhere,[83] nationality may be interpreted as a shorthand for the sharing of equal and interdependent stakes by a group of people. To that extent, it is based on criteria that allow to track membership in that political community of equals. As a result, the regularity or, at least, the potential for the regularity of effective control underpinning human rights jurisdiction may signal that some of the factual conditions, albeit not all, for nationality are given. The fact is, however, that international nationality law does not yet accommodate a human right to nationality,[84] which is exactly what the derivation of personal jurisdiction *stricto sensu* from human rights jurisdiction would amount to.

Finally, however, things look quite different with respect to universal jurisdiction *stricto sensu*. Indeed, what grounds such a head of jurisdiction is the protection of collective State interests that include human rights protection. To the extent that a State has human rights jurisdiction and bears human rights duties on that ground, one may consider that such human rights duties may give rise to human rights-based universal jurisdiction *stricto sensu* with respect to

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[81] See eg General Comment no 24 (n 10) paras 30–33.

[82] See Besson (n 3) 882–83. See also Marko Milanovic and Tatjana Papic, 'The Applicability of the ECHR in Contested Territories' (2018) 67(4) Intl and Comparative L Q 779.

[83] See Samantha Besson, 'Investment Citizenship and Democracy in a Global Age: Towards a Democratic Interpretation of International Nationality Law' (2019) 29 Swiss Rev Intl Eur L 525.

[84] Ibid.

the specific right-holders' situation. It may, for instance, ground a State's universal prescriptive or adjudicative jurisdiction over those right-holders.[85] This is how one may account, for instance, for the right to a judicial remedy that is triggered under international human rights law in case of violation of extraterritorial human rights, and this even in cases where domestic law does not yet grant extraterritorial judicial jurisdiction.

FROM EXTRATERRITORIAL JURISDICTION *STRICTO SENSU* TO EXTRATERRITORIAL HUMAN RIGHTS JURISDICTION

The unidirectional relationship identified before between State jurisdiction *stricto sensu* and human rights jurisdiction, and their evidentiary and normative implications in international human rights law, all pertain to *territorial* jurisdiction (of both kinds). The next question is whether one could extend the argument to *extraterritorial* jurisdiction *stricto sensu*. This could be the case for extraterritorial spatial jurisdiction *stricto sensu* by consent, but also for extraterritorial personal (based on nationality) jurisdiction *stricto sensu*.

Note that things may be different with universal jurisdiction *stricto sensu*, especially when it is grounded in the protection of human rights to the extent that those are individual interests of all people. True, that head of jurisdiction has only been rarely exercised to date, and to that extent fails the paradigmatic test. Accordingly, it is difficult to argue that it should give rise to a presumption of effective control and hence of extraterritorial human rights jurisdiction. However, and moving to the normative dimension of the relationship, one may argue that, when universal jurisdiction *stricto sensu* is given under either domestic or international law and even if it is only as a right (and not yet as a general international law duty), it could ground a general positive human rights duty to *exercise* that universal jurisdiction to prescribe or adjudicate even in the absence of effective control and hence of human rights jurisdiction in the first place. Importantly, such a general positive human rights duty to exercise universal jurisdiction[86] *stricto sensu* should not be conflated, even if they may overlap, with the various 'responsibilities for human rights' of all States under international human rights law.[87] This is an important point as the latter may also give rise to non-directed States' responsibilities of diligent effective exercise of their jurisdiction *stricto sensu* under international law.[88]

From Extraterritorial Spatial Jurisdiction *Stricto Sensu* to Extraterritorial Spatial Human Rights Jurisdiction

The relationship between extraterritorial spatial jurisdiction *stricto sensu* and extraterritorial spatial effective control and the corresponding extraterritorial human rights jurisdiction comes closest to the one discussed between the two territorial types of jurisdiction in the previous section. For that reason, it is regularly at play in international human rights practice where dif-

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[85] See on similar grounds, Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 EJIL 427, 452–53; Mills (n 35) 229, 235.

[86] See also Ryngaert (n 16) 188–89; Brynn O'Brien, 'Extraterritorial Detention Contracting in Australia and the UN Guiding Principles on Business and Human Rights' (2016) 1 BHRJ 333.

[87] See eg General Comment no 24 (n 10) paras 30–33.

[88] See Besson (n 3) 884; Besson (n 11).

ferent States with territorial title, or mere extraterritorial spatial control over the same territory, incur competing human rights duties.

While extraterritorial jurisdiction *stricto sensu* is usually individual as opposed to spatial, to borrow the distinction made earlier regarding human rights jurisdiction, there may be cases of extraterritorial spatial jurisdiction *stricto sensu* considered lawful under international law. This is the case, for instance, where the State's exercise of spatial jurisdiction abroad is consensual, as with consensual intervention and occupation by a State of a portion of another State's territory.[89]

Again, one should distinguish between the evidentiary and the normative dimensions of the relationship between the two kinds of extraterritorial spatial jurisdiction.

Starting with the former, the question is whether the presumption of effective spatial control for the purposes of (extraterritorial, this time) human rights jurisdiction should be extended to occupied territories, provided they are lawfully occupied by invitation of the territorial State. The justifications would have to be very different this time around, however. Foreign occupation is paradigmatic neither of State jurisdiction *stricto sensu* nor of human rights jurisdiction under international law, and nor should it be. All the same, if jurisdiction *stricto sensu* under international law is about co-ordinating and hence facilitating international relations when State jurisdiction is exercised beyond borders, it would seem that lawful occupation could well also trigger a presumption of effective spatial control and, accordingly, some form of facilitated (and rebuttable) evidence mechanism to establish extraterritorial human rights jurisdiction. Thus, to the extent that international law recognizes a specific exercise of extraterritorial spatial jurisdiction *stricto sensu* as lawful (because it is consensual), and hence contributes to raising corresponding expectations on the part of the individual members of the local population, this should be considered a ground for a presumption of spatial effective control over the territories occupied and, accordingly, for human rights protection to be triggered (at least until the presumption is rebutted).[90] The main counterargument here pertains to the respect of the right to self-determination of the population whose territory is occupied and whose consent should be that which is represented – not to mention, of course, the risk of territorialization of the extraterritorial,[91] albeit this time through a mere presumption of extraterritorial spatial effective control.

As to the normative relationship between extraterritorial spatial jurisdiction *stricto sensu* and extraterritorial spatial effective control and human rights jurisdiction, again the justifications would have to be very different from the territorial context. Indeed, the effective exercise of spatial jurisdiction *stricto sensu* outside a State's territory cannot be said to be a requirement of either the international law of statehood or international human rights law. To that extent, it may be difficult to argue for a general human rights positive duty to regain an effective control that has been lost, or was never gained in the first place, over (people within) a territory over which a State has no territorial jurisdiction *stricto sensu*. Of course, this does not mean that such a positive human rights duty to exercise one's extraterritorial spatial jurisdiction *stricto sensu* could not arise from extraterritorial human rights jurisdiction once it is given.

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89 See Berkes (n 4) 25–42.
90 See Besson (n 3) 876–78.
91 Ibid 882–83.

From Extraterritorial Personal Jurisdiction *Stricto Sensu* to Extraterritorial Individual Human Rights Jurisdiction

The second unidirectional relationship between extraterritorial jurisdiction *stricto sensu* and human rights jurisdiction to be discussed should be the relationship between extraterritorial personal jurisdiction *stricto sensu* and extraterritorial individual effective control and the human rights jurisdiction it may give rise to.

The first question is whether the (rebuttable) presumption of effective individual control for the purposes of (extraterritorial, this time) human rights jurisdiction based on the mere existence of extraterritorial (active or passive) personal jurisdiction *stricto sensu* on grounds of the nationality of a given person could be argued for on evidentiary grounds.

Under a democratic reading of international nationality law,[92] nationality may be considered as a shorthand for the sharing of equal and interdependent stakes by a group of people and should track membership in that political community of equals. To that extent, the factual conditions for nationality do, and should under international nationality law, overlap partly with the regularity or, at least, potential for the regularity of effective control underpinning human rights jurisdiction. One may argue therefore, and by analogy to what was the case for territorial effective control, that personal jurisdiction *stricto sensu*, provided it is exercised, usually corresponds, more or less well of course,[93] to some kind of individual effective control over people holding a nationality. To that extent, a presumption of individual effective control based on nationality and of human rights jurisdiction could be justified. Of course, personal jurisdiction may not be exercised in all cases and a State may have no effective control over its nationals, especially when they are situated outside its territory. The presumption may therefore be rebutted in such cases.

In international human rights practice, however, that evidentiary relationship and the related presumption have not yet been recognized. True, there are growing signs on the part of certain universal human rights bodies that a link between nationality and human rights duties abroad should be made,[94] but the reasoning remains moot to date.[95] It even overlaps in some cases with the causal model of jurisdiction criticized earlier. Not only is those bodies' reasoning unclear, but the outcome of those cases so far has come close to entirely conflating extraterritorial personal jurisdiction *stricto sensu* with extraterritorial human rights jurisdiction.

Other international human rights bodies, such as the ECtHR, have a more nuanced and clearer case law on the issue. To start with, the ECtHR draws a difference between the extraterritorial human rights duties owed to nationals and non-nationals situated in the same circumstances abroad (such as a consulate or a camp).[96] In so doing, it contradicts one of the egalitarian premises of human rights jurisdiction mentioned earlier in this chapter.[97] For the rest, the Court rightly requires effective individual control over nationals for human rights

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[92] See Besson (n 83) 533–35.

[93] Ibid 540–43.

[94] See *LH and others* (n 14) para 9.7. See for similar facts, *HF and Others* (n 14).

[95] See Raible (n 12) 13ff.

[96] See *MN* (n 8) para 123. See Sébastien Touzé, 'Si la compétence l'emportait sur le territoire? Réflexions sur l'obsolescence de l'approche territoriale de la notion de juridiction' (2020) Revue québécoise de droit international (Hors série) 190, 198.

[97] A person's nationality does not affect the kind of individual procedural control exercised over her nor does it strengthen that person's procedural rights arising from it. See on the renewal of a passport

jurisdiction to arise (such as having called the consulate for assistance or introduced some kind of procedure, as opposed to merely being in danger somewhere abroad).[98] To this date, therefore, it does not resort to a presumption of individual effective control over nationals abroad.

As to the normative relationship between extraterritorial personal jurisdiction *stricto sensu* and extraterritorial human rights jurisdiction, again the argument would have to be very different from the one made before in the territorial jurisdictional context.

One may consider, however, that, to the extent that nationality is a shorthand for the sharing of equal and interdependent stakes by a group of people and for what makes them a political community of equals, (passive) personal jurisdiction *stricto sensu* should be exercised for that political community of equals to thrive. This could therefore be said to be a general requirement of international human rights law. To the extent that personal jurisdiction has not been exercised, one may argue that there is a general positive human rights duty for a State to exercise it so as to be in a general position to protect its nationals' human rights abroad.

This could be particularly interesting in circumstances where, in the absence of an individual right to diplomatic protection *stricto sensu* and of the limited scope of the individual rights to consular protection under international law,[99] one should not expect States to owe specific rescue duties to all their nationals abroad by the mere fact that they are nationals.[100] One could argue, however, that a State should at least make sure its institutions abroad are organized in such a way as to be able to rescue nationals as soon as requested to do so. For further more specific human rights duties to arise, the existence of individual effective control and hence extraterritorial human rights jurisdiction would still be required.

CONCLUSION

Besides the various relations between extraterritorial human rights jurisdiction and extraterritorial jurisdiction *stricto sensu* identified and interpreted in this chapter, recent practice also reveals interesting parallels between those two types of jurisdiction's respective evolution under international law. This is the case of their increasing individualization and corresponding de-territorialization and, in reaction to the former, of their re-territorialization.

To start with, State jurisdiction *stricto sensu* is increasingly grounded or based on individual 'links' or 'nexus' instead of relying on heads of jurisdiction of a collective nature capturing the relationship between a political and legal community and its members. Those 'functional', but also 'technical,' 'rational' or 'scientific' jurisdictional nexus have led to forms of not only de-territorialized but also over-individualized jurisdiction *stricto sensu*. Worse, when they individualize jurisdiction *stricto sensu*, some of them also de-personalize it by reifying individuals and their relations by reference to those individuals' connection to things (such as money or technology)[101] rather than to other individuals.

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abroad, HRC, 'Communication no 1107/2002 (*Loubna El Ghar v Libyan Arab Jamahiriya*)' (2004) UN Doc CCPR/C/82/D/1107/2002, paras 2.1–2.4.

[98] See *MN* (n 8) para 118; *Aarrass* (n 14) paras 40–41; *HF and Others* (n 14).

[99] See also Touzé (n 96) 199–200.

[100] See *Suzana Orel and Others v Croatia*, App no 51506/13 (EtCHR, 7 June 2016), para 73.

[101] See eg Andrea Bianchi, 'Reply to Professor Maier' in Karl M Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International 1996) 92–99; Thomas Schultz, 'Carving

The difficulty is that some of those developments are sometimes, wrongly, justified by reference to international human rights law. For instance, some of those new heads of State jurisdiction are said to protect individuals' rights more efficiently and to secure those individuals' personal empowerment.[102] This should not come as a surprise, however. After all, the same evolution may be observed in practice pertaining to extraterritorial human rights jurisdiction where the egalitarian, and hence relational and political, dimension of human rights has been steadily criticized. This explains why human rights jurisdiction is increasingly interpreted as amounting to a merely 'functional' or 'causal' connection between a State and an alleged right-holder (or, worse, her 'rights') independently of any collective context. This has led to a progressive de-territorialization not only of extraterritorial human rights jurisdiction, but also of territorial human rights jurisdiction itself, with important consequences for the political preconditions of human rights protection and especially for the democratic regime they are closely related to.

Interestingly, in reaction to the individualization of extraterritorial State jurisdiction under both international jurisdiction law and international human rights law, one may observe a new tendency to re-territorialize extraterritorial jurisdiction. Recent State practice indeed is to ground jurisdiction *stricto sensu* back into territory as much as possible, by resorting to the 'effects doctrine' or identifying some other territorial connection. Based on the instrumental egalitarian justification provided before for territorial jurisdiction *stricto sensu*, this re-centring of territorial jurisdiction should be welcome. An interesting question for future research is whether this will also influence international human rights law in return, and especially extraterritorial human rights jurisdiction.

Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' (2008) 19 EJIL 799, 816–19.

[102] See eg Bethlehem (n 20) 19. For a critique, see Besson (n 15) 123–24.