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Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties

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Abstract

This article uses the case study of the question of whether human rights treaty law applies extraterritorially as a means of exploring the general theme of the value of the International Court of Justice's involvement in human rights, when compared to such involvement by specialist human rights bodies. The Court's express pronouncements on the issue, in the *Wall* Advisory Opinion, the *DRC v. Uganda* judgment, and the Provisional Measures Order in *Georgia v. Russia*, as well as an earlier more general statement in the

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Namibia Advisory Opinion, are compared to determinations on the issue by specialist courts and tribunals. The article begins by setting out the broader historical context of the ICJ's involvement in human rights issues. It then analyses the different ways in which this involvement can be critically appraised, in the process making the case for the focus adopted herein, on a comparison between the role of the Court and that of specialist human rights tribunals on issues of meaning/interpretation rather than application/enforcement, and, within this, on comparative analysis concerned with the generalist/specialist distinction itself rather than the relative merits of positions taken on the substantive law. Such a focus is then deployed through a detailed critical evaluation of the Court's statements in the decisions indicated. Finally, the article summarizes the significance of the Court's determinations on the extraterritorial application of human rights law, and the broader relevance of these determinations for understanding the role of the ICJ in the field of human rights more generally.

I. Introduction

Is there something the ICJ should do in the field [of human rights] that specialised courts cannot do, or that the Hague Court might be able to do better?

*Bruno Simma (writing in a personal capacity)*¹

1. The International Court of Justice now has a significant track record of involvement in human rights issues, acting as a body that makes pronouncements on the meaning of the law in this field and applying the law to particular situations, supplementing the more long-standing and wide-ranging activities of specialist human rights courts and tribunals.² What is the value of having the plenary generalist body involved alongside

1 Bruno Simma, *Mainstreaming Human Rights: The Contribution of the International Court of Justice*, 3(1) *Journal of International Dispute Settlement* (2012) 7–29.

2 See the following commentary, and the cases referred to in it: Egon Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 *AJIL* (1972), 337, 348; Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 *ICLQ* (1989), 321; Stephen M. Schwebel, *Human Rights in the World Court*, 24 *Vanderbilt J Transnational L* (1991) 945; Stephen M. Schwebel, *Human Rights in the World Court*, in: R. S. Pathak (ed.), *International Law in Transition: Essays in Memory of Judge Nagendra Singh* (Martinus Nijhoff, 1992), 267; Stephen M. Schwebel, *The Treatment of Human Rights and of Aliens in the International Court of Justice*, in: Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (CUP 1996), 327; Rosalyn Higgins, *The International Court of Justice and Human Rights*, in: Karen Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Martins Nijhoff 1998), 691; Alison Duxbury, *Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights*, 31 *California Western ILJ* (2000), 141; Jonas

Grimheden, The International Court of Justice in Furthering the Justiciability of Human Rights, in: Gudmundur Alfredsson et al. (eds.), *International Human Rights Monitoring Mechanisms* (Kluwer 2001), 469; Raymond Goy, *La Cour Internationale de Justice et les droits de l'homme* (Bruylant, 2002); Antonio Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium Case*, 13 *EJIL* (2002), 853, 867-870; Vladlen S. Vereshchetin and C.J. Le Mon, Immunities of Individuals under International Law in the Jurisprudence of the International Court of Justice, 1 *The Global Community Yearbook of International Law and Jurisprudence* (2004), 77, 88; Shiv R.S. Bedi, The Development of Human Rights Law by the Judges of the International Court of Justice (Hart, 2007); Rosalyn Higgins, Human Rights in the International Court of Justice, 20(4) *Leiden JIL* (2007), 745; Gentian Zyberi, The Development and Interpretation of International Human Rights and Humanitarian Law Rules and Principles Through the Case-Law of the International Court of Justice, 25 *Netherlands QHR* (2007), 117; Gentian Zyberi, The Humanitarian Face of the International Court of Justice: Its contribution to interpreting and developing international human rights and humanitarian law rules and principles (Intersentia, 2008); Jonas Grimheden, The International Court of Justice—Monitoring Human Rights, in: Gudmundur Alfredsson et al. (eds), *International Human Rights Monitoring Mechanisms. Essays in Honour of Jacob Th. Moeller* (2009), 249; Rosalyn Higgins, A Babel of Judicial Voices? Ruminations From the Bench, 55 *ICLQ* (2006), 791; Rosalyn Higgins, A Babel of Judicial Voices? Ruminations from the Bench, in: Rosalyn Higgins, *Themes and Theories, Selected Essays, Speeches and Writings in International Law* (OUP, 2009), Pt. 10, ch. 1; Rosalyn Higgins, Anna Lindh Memorial Lecture: Dispersal and Coalescence in International Human Rights Law, in: Rosalyn Higgins, *Themes and Theories, Selected Essays, Speeches and Writings in International Law* (OUP, 2009), Pt. 5, ch. 17; Conor McCarthy, Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice, in: Carla Ferstman, Mariana Goetz and Alan Stephens (eds.), *Reparations for Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making* (2009), 283; Gentian Zyberi, Self-determination Through the Lens of the International Court of Justice, 56 *Netherlands ILR* (2009) 429; Sandesh Sivakumaran, The International Court of Justice and Human Rights, in: Sarah Joseph and Adam McBeth (eds.), *Research Handbook on International Human Rights Law* (Edward Elgar Press 2010), 299; Gentian Zyberi, The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations, 7(1) *Utrecht LR* (2011), 204; Djamchid Momtaz and Amin Ghanbari Amirhandeh, The Interaction between International Humanitarian Law and Human Rights Law and the Contribution of the ICJ, in: Karine Bannelier, Théodore Christakis and Sarah Heathcote (eds.), *The ICJ and the Evolution of International Law, The Enduring Impact of the Corfu Channel Case* (Routledge, 2011), ch. 16; Bruno Simma, above n.1; Bruno Simma, The ICJ and Human Rights, in: Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP, 2013), ch. 10; Gentian Zyberi, The ICJ and Rights of Peoples and Minorities, Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP, 2013), ch. 13.

specialist bodies as international mechanisms concerned with the interpretation and application of human rights law? Is it simply “more of the same” or, as Bruno Simma asks, is there something qualitatively different to and beneficial in the involvement of the Court?

2. This question has been explored within academic commentary predominantly as part of general reviews of the treatment of the full spectrum of human rights issues within the Court’s jurisprudence.³ The issues in question cover a range of different areas of law including, but not limited to, human rights treaty law, for example taking in customary international law on self-determination, the law of immunity, treaty law, United Nations law, international criminal law, international humanitarian law, and occupation law. Such a broad canvas is helpful in capturing the range and scope of the Court’s involvement in human rights issues. However, as a means of considering the particular question of the merits of having an international generalist court, *qua* its generalist orientation, involved in human rights issues, it is limited because the “other” comparator partly required in the analysis—the judicial or quasi-judicial enforcement body with a specialist competence in the particular area of law in question—varies significantly (e.g. when international criminal tribunals are compared to human rights institutions) or is absent (e.g. in the case of international humanitarian law outside of international criminal law) depending on the area of law under evaluation. Moreover, the value of universalizing comparisons between the roles of a range of specialist bodies concerned with different areas of law, on the one hand, and the role of the Court in these areas of law, on the other hand, is further diminished by the scant and piecemeal nature of the Court’s jurisprudence in any given area, and the consequent difficulties of drawing meaningful, generalizable conclusions from modest evidence.

3. As a complementary contribution to the existing literature on the general topic of the ICJ and human rights, and offering sustained treatment of a particular area of law that has hitherto not been offered in this literature, the present article uses the case study of the extraterritorial application of human rights treaty law as a means of exploring the general theme of the value of the ICJ’s involvement in human rights. The case study concerns the entry-level question of whether human rights treaties apply extraterritorially at all, a fundamental matter of the very operation of obligations which, as will be explained, has been and remains a contested issue. It focuses on the significance of express pronouncements by the Court on this issue, placed in the wider context of corresponding determinations by specialist courts and tribunals.

4. The Court’s pronouncements were made in three cases: the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* Advisory Opinion of 2004 (hereinafter *Wall Advisory Opinion*); the *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)* judgment of 2005 (hereinafter *DRC v. Uganda*); and the 2008 *Order Indicating Provisional Measures in the Application of*

3 Ibid.

the *International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* case (hereinafter *Georgia v. Russia* (Provisional Measures)).⁴ As will be discussed, the significance of these pronouncements to the law on the extraterritorial application of human rights treaty law builds on a statement in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (hereinafter *Namibia* Advisory Opinion) from decades earlier, 1971.⁵ Although not about this area of law as such, that statement can nonetheless be regarded as foundational to how the law is now understood.

5. The article begins in Section II by setting out the broader historical context of the ICJ's involvement in human rights issues. Then in Section III it analyses the various different ways in which this involvement can be critically appraised, in the process making the case for the focus adopted herein, on a comparison between the role of the Court and that of specialist human rights tribunals on issues of meaning/interpretation rather than application/enforcement, and, within this, on comparative analysis concerned with the generalist/specialist distinction itself rather than the relative merits of positions taken on the substantive law. Such a focus is then deployed in Sections IV–X through the case study of the Court's treatment of the question of the extraterritorial application of human rights treaties in the *Wall* Advisory Opinion, the *DRC v. Uganda* judgment, and *Georgia v. Russia* (Provisional Measures). Finally, Section XI summarizes the significance of the Court's determinations on extraterritoriality, and sets out the lessons suggested by these determinations for broader understandings of the role of the ICJ in the field of human rights.

II. Historical developments in human rights law and at the ICJ

6. One of the main developments in the subject-matter covered by international law occurring over the lifespan of the International Court of Justice has been the

- 4 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 ICJ Reports 163 (9 July) (hereinafter *Wall* Advisory Opinion); *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Request for the Indication of Provisional Measures, Order of 1 July 2000, [2000] ICJ Reports 111; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005 (hereinafter *DRC v. Uganda* Judgment), paras.216–217; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Order Indicating Provisional Measures, 15 October 2008 (www.icj-cij.org/docket/files/140/14801.pdf (last visited 3 November 2013)) (hereinafter *Georgia v. Russia* (Provisional Measures)), paras.109, 149.
- 5 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 (hereinafter *Namibia* Advisory Opinion).

emergence of and rapid expansion in the coverage of human rights in international treaty law.⁶ Moreover, the establishment and then operation of the jurisdiction of dedicated mechanisms for the interpretation and application of these human rights instruments constituted one of the main ways in which the ICJ came to share its position as an international judicial body with other international courts and quasi-judicial bodies.⁷

7. It is commonplace to describe the situation during the period in which human rights treaties and their enforcement bodies were established as one where the ICJ's docket predominantly addressed a narrow set of issues, such as boundary disputes,

- 6 On this development, see e.g. Rosalyn Higgins, *The International Court of Justice and Human Rights*, above n.2, 693; Rosalyn Higgins, *Human Rights in the International Court of Justice*, above n.2, 745; Rosalyn Higgins, *Anna Lindh Memorial Lecture*, above n.2, *passim*. For the instruments the provisions of which be addressed in the present piece, see American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, OAS Res. XXX (1948) (hereinafter American Declaration) [not a treaty]; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (hereinafter ECHR); ECHR Protocol No. 1; ECHR Protocol No. 6; ECHR Protocol No. 13; Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, 78 UNTS 277; Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (hereinafter ICESCR); International Covenant on Civil and Political Rights, GA Res. 2200A/XXI, 16 December 1966, UN Doc. A/6316 (19 December 1966), 999 UNTS. 171 (hereinafter ICCPR); American Convention on Human Rights, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 UNTS 123, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, Doc. 21, Rev. 6 (22 November 1969); International Convention on the Elimination of All Forms of Racial Discrimination, Adopted by General Assembly Resolution 2106 (XX), 21 December 1965, 660 UNTS 195 (hereinafter CERD or ICERD); International Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, 1249 UNTS 13 (hereinafter CEDAW); The African Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 27 June 1981) (hereinafter ACHPR); Convention on the Rights of the Child, GA Res. 44/25, Annex, 44 UN GAOR Supp. No. 49, UN Doc. A/44/49 (20 November 1989), 1577 UNTS 3 (hereinafter CRC); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000 (CRC Optional Protocol); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 46, UN GAOR, 39th Sess., Supp. No. 51, UN Doc. A/39/51, 10 December 1984, 1465 UNTS 85 (hereinafter CAT).
- 7 On this, see e.g. Rosalyn Higgins, *Human Rights in the International Court of Justice*, above n.2, 745.

commonly characterized as inter-State in character.⁸ The international supervision of the human rights situation within States, as far as compatibility with the provisions of human rights treaties was concerned, was the exclusive preserve of human rights-specific bodies, if it occurred at all. The right to self-determination came before the Court in the decisions about South West Africa/Namibia and the Western Sahara, but only in its ‘colonial’ manifestation, and as a matter of the entitlements of people vis-à-vis States who did not enjoy title over the territory in which those people resided, rather than the rights of people within their own State.⁹

8. The end of Cold War led to inter-related trends that substantially altered the character of the Court’s work: an increased willingness of States, of a more diverse geographic, economic and military character, to have their disputes submitted to the Court, and the Court’s docket expanding in both quantum and the range of areas of international law being addressed.¹⁰ As the increase in the types of disputes and applicable law occurred, so human rights matters outside the field of self-determination came into the frame.

9. The Court’s jurisprudence on human rights issues, including international criminal law, is now significant.¹¹ Although the Court is not a “human rights court”, it has nonetheless become a court that makes decisions in the human rights field, rather like a domestic generalist court with plenary jurisdiction with respect to a legal system which includes human rights norms.¹²

- 8 See e.g. the discussions in Bruno Simma, above n.1; Gentian Zyberi, *The ICJ and Rights of Peoples and Minorities*, above n.2; and Rosalyn Higgins, *Legal Disputes and Political Realities: The Current Role of the International Court of Justice*, Sydney Bailey Memorial Lecture, 3 March 2000 (http://website.lineone.net/~ccadd/3mar00_sbml.htm (last visited 3 November 2013)), section II.
- 9 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, 21 Dec. 1962, (1962) ICJ Reports 319; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, 18 July 1966, (1966) ICJ Reports 6; *Namibia Advisory Opinion*, above n.5; *Western Sahara, Advisory Opinion* (1975) ICJ Reports 12.
- 10 Gentian Zyberi, *The International Court of Justice and Applied Forms of Reparation*, above n.2, 29.
- 11 See the commentary listed above, n.2, and sources cited therein.
- 12 Writing in a personal capacity in 1998, having reviewed the Court’s jurisprudence up to that point, Rosalyn Higgins observed that “notwithstanding that the International Court of Justice is not a human rights court as such, it is fully engaged in the judicial protection of human rights.” Rosalyn Higgins, *The International Court of Justice and Human Rights*, above n.2, 703. Almost a decade later, she observed, again in a personal capacity, that “We may be sure that the International Court of Justice, while not a ‘human rights court’ as such, will continue to play a major role in the protection of human rights.” Rosalyn Higgins, *Anna Lindh Memorial Lecture*, above n.2, 19. See also Sandesh Sivakumaran, above n.2, 325.

10. Human rights matters addressed by the Court have included, in addition to self-determination, the following: the law on genocide including the definition of the crime (the *actus reus* and *mens rea* elements and which groups come within its protection) and the applicability of the prohibition of genocide to States; certain aspects of treaty law in the context of human rights treaties, notably on reservations and succession/accession issues; the interplay between the law of State immunity and the law of universal criminal jurisdiction in the context of serious crimes; the law of diplomatic protection; the application of human rights law in situations of war and occupation where the law of armed conflict/humanitarian law/occupation law are also applicable; and the protection of individuals under humanitarian law.¹³

11. This involvement by the ICJ in human rights matters has been linked by commentators to the broader trend within the United Nations of “mainstreaming” human rights at the Organization (of which the ICJ is of course the “principal judicial organ”¹⁴): complementing the treatment of human rights issues within dedicated mechanisms, hitherto the predominant or even exclusive forum for such treatment, with treatment in other, “generalist”, non-human-rights-specific bodies.¹⁵ Put from the perspective of international law, Rosalyn Higgins (writing in a personal capacity) observes that the Court has played a major role in the “embedding” of the “protection of human rights” within the “broader setting of international law”.¹⁶ Bruno Simma (also writing in a personal capacity) makes a similar point using the UN language of “mainstreaming”, with an additional, striking characterization of the ICJ and general international law, on the one hand, and human rights bodies and human rights law, on the other, as, respectively, the “old” and the “new”:

If we wanted to find a short-term description for our topic of the International Court of Justice and human rights, we could call it an instance of international legal discourse in which old international law (represented for our purpose by the Court) encounters the new. What we can observe already is that the Court has become a major player in a process in which human rights and general international law mutually impact upon one another: human rights “modernize”

13 The sources cited above, n.2, provide an extensive coverage of this, including citations to the relevant case law. For an overview of the relevant case law, see e.g. Gentian Zyberi, *The International Court of Justice and Applied Forms of Reparation*, above n.2, 195; Gentian Zyberi, *The ICJ and Rights of Peoples and Minorities*, above n.2, passim; Sandesh Sivakumaran, above n.2, passim and in particular 319–320 (on genocide), 310 (on treaty law), 214 (on humanitarian law).

14 UN Charter, art. 92.

15 Gentian Zyberi, *The International Court of Justice and Applied Forms of Reparation*, above n.2, passim; Bruno Simma, above n.1, 29.

16 Rosalyn Higgins, *Anna Lindh Memorial Lecture*, above n.2, 19.

international law, while international law “mainstreams”, or “domesticates”, human rights”.¹⁷

12. As the judicial careers of Rosalyn Higgins and Bruno Simma demonstrate, this expansion from the specialist to the generalist is symbolized by the movement of a number of jurists with experience in human rights law (though usually as part of a generalist professional expertise) onto the bench of the Court. Considering membership on the bench during the period when one or more of the three decisions under present evaluation were issued, some judges had previously served on international human rights enforcement bodies: Judge Higgins was a former member of the UN Human Rights Committee;¹⁸ Judge Pieter Kooijmans was a former UN Special Rapporteur on Torture and President of the UN Commission on Human Rights;¹⁹ Judge Thomas Buergenthal was a former President of the Inter-American Court of Human Rights and member of the UN Human Rights Committee;²⁰ and Judge Simma was a former member of the UN Committee on Economic, Social and Cultural Rights.²¹ Other members had previous experience of diplomatic service for their countries of nationality that involved participation in human rights bodies (Judge Leonid Slotnikov²²

17 Bruno Simma, above n.1, 29.

18 Judge Higgins was a member of the Court from 1995 to 2009: see ICJ, All Members List (www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2 (last visited 3 November 2013)). On her membership of the UN Human Rights Committee, see e.g. International Balzan Prize Foundation, Rosalyn Higgins (www.balzan.org/en/prizewinners/rosalyn-higgins (last visited 3 November 2013)).

19 Judge Kooijmans was a member of the Court from 1997 to 2006: see ICJ, All Members List, above n.18. On his tenure as UN Special Rapporteur on Torture and Chairman of the UN Commission on Human rights, see Peace Palace Library, In Memoriam Pieter Hendrik Kooijmans (1933-2013), Former Judge of the International Court of Justice (26 February 2013) (www.peacepalacelibrary.nl/2013/02/in-memoriam-pieter-hendrik-kooijmans-1933-2013-former-judge-of-the-international-court-of-justice/ (last visited 3 November 2013)) and Office of the High Commissioner for Human Rights, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx (last visited 3 November 2013)).

20 Judge Buergenthal was a member of the Court from 2000 to 2010: see ICJ, All Members List, above n.18. On his position at the Inter-American Court of Human Rights and on the UN Human Rights Committee, see The George Washington University, Faculty Directory: Thomas Buergenthal (www.law.gwu.edu/faculty/profile.aspx?id=1758 (last visited 3 November 2013)).

21 Judge Simma was a member of the Court from 2003 to 2012: see ICJ, All Members List, above n.18. On his membership of the UN Committee on Economic, Social and Cultural Rights, see University of Michigan, Faculty Biographies: Bruno Simma (www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=simmab (last visited 3 November 2013)).

and Judge Peter Tomka²³); previous experience of practice in human rights law (Judge Ronny Abraham²⁴); previous publications on human rights law (Judge Bernardo Sepúlveda-Amor²⁵); and previous such publications and involvement in human rights issues as a component of the applicable law on the senior national courts on which he sat (Judge Kenneth Keith²⁶). Rosalyn Higgins, writing in a personal capacity about the membership of herself and Judges Kooijmans, Buergethal and Simma on the Court, observed that:

The presence of these judges on the bench, providing a “critical mass” of persons particularly versed in human rights law, has contributed, I believe, to human rights being viewed as in the centre of what the Court does, not at the margin.²⁷

13. The effect of the expansion in the range of international law topics addressed by the Court is that in many areas of international law, the ICJ now a source of potentially persuasive and authoritative interpretation to a greater extent and across a broader spectrum of the international legal field than was the case previously. This is an especially significant development in the area of international human rights law, where the Court’s pronouncements do not sit largely alone as judicial determinations of the area of law at issue (unlike, it might be said, in the field of the use of force). On human rights matters, the Court’s jurisprudence has to be situated in, and compared with, the more long-standing jurisprudence of specialist human rights bodies.

22 Judge Slotnikov was previously a member of the Russian delegation to UN human rights Commission; he has been on the Court since 2006: see ICJ, Current Members: Judge Leonid Skotnikov (www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=159 (last visited 3 November 2013)).

23 Judge Tomka was in 1996 Chairman of the Meeting of the States Parties to the International Covenant on Civil and Political Rights; he has been on the Court since 2003: see ICJ, Current Members: President Peter Tomka (www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=15 (last visited 3 November 2013)).

24 Member of the Court from 2005: see ICJ, Current Members: Current Members: Judge Ronny Abraham (www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=136 (last visited 3 November 2013)).

25 Member of the court since 2006: see ICJ, Current Members: Vice-President Bernardo Sepúlveda-Amor (www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=158 (last visited 3 November 2013)).

26 Judge Keith was a member of the Court of Appeal and the Supreme Court of New Zealand; he has been on the Court since 2006: see ICJ, Current Members: Judge Kenneth Keith (www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=157 (last visited 3 November 2013)).

27 Rosalyn Higgins, *Human Rights in the International Court of Justice*, above n.2, 746.

III. Appraising the ICJ's treatment of human rights law

As Article 38 of the Statute of the International Court envisages the Court's jurisdiction extending to disputes arising from treaties, all of this vast explosion of human rights conventions could, it might have been thought, lead to a heavy human rights component in the Court's work. The reality, however, is different. Only a few of the human rights treaties contain a specific compromis clause referring to the Court ... Further, some of the great human rights instruments have their own judicial settlement procedures.

*Rosalyn Higgins (writing in a personal capacity in 1998)*²⁸

14. What role has the Court had, and should it have, on human rights matters, given that it co-habits with other specialist bodies, its contentious jurisdiction is open only to States, not also to individuals, and only few of the wide range of human rights treaties contain compromissory clauses that enable States to refer disputes to it?²⁹

15. On a basic level, the ICJ's entry into the judicial application and enforcement of human rights law adds to the sum total of such treatment by international expert bodies. So it could be said that although, for the foregoing reasons, the ICJ may not be involved in many human rights cases, the involvement which does happen should be regarded as beneficial (if the quality of the Court's reasoning is sound, a matter which has been disputed in some of its human rights cases, as explored further below), in that it adds, albeit modestly, to the quantum of international institutional application and enforcement of human rights law (assuming, of course, the merit of such application and enforcement in the first place).³⁰

16. Clearly, however, more can be said about the merits of the Court's involvement than simply the observation that it is "more of the same" (and the cognate normative assumption that the "same" is of merit). One way into the possible avenues of enquiry here is via the distinction that can be made in the role of any expert body addressing human rights law between, on the one hand, being engaged in pronouncing on the substance of the law itself—clarifying its meaning, for example, through interpreting

28 Rosalyn Higgins, *The International Court of Justice and Human Rights*, above n.2, 693–694.

29 An example of such a compromissory clause would be CERD, above n.6, art. 22.

30 For Rosalyn Higgins, writing in a personal capacity about the Court's involvement in human rights law, "the promotion of effective guarantees of human rights requires a common endeavour across a broad front." Rosalyn Higgins, *The International Court of Justice and Human Rights*, above n.2, 703. For Sandesh Sivakumaran, "the Court has not always covered itself in glory and the position is too nuanced to say that the Court has consistently developed human rights law", but it "... can certainly stand alongside other bodies that are tasked to uphold the protection of human rights. For one that is not a human rights court, it has done much to further their protection." Sandesh Sivakumaran, above n.2, 325.

treaty provisions—and, on the other hand, applying this law to the particular facts before it, leading to a result that potentially “enforces” this law with respect to a given situation, including through the provision of remedies.³¹

17. In the context of human rights, this distinction takes on a particular significance at the ICJ given that individuals do not have direct standing before the Court. As far as enforcement/remedies are concerned, the Court is structurally deficient on this key standing matter when compared to human rights bodies to which individuals have direct access.

18. Thus the Court is unable to provide remedies directly to individuals; moreover, the exclusion of access the Court of those whose interests are directly at stake in human rights cases also, of course, reduces the likelihood that such cases will go before the Court in the first place, compared to human rights tribunals where individuals have direct standing. More fundamentally, the inter-State character of the Court’s jurisdiction (in the sense that its contentious jurisdiction is only for States, and its advisory jurisdiction, as far as general legal questions are concerned, requires States members of the General Assembly or the Security Council to agree on requests), means that even when human rights matters come before the Court, there is still potentially a State-centric orientation to the treatment of such matters. In explaining the modest number of human rights cases before the Court, Bruno Simma (writing in a personal capacity) argues that:

... we are looking at the “wrong relationship” here: approaching human rights problems, above all the issue of violations, from an inter-State perspective can only bring to the fore, and solve, certain limited aspects of these problems. The ICJ will deal with violations of human rights as matters of State responsibility, and State responsibility is typically [in the words of Robert McCorquodale] “law by states for states”.³²

19. How might the “inter-State” perspective lead to only “limited” aspects of human rights problems being addressed? One potential area is in the level of detail that the Court is willing and able to go into when applying the law to the facts in human rights cases and making determinations on compliance, when compared to such willingness and ability by human-rights-specific bodies. In her Separate Opinion to the Court’s *Wall* Advisory Opinion, Judge Higgins, while agreeing with the Court’s finding on what she termed the “relevance of human rights law in occupied territories”³³—what will be discussed below as matter of whether or not human rights law

31 On this distinction in the context of the ICJ’s decisions on human rights matters, see also Sandesh Sivakumaran, above n.2, 325.

32 Bruno Simma, above n.1, 15, quoting Robert McCorquodale, *Impact on State Responsibility*, in: Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009), 235, 236.

33 *Wall* Advisory Opinion, above n.4, sep. op. para.25 (Higgins).

applies extraterritorially on the basis of effective territorial control—expressed reservations about the quality of the Court’s substantive determination in applying this law to the facts. For Judge Higgins,

... it has to be noted that there are established treaty bodies whose function it is to examine in detail the conduct of States parties to each of the Covenants. Indeed, the Court’s response as regards the ... [ICCPR] notes both the pertinent jurisprudence of the Human Rights Committee and also the concluding observations of the Committee on Israel’s duties in the occupied territories.

So far as the [ICESCR] is concerned, the situation is even stranger, given the programmatic requirements for the fulfilment of this category of rights. The Court has been able to do no more than observe, in a single phrase, that the wall and its associated regime

“impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights ...” (para.134).

For both Covenants, one may wonder about the appropriateness of asking for advisory opinions from the Court on compliance by States parties with such obligations, which are monitored, in much greater detail, by a treaty body established for that purpose. It could hardly be an answer that the General Assembly is not setting any more general precedent, because while many, many States are not in compliance with their obligations under the two Covenants, the Court is being asked to look only at the conduct of Israel in this regard.³⁴

Drawing on some of the ideas in these comments it might be argued that the value of the Court in applying human rights law to any given situation is questionable when a specialist body already performs this function (cf. the initial comment about the ICCPR), given the Court’s decision to make a pronouncement on compliance with rights of a programmatic character that is so generalized as to be, one might say, of questionable worth (cf. the comment on the ICESCR) and bearing in mind the relatively greater detail that human rights-specific enforcement bodies go into (cf. the comment on both Covenants).

20. However, the potential role of the Court on the issue of the meaning/interpretation of the law, as distinct from its application of the law to the facts—in the *Wall* case, the initial issue, to be addressed later, that Judge Higgins agreed with, of whether the two Covenants even applied extraterritorially in the first place—is of a different character.

21. Questions of the meaning/interpretation of the law require, to be sure, considerable intellectual deliberation, but not detailed factual and evidential assessment. The Court is in no worse a position to engage in such a deliberation when compared to

34 Ibid. paras.25–26.

human rights tribunals, as a simple a matter of practicality and detail (the question of expertise will be addressed momentarily). If, however, this negative aspect is absent, what of the question of the positive case? The more essential question raised by Judge Higgins in the context of application/enforcement remains as far as interpretation is concerned: what does it add to have the Court doing this in addition to the specialist bodies? It is just, as asked earlier, “more of the same”?

22. Obviously, the ICJ differs from specialist tribunals in the potential breadth of applicable law that can be applied by it.³⁵ An aspect of this wide-ranging role is that for the Court, dealing with the fundamental contested aspects of particular areas of law is commonplace. It might be said, by contrast, that in the jurisprudence of human rights tribunals the balance in the quantum of cases is tilted further towards matters of detailed application to the facts as distinct from fundamental contests over the meaning of the legal norms themselves. Just as it might be argued, as reviewed earlier, that human rights tribunals are better suited to matters of enforcement and remedies because of their detailed focus and extensive experience, so it could also be said that the ICJ might be more self-assured and capable on matters of interpretation, including on fundamental matters, because of the frequency with which it must engage in judicial determinations of this type (all other things being equal).

23. One basis for assessing the merit of the Court’s pronouncements on human rights law is a consideration of how these pronouncements compare to the treatment of the same issues by specialist bodies. Within this question a distinction needs to be made between the related questions of whether the Court fits within/departs from approaches taken by other bodies, and whether the approach taken by the Court is regarded to be meritorious.

24. A significant body of commentary this topic links these two issues in the sense that consistency is regarded as beneficial. For Sandesh Sivakumaran, for example,

The protection of international human rights by courts and tribunals is aided by the consistency of their jurisprudence. The extent to which the Court has adopted or departed from the jurisprudence of other human rights bodies thus merits consideration ... [the] interlocking network of adjudicatory bodies and their consistence of jurisprudence can only be of benefit to the protection of human rights.³⁶

35 In the words of Gentian Zyberi,

Having no limitations over its subject matter jurisdiction, the ICJ offers a judicial forum in which much interpretation and progressive development of different branches of international law can take place.

Gentian Zyberi, *The International Court of Justice and Applied Forms of Reparation*, above n.2, 297.

36 Sandesh Sivakumaran, above n.2, 303 and 305.

Sometimes this linked concept of consistency as a good appears to be tied to the idea of relative expertise of the specialist bodies: thus the emphasis seems to be placed more on the Court following the specialist bodies than vice versa. Bruno Simma, writing in a personal capacity, observes that:

The court has been increasingly supportive of human right claims and it has demonstrated that it can handle human rights in a way considered respectable also by the “*droits de l’hommeistes*”. In this regard, it has caught up with the existing human rights courts.³⁷

Rosalyn Higgins, also writing in a personal capacity, observes that:

The acknowledged expertise of these specialist human rights courts and bodies, and the desire to avoid fragmentation, provide an impetus for all concerned to seek common solutions on evolving points of law. If the Court would seem to be acting cautiously in this regard, it is certainly not acting negatively.³⁸

Before, the very involvement of the Court in matters of application/enforcement was questioned by Judge Higgins in light of the more “detailed” existing role of the enforcement bodies. Here, a somewhat equivalent relative merit appears to be ascribed to the latter, in this case because of expertise, and with the consequence not of questioning the involvement of the Court in and of itself, as before, but, rather, accepting (or, at least, not challenging) such involvement but perhaps suggesting something akin to respect, even deference, on the part of the Court to the specialist bodies. Of course, the tenure of Rosalyn Higgins, Bruno Simma and their fellow “human rights” judges on the Court indicates that questions of relative expertise in human rights law of members of the bench at the ICJ as compared to human rights tribunals are not straightforward.

25. Beyond issues of consistency in light of the Court’s co-existence with human rights bodies, further approaches to the substantive merits of the Court’s treatment of human rights law are more focused on this treatment on its own terms, not with reference to other treatment elsewhere, although some of the ideas generated in this context are clearly transferrable to comparative analysis. Two approaches can be identified here. Under the first approach, the Court has been engaged in the “clarification” of human rights law, and that this has been beneficial.³⁹ The second approach distinguishes between “progressive” and “conservative” approaches which encapsulate

37 Bruno Simma, above n.1, 25.

38 Rosalyn Higgins, *Human Rights in the International Court of Justice*, above n.2, 749.

39 For Zyberi, the court has “clarified how certain human rights rules and principles were to be understood and applied”. Gentian Zyberi, *The International Court of Justice and Applied Forms of Reparation*, above n.2, 294. Sivakumaran describes the Court’s role as “clarifying the normative status of particular instruments and specific rights”. Sandesh Sivakumaran, above n.2, 307.

similarly vague notions of being “pro” or “anti” human rights, corresponding to positions that are typically regarded (often implicitly) as respectively meritorious and to be criticized.⁴⁰ The potential link between such approaches and the earlier focus on consistency with human rights tribunals is illustrated by the previous quote from Bruno Simma that links the Court’s consistency with human rights tribunals to being “supportive of human rights”.

26. The notion of clarification as a good implicitly, and assessments of being “pro” or “anti” human rights explicitly, presuppose more fundamental positions on contested matters in the field of human rights. Clarification as a good is at best thin and at worst ignoring a more fundamental matter if not allied to a notion that the particular position being clarified is of merit, thereby requiring a position to be taken on the more fundamental “pro” or “anti” human rights issue. And one does not have to be a relativist to accept that reasonable people can disagree on what is and is not “pro” or “anti” human rights. In any case, such analysis is a matter of general human rights theory and case law, capable of application to the jurisprudence of all judicial bodies, specialist tribunals and the generalist court alike. It is, to be sure, a fundamentally important question, but ultimately not directly about the topic of the relative merits and capabilities of specialist versus generalist courts.⁴¹

27. To establish a link between the underlying question and the topic at hand, one would appraise the substantive merit of the position taken by the Court on the question of extraterritoriality according to some general theory about human rights relevant to that question, and then use this as a basis for comparing the Court’s position with

40 For example, Zyberi takes the position that “the court has generally taken a firm position in favour of human rights”. Gentian Zyberi, *The International Court of Justice and Applied Forms of Reparation*, above n.2, 294.

41 Although some seem to worry that the ICJ may be more likely to be “conservative” on human rights issues than the specialist tribunals. Bruno Simma observes that specialist bodies have been behind the

... great advances of international human rights law . . . have developed doctrines and rules custom-made for human rights . . . which might go too far for more conservative circles of the legal mainstream. This acquis must not be levelled by the participation in the discourse of a generalist court such as the ICJ.

Bruno Simma, above n.1, 26. Simma’s concerns are tied to his focus on the “inter-State” character of the Court. He asks:

[C]ould we exclude that at least part of its clientele might be somewhat less than enthusiastic if the ICJ assumed (more pronounced) features of a human rights court?

Ibid. Simma states that:

... the development of international human rights will not infrequently upset sovereignty-based rules of international law with which most States will have been, and still are, quite comfortable.

Ibid. 27.

that of specialist tribunals, and drawing conclusions about the relative merits of the two types of forums in terms of the substantive positions they take. Ultimately, the key contest would be on the underlying question: this would determine the outcome on the relative merits issue.

28. As this article is not an effort to provide a theory to address the underlying question of whether human rights law should apply extraterritorially—a topic that is worthy of lengthy treatment in and of itself⁴²—it is not concerned with the ultimate merit of the positions taken by the Court on this question.⁴³

42 For academic commentary on this topic, see e.g. Fons Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”*, 87 *IRRC* (2005), 39; Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 *AJIL* (2005), 119; Ralph Wilde, *Legal “Black Hole”?: Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 *MJIL* (2005), 739; Sigrun Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia 2006); Ralph Wilde, *Case Note, R. (Al-Skeini) v. Secretary of State for Defence (The Redress Trust intervening)*, 102 (3) *AJIL* (2008), 628; Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: the Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 *Loyola of Los Angeles International and Comparative Law Review* (2009), 75; Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010); Ralph Wilde, *Compliance with Human Rights Norms Extraterritorially: “Human Rights Imperialism”?*, in: Laurence Boisson de Chazournes and Marcelo Kohen (eds), *International Law and the Quest for its Implementation, Liber Amicorum Vera Gowlland-Debbas* (Brill/Martinus Nijhoff 2010), ch. 16; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011); Various Authors, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, adopted 28 September 2011; Fons Coomans and Rolf Künnemann, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012); Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Brill 2012); Malcolm Langford, Wouter Vandenhole, Martin Scheinin and Willem van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013).

43 Others have pronounced on this issue. Shiv Bedi states that, by determining that ICCPR, the ICESCR and the CRC apply extraterritorially, the ICJ has

... universalised the territorial application of human rights law and circumvented the traditional sovereign power of States in depriving individuals, irrespective of their nationality, of their human rights and respect for human dignity. This is a step forward for the cause of human dignity and a step backward for the traditional narrow meaning of State sovereignty.

Shiv R.S. Bedi, above n.2, 344.

29. Rather, it is concerned with the second order issue of what a comparison between the pronouncements of the Court and the position taken by specialist bodies on this issue might say about relationship between the two and the role of the Court in human rights jurisprudence *qua* generalist Court. In other words, what can be said on the generalist/specialist issue as distinct from the substantive-merits-of-the-position-taken issue?

30. The focus will be placed on the significance, as discussed above, of the Court's involvement in questions of meaning/interpretation rather than application/enforcement, when compared to such involvement by specialist bodies. The case study of the question of whether human rights law applies extraterritorially will be used to test whether there is merit in what has been suggested in the foregoing analysis: Does the Court have the potential, in some instances, to make a positive difference on questions of interpretation in the field of human rights when compared to specialist bodies, and, if so, what factors might be relevant in determining when this possibility might arise?

IV. The contested issue and treaty law framework on extraterritoriality

31. The Court's determinations on the question of the extraterritorial application of human rights treaty law obligations were made at the time when this question was highly contested.⁴⁴ The entry-level matter of the very applicability of the obligations themselves—as distinct from consequential questions, such as what they would mean were they to apply, how this meaning would be mediated by the interplay with other applicable law, etc.—was disputed.⁴⁵ Such a situation was possible in part because the relevant provisions of the treaties contain terminology on applicability that lack a clear indication of spatial scope.

32. Some of the main treaties addressing civil and political rights, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR) and their Protocols, the Convention Against Torture (CAT), as well as the Convention on the Rights of the Child (CRC), which also covers economic, social and cultural rights, conceive obligations as operating in the State's "jurisdiction". Under the ECHR and some of its Protocols and the ACHR, the State is obliged to "secure" the rights contained in the treaty within its "jurisdiction".⁴⁶ Under the CAT, the State is obliged to take measures to prevent acts of torture "in any territory under its

44 See generally the sources cited above, n.42, and, e.g. Ralph Wilde, Legal "Black Hole"?, above n.42, 776–778. Sandesh Sivakumaran highlights this significance in the Court's intervention on the topic. See Sandesh Sivakumaran, above n.2, 307.

45 See the sources cited *ibid*.

46 See ECHR, above n.6, art. 1; ACHR, above n.6, art. 1.

jurisdiction”.⁴⁷ Under the CRC, States parties are obliged to “respect and ensure” the rights in the treaty to “each child within their jurisdiction”.⁴⁸ The ICCPR formulation is slightly different from the others in that applicability operates in relation to those “within [the State’s] territory and subject to its jurisdiction”.⁴⁹

33. Thus a nexus to the State—termed “jurisdiction”—has to be established before the State’s obligations are in play (the significance of the separate reference to “territory” in the ICCPR will be addressed below). As the Grand Chamber of the European Court of Human Rights stated in the *Al-Skeini* decision about the applicability of the ECHR to the activities of UK forces in Iraq,

“Jurisdiction” under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.⁵⁰

34. Certain other international human rights instruments do not contain a general provision, whether using the term “jurisdiction” or some other equivalent expression, stipulating the scope of applicability of the obligations they contain: the 1948 (Inter-) American Declaration of the Rights and Duties of Man (not a treaty), the 1981 African Charter on Human and Peoples’ Rights, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1979 International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000.⁵¹

35. What might be called a “free-standing” model of applicability echoes the position under certain other treaties concerned with warfare which include provisions concerned with the treatment of individuals, such as Common article 1 of the Geneva Conventions of 1949, according to which contracting parties undertake “to respect and to ensure respect for the present Convention in all circumstances.”⁵²

47 CAT, above n.6, art. 2.

48 CRC, above n.6, art. 2.1.

49 ICCPR, above n.6, art. 2.

50 *Al-Skeini v. United Kingdom*, ECtHR, Application No. 55721/07, Judgment of 7 July 2011, (hereinafter *Al-Skeini* (ECtHR)), para.130.

51 American Declaration, above n.6; ACHPR, above n.6; CEDAW, above n.6; CERD, above n.6; CRC Optional Protocol, above n.6.

52 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31, art. 1; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 75 UNTS 85, art. 1; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135, art. 1; Geneva Convention (IV) Relative

36. In the case of the CERD, a sub-set of obligations *are* conceived in the context of the State's "jurisdiction". The obligation concerning racial segregation and apartheid applies to parties with respect to "territories under their jurisdiction."⁵³ Similarly, the provision of remedies operates with respect to people in the State's "jurisdiction", in terms of both the obligation borne by the State to provide such remedies itself, and the jurisdiction of the international Committee on the Elimination of Racial Discrimination, if it has been accepted, to hear complaints against parties.⁵⁴ Moreover, as far as the Inter-American Declaration is concerned, the Inter-American Commission on Human Rights has treated the instrument as if it does contain the "jurisdiction" trigger, without an explanation for this assumption.⁵⁵

37. The obligation to secure the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not include a dedicated stipulation concerning spatial applicability. The relevant provision obliges parties

to take steps, individually and through international assistance and cooperation...with a view to achieving progressively the full realization of the rights recognized in the present Covenant.⁵⁶

38. The vagueness of the provisions in the instruments reviewed enables the scope of the spatial applicability of these instruments to be easily disputed. "Jurisdiction" could be regarded as a synonym for presence in sovereign territory only, thereby ruling out extraterritorial applicability. Alternatively, it could be defined in some way that includes, but is not limited to, a State's presence in its sovereign territory, but is defined in a manner that only covers a sub-set of extraterritorial activities (e.g. requiring a certain level of control), thereby creating the possibility for disagreements over which activities are covered. "Free-standing" obligations could be regarded as operating in any spatial zone in which the State is present, or, alternatively, a claim could be made that a limitation to sovereign territory should be read into them.

V. Decisions by other bodies and the ICJ

39. By the time the ICJ came to pronounce upon the extraterritorial applicability of certain of the aforementioned human rights treaties, there were already other decisions (judicial, quasi-judicial, advisory) on the topic, and the process of overlapping

to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287, art. 1.

53 CERD, above n.6, art. 3.

54 CERD, above n.6, arts. 6 (domestic remedies), 14.1 (jurisdiction of the Committee).

55 *Coard v. U.S.*, Case 10.951, Report No.109/99, OEA/Ser.L./V/II.85, doc. 9 rev. (1999), para.37.

56 ICESCR, above n.6, art. 2.

deliberations continued during the period in which the Court became seized of the topic. Prominent were decisions of the United Nations Human Rights Committee (expressed through Views and General Comments),⁵⁷ the United Nations Committee on Economic, Social and Cultural Rights,⁵⁸ the Inter-American Commission of Human Rights,⁵⁹ the European Commission and Court of Human Rights,⁶⁰ the

57 HRC General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para.10; Lilian Celiberti de Casariego v. Uruguay, Comm. No. 56/1979, UN Doc. CCPR/C/13/D/56/1979 (29 July 1981) (Celiberti de Casariego), para.10.3; Lopez Burgos v. Uruguay, Communication No. R.12/52, Supp. No. 40, 176, UN Doc. A/36/40 (1981), para.12.3; Mabel Perreira Montero v. Uruguay (Montero), Comm. No. 106/1981, UN Doc. CCPR/C/OP/2, 136 (1990) (31 March 1983), para.5.

58 ESCR Committee General Comment No. 2, International technical assistance measures (art. 22), 4th session (1990), in: *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.7 (2004), at 12, paras.6, 7(d), 9; ESCR Committee General Comment No. 3, The Nature of States Parties' Obligations (art. 2(1)), 5th session (1990), in: *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.7 (2004), at 15, paras.13, 14; ESCR Committee General Comment No. 8, The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, 17th session (1997), in: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.7 (2004), at 51; ESCR Committee General Comment No. 12, The Right to Adequate Food (art. 11), 20th session (1999), in: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.7 (2004), at 63, paras.36, 37; ESCR Committee General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12), 22nd session (2000), in: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.7 (2004), at 86, para.39.

59 Coard, above n.55, paras.37, 39, 41.

60 Hess v. United Kingdom, ECtHR, Application No. 6231/73, 2 Eur. Commission H. R. Dec. & Rep. 72 (1975); Gillow v United Kingdom, ECtHR, Application No. 13/1984/85/132, Judgment of 23 October 1986, para.62; Bui Van Thanh v. United Kingdom, ECtHR, Application No. 16137/90, European Commission of Human Rights, Judgment of 12 March 1990; WM. v. Denmark, Application. No. 17392/90, 73 Eur. Commission H.R. Dec. & Rep. 193 (1992), 196, Section "The Law", para.1; Drozd and Janousek v. France and Spain, 14 ECtHR. 745 (1992); Loizidou v. Turkey, 310 ECtHR (ser. A) (1995) (Preliminary Objections) (hereinafter Loizidou (Preliminary Objections)), para.62; Loizidou v. Turkey, 1996-VI, ECtHR, (ser. A) 2216, (GC) (Merits), (hereinafter Loizidou (Merits)), paras. 52–56; Illich Sanchez Ramirez v. France, Application No. 28780/95, 86 Eur. Commission H.R. Dec. & Rep. 155 (1996); Yonghong v. Portugal, Application no. 50887/99, ECtHR, Judgment of 25 November 1999 (Yonghong); Öcalan v. Turkey, Application No. 46221/99, ECtHR, Admissibility Decision, (14 December 2000), (hereinafter

United Nations Committee Against Torture,⁶¹ the United Nations Committee on the Rights of the Child,⁶² and judgments of domestic courts such as in the United Kingdom.⁶³

40. The question of the extraterritorial applicability of human rights law treaties raised in the ICJ cases concerned the applicability of these treaties to Israel in the Palestinian Territories in the context of the occupation in general and the construction of

Öcalan Admissibility Decision), Section “The Facts”, para.1; and Öcalan v. Turkey, 2005-IV ECtHR (GC) (Öcalan GC), para.91; Cyprus v. Turkey, 2001-IV ECtHR, 1 (GC), para.77; Issa and others v. Turkey, ECtHR, Admissibility Decision of 30 May 2000; Issa and others v. Turkey, 41 Eur. Ct. H.R. 27 (2004) (Merits), para.71; Banković v. Belgium, 2001–XII ECtHR, 333 (GC), paras.70–71; Ilascu and others v. Moldova and Russia, ECtHR, Application No. 48787/99 [Grand Chamber], Reports 2004-VII (8 July 2004); Solomou v. Turkey, ECtHR, Application No. 36832/97, Judgment of 24 June 2008, paras.43–52; Isaak v. Turkey, ECtHR, Application No. 44587/98, Judgment of 28 Sept 2006, Admissibility, p. 21 (hereinafter Isaak (Admissibility)); Behrami and Behrami v. France, and Saramati v. France, Germany and Norway [GC], ECtHR, Application Nos. 71412/01 and 78166/01, Admissibility Decision, 31 May 2007 (hereinafter Behrami and Saramati); Pad and others v. Turkey, ECtHR, Application No. 60167/00, 28 June 2007; Andreou v. Turkey, ECtHR, Application No. 45653/99, Admissibility decision, 3 June 2008, p. 11; Andreou v. Turkey, ECtHR, Application No. 45653/99, Merits, 27 October 2009, para.25; Al-Saadoon and Mufdhi v. United Kingdom, ECtHR, Application No. 61498/08, Chamber decision, 2 March 2010; Al-Skeini (ECtHR), above n.50; Medvedyev and others v. France, Application No. 3394/03, ECtHR, Grand Chamber decision, 29 March 2010; Hirsi Jamaa and Others v. Italy, ECtHR, Application No. 27765/09, Grand Chamber decision, 19 January 2012; Catan and others v. Moldova and Russia, ECtHR, Applications Nos. 43370/04, 8252/05 and 18454/06 Grand Chamber (19 October 2012).

- 61 Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America, UN Doc. CAT/C/USA/CO/2 (25 July 2006), para.15; General Comment No. 2, Implementation of Article 2 by States Parties, 23 November 2007, UN doc. CAT/C/GC/2 (24 January 2008), para.16.
- 62 Concluding Observations of the Committee on the Rights of the Child: Israel, UN Doc. CRC/C/15/Add.195, 4 October 2002, paras.2, 5, 57–58.
- 63 *R v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, 9 December 2004 (hereinafter *Roma Rights*); *R (Quark Fishing Ltd) v. Secretary of State for the Foreign & Commonwealth Affairs* [2005] UKHL 57, 13 October 2005; *R (on the application of Al-Skeini and others) v. Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2007] 3 WLR 33 (hereinafter *Al-Skeini (HL)*); *R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2005] EWCA (Civ) 1609 (21 December 2005) (hereinafter *Al-Skeini (CA)*); *R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2004] EWHC 2911 (Admin), 14 December 2004 (hereinafter *Al-Skeini (DC)*).

the separation barrier in particular, to Uganda in the DRC in the context of the military action by the latter in the territory of the former, and to Russia in Georgia in the context of Russia's support for the breakaway Republics of Abkhazia and South Ossetia, including through military action in 2008. The treaties at issue were the ICCPR (*Wall and DRC v. Uganda*), the CRC (*DRC v. Uganda*), the CRC Optional Protocol (*DRC v. Uganda*), the African Charter (*DRC v. Uganda*), the ICESCR (*Wall Advisory Opinion*) and the CERD (*Georgia v. Russia*).

41. Just as in general many of the States who act extraterritorially—and whose legal position is, therefore, directly at stake—refute applicability in this context, so the three States whose obligations were being determined in these cases—Israel, Uganda and Russia—advanced the view that the treaties at issue did not apply to them in the territories under consideration.

42. The way the Court rejected these positions, and affirmed extraterritorial applicability, involved a series of assertions with a more general significance for the debates on applicability. Moreover, as will be explained, the Court's contribution to understandings of what obligations should mean in the extraterritorial context builds upon what it had said decades previously in the *Namibia* Advisory Opinion concerning South Africa's obligations to the people of that Territory. The Court's contribution in this field can be divided up into five distinct elements. These elements will be set out in the following sections.

43. In the first place, in the *Namibia* Advisory Opinion, the Court established the principle that territorial control also, rather than the enjoyment of territorial sovereignty (that is, title), only, should be the basis for the operation of State obligations in general. Although not a determination specifically about international human rights treaty obligations, this broad proposition paved the way for later decisions about human rights law by both human rights bodies and subsequently the Court itself.

44. In the second place, for treaties containing the “jurisdiction” trigger for applicability, the Court both supported prior affirmations by other bodies that this trigger has an extraterritorial dimension, and offered original affirmations of its own.

45. In the third place, for treaties that have a “free standing” model of applicability, the Court has for some instruments treated them as if they did contain a “jurisdiction” clause, which operates extraterritorially, and for other instruments affirmed extraterritorial application in a simpler fashion.

46. In the fourth place, the Court's pronouncement upon the “exceptional” nature of extraterritorial activities is potentially significant for the regulation of these activities by human rights law when compared to similar pronouncements by certain other bodies.

47. Similarly, in the fifth place the Court's approach to the application of human rights treaty obligations to a State acting in territory not forming part of the territory of another State also party to the same treaty is highly significant given what has been suggested by certain other decisions on this matter.

VI. The Court's contribution (1): Significance of control versus sovereignty; effective control as a trigger

48. In the *Namibia* Advisory Opinion the ICJ stated that South Africa, which at the time was unlawfully occupying Namibia, was

... accountable for any violations ... of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.⁶⁴

This Opinion was issued before the main decisions by human rights bodies on the extraterritorial application of human rights treaties.⁶⁵ It is not, of course, a decision about human rights-specific treaty law as such, although it concerns the “rights of the people of Namibia”. The reference to “obligations and responsibilities under international law towards other States” and “liability for acts affecting other States” adopts an inter-State focus, although such a focus can include human rights given that obligations of this type are contained in treaties between States, and that certain such obligations (including those at issue here, the prohibition of racial discrimination and the right of self-determination) are regarded as operating *erga omnes*, implicating a generalized community interest on the part of all States.

49. Whatever the intended meaning in the case of South Africa and the people of Namibia, and significance for rules concerning applicable law in general, and human rights law in particular, as a general proposition the echo of this statement can be traced through later decisions on the applicability of human rights treaty law, in two related but distinct respects.

50. In the first place, the fundamental point that State responsibility should not be limited to situations where a State enjoys title is the basic underpinning of extraterritorial applicability. In the second place, the particular concept of “physical control over territory” as a basis for determining where obligations should subsist has been adopted in later human rights decisions, notably those made in interpreting the meaning of “jurisdiction” in the European Convention on Human Rights, as one of the two main triggers for extraterritorial applicability, the second being a concept of control exercised over individuals.⁶⁶ The extraterritorial applicability of human

64 *Namibia* Advisory Opinion, above n.2, 54, para.118.

65 See the sources cited above, nn.50, 57, 58, 59, 60, 61, 63.

66 See the discussion and sources cited below, para. 55.

rights treaties based on the exercise of control over territory—the “spatial” or “territorial” trigger—finds its origin in this more general concept from the ICJ.⁶⁷

51. It would be no exaggeration to say, then, that the ideas first judicially affirmed by the ICJ are the underpinning of both the notion of the extraterritorial application of human rights law itself, and also one of the two main ways in which the trigger for such application has been defined. They foreground subsequent approaches taken on these issues by human rights bodies and the Court itself.⁶⁸ In retrospect, it can be said that the ground breaking decision on the extraterritorial application of human rights law came from the ICJ, not from a human rights tribunal, and well before the canonical decisions were issued on the topic by human rights tribunals.

52. Just as the Court paved the way for later approaches taken on extraterritorial applicability that were directly concerned with human rights treaty law, so too the Court later became involved in offering approaches of its own to the topic. Bearing in mind Bruno Simma’s “old” versus “new” distinction mentioned earlier, we see, on this topic, the “old” Court applying “old” general international law, not “new” human rights law, to craft an idea which then re-appears in that “new” law, and then later returns to the “old” body, to be re-determined there, now in its manifestation as part of the “new” field of law. The distinctions between old/new, general international law/international human rights law, and the ICJ/specialist tribunals, helpful for certain purposes, must not obscure the provenance and journey of an underlying idea.

53. The Court’s contribution on the extraterritorial application of human rights treaty law can be split into different elements, beginning with the question of the extraterritorial meaning of the term “jurisdiction” as used in human rights treaties.

VII. The Court’s contribution (2): Affirming the extraterritorial meaning of “jurisdiction”

54. The general refutation of the extraterritorial application of human rights law mentioned earlier, made by many of the States which would be subject to the obligations were they to apply, including Israel, Uganda and Russia with respect to the three ICJ decisions in this field, has been primarily concerned with the term “jurisdiction” in some of the main human rights treaties. This term, it is argued, means the State’s presence in its sovereign territory only, and so in circumstances where it serves as the trigger for applicability, the relevant obligations do not apply extraterritorially.⁶⁹ In the

67 See *ibid.*

68 Sandesh Sivakumaran observes that the Court’s later decisions on the extraterritorial application of the ICCPR, ICESCR and CRC (addressed herein below in sections VII–X) are “timely and important” but also “no more than the specific application to human rights treaties of” this earlier idea. Sandesh Sivakumaran, above n.2, 309.

69 See e.g. the discussion in Ralph Wilde, Legal “Black Hole”?, above n.42, 776–778, and sources cited therein.

particular case of the ICCPR provision on applicability, which as mentioned earlier addresses those “within [the State’s] territory and subject to its jurisdiction”, the argument is made that the inclusion of the word “territory” in addition to “jurisdiction” should be read to suggest that jurisdiction is limited to territory, thereby ruling out extraterritorial applicability.⁷⁰ Arguments have also been made against the extraterritorial application of the ICESCR, for example by Israel in the context of the situation in the Palestinian territories.⁷¹

55. Even before the *Wall* Advisory Opinion and the *DRC v Uganda* and *Russia v Georgia* decisions were issued by the ICJ, the consistent position adopted in relation to international human rights instruments by international review bodies was the opposite of the rejectionist position. The term “jurisdiction” in the ECHR, ACHR, CAT and CRC has been interpreted to operate extraterritorially in certain circumstances.⁷² The aforementioned treatment of the applicability of the (Inter-)American Declaration by the Inter-American Commission on Human Rights in terms of the exercise of “jurisdiction” was in the context of extraterritorial activity, which it regarded as capable of constituting the exercise of jurisdiction and thereby falling under the scope of the obligations in the Declaration.⁷³ The ICCPR was interpreted as applying extraterritorially by the UN Human Rights Committee in Views issued in 1981 and General Comment 31 of 2004.⁷⁴ In general, the term “jurisdiction” has been defined extraterritorially as the exercise of control over either territory—the concept, indicated earlier, which has its origins in the *Namibia* Advisory Opinion, sometimes referred to as the “spatial” or “territorial” definition⁷⁵—or individuals, sometimes referred to as the “individual”, “personal” or, because of the identity of the foreign State actor involved, “State agent authority” definition.⁷⁶

70 See the discussions in the literature cited above, n.42; for one example of a commentator who advocates this position, see Michael J. Dennis, above n.42. For Israel’s position with respect to the ICCPR, see e.g. *Wall* Advisory Opinion, above n.4, para. 110, and sources cited therein.

71 See the *Wall* Advisory Opinion, above n.4, para. 112.

72 See decisions cited above nn.50, 59, 60 61, 62.

73 Coard, above n.55, para.37.

74 HRC General Comment No. 31, above n.57; Lopez Burgos; above n.57.

75 See e.g. *Cyprus v. Turkey*, above n.60; *Loizidou* (Preliminary Objections), above n.60; *Loizidou* (Merits), above n.60; *Banković*, above n.60; *Al-Skeini* (DC), above n.63; *Al-Skeini* (CA), above n.63; *Al-Skeini* (HL), above n.63; *Al-Skeini* (ECtHR), above n.50; *Issa*, above n.60.

76 *Celiberti de Casariego*, above n.57, para.10.3; *Lopez Burgos*, above n.57, para.12.3; *Öcalan* (GC), above n.60, para.91; *Isaak* (Admissibility), above n.60, 21; *Coard*, above n.55, paras.1–4, 37, 39, 41; *Al-Skeini* (DC), above n.63; *Al-Skeini* (COA), above n.63; *Al-Skeini* (HL), above n.63, *passim*; *Al-Saadoon*, *passim*, above n.60; *WM*, above n.60, 196, section “The Law”, para.1; *Montero*, para.5, above n.57.

56. The significance of the ICJ's determinations on this issue was to bolster some of the affirmations of extraterritorial applicability that had already been made by expert bodies in relation to the ICCPR and the CRC.

57. In the *Wall* Advisory Opinion and the *DRC v. Uganda* judgment the Court affirmed that the ICCPR is capable of extraterritorial application.⁷⁷ This bolsters the credibility of the Human Rights Committee's position on this question, and, by the same token, the credibility of the rejectionist view is weakened. It is also significant more broadly within the Court's jurisprudence because the Human Rights Committee's position is expressly cited by the Court in its reasoning on the issue in the *Wall* Advisory Opinion, both as a general matter, and as far as the position of Israel in the Palestinian territories in particular is concerned (the reasoning in *DRC v. Uganda* merely invokes the Court's earlier reasoning in the *Wall* Advisory Opinion in summary form).⁷⁸ Just as its decisions on extraterritorial applicability constitute some of the main decisions by the Court on human rights law generally, so here a decision in this category is a landmark in the broader theme of the Court's express use of the decisions of other courts and tribunals.

58. In a similar fashion, in the same two decisions the Court provided authority for the extraterritorial application of the CRC, as with the Human Rights Committee and the ICCPR earlier, bolstering the position of the Committee on the Rights of the Child on this issue (although, in contrast, without referring to the latter Committee's position on the issue).⁷⁹

59. Before the ICJ became involved, the position on the extraterritorial applicability of the term "jurisdiction" when used in human rights treaties was limited to affirmation by the UN Human Rights Committee and the Committee on the Rights of the Child, whose decisions, although important and influential, are formally non-judicial and non-binding, and the European Commission and Court of Human Rights, whose decisions are necessarily specific to the ECHR and its Protocols even if often containing logic that is clearly transferrable to equivalent provisions in other treaties. The extraterritorial applicability of the ICCPR and the CRC could be rejected on the grounds that it had not been affirmed by a body other than the Committees associated with the two instruments, that the positions of those Committees were non-binding, and that

77 *Wall* Advisory Opinion, above n.4, paras 107–111; *DRC v. Uganda*, above n.4, paras.216–217.

78 *Wall* Advisory Opinion, above n.4, para.109 (on the Committee's general position on extraterritorial applicability), para.110 (on the Committee's position on Israel in the Palestinian territories in particular); *DRC v. Uganda*, above n.4, para.216.

79 *Wall* Advisory Opinion, above n.4, para.113; *DRC v. Uganda* Judgment, above n.4, paras.216–217. On the decisions of the Committee on the Rights of the Child, see above, n.62.

decisions made with respect to the European Convention on Human Rights were irrelevant.⁸⁰

60. After these ICJ cases, the positions of the Human Rights Committee and the Committee on the Rights of the Child with respect to the CRC and the ICCPR were no longer isolated, and, moreover, had been endorsed by a body with formal judicial status, and in a multi-faceted fashion that both affirmed the position as general proposition and applied it to the facts of two separate situations, Israel in Palestine and the DRC in Uganda, in the latter case in a binding judgment.

61. More broadly, the quantum of authoritative interpretation on the question of the extraterritorial applicability of the term jurisdiction across international human rights treaties generally had become significantly greater, in that jurisprudence from specialist human rights bodies was joined by the preeminent, generalist court.

VIII. The Court's contribution (3): Affirming the extraterritorial applicability of other treaties with free-standing obligations

62. As mentioned above, some treaties operate in a free-standing sense, in that they do not contain express provisions stipulating their general spatial field of application. Debates about this spatial field are concerned not with the meaning of an ambiguous term (as in the earlier contest over the meaning of "jurisdiction") but, rather, on whether, as mentioned, the lack of an express provision renders the treaties always applicable to States Parties anywhere in the world, or whether some sort of spatial test for applicability should be read into them and, if so, what constitutes the limits of that test.

63. The Court has made an important contribution to these debates, through adopting two distinct approaches to extraterritorial applicability. In the first place, the Court in effect read in to treaties a concept of jurisdiction, which it then determined to apply extraterritorially. In the second place, the Court offered a more simple affirmation of extraterritorial applicability, without explaining the basis for this.

64. As indicated above, the Inter-American Commission on Human Rights had read a concept of "jurisdiction" into the American Declaration on Human Rights (not a treaty), which did not contain an express reference to this word, as a way into affirming its extraterritorial applicability. This approach was taken up (without acknowledgment of its origins, as an idea, in the Commission's decision about the Declaration) and applied by the ICJ in relation to the ICESCR in the *Wall* Advisory Opinion and the African Charter and the CRC Optional Protocol in *DRC v. Uganda*. All of these instruments were treated as if they contained the "jurisdiction" trigger, as a way in to affirming that they were capable of extraterritorial application on the basis of the performance of

80 See the discussions in the literature cited above, n.42; for one example of a commentator who advocates this position, see Michael J. Dennis, above n.42. For Israel's position with respect to the ICCPR, see e.g. *Wall* Advisory Opinion, above n.4, para. 110, and sources cited therein.

activity by the State which fell within the scope of this concept.⁸¹ In the *Wall* Advisory Opinion, the Court mentions the positions of Israel and the Committee on Economic, Social and Cultural Rights on the question of the applicability of the ICESCR to Israel in the Palestinian territories.⁸² Whereas it rejects Israel's advocacy of inapplicability, in contrast to its discussion of the position of the Human Rights Committee in relation to the ICCPR, it does not expressly associate the position of the Committee on Economic, Social and Cultural Rights advocating applicability (either generally or in relation to Israel in the Palestinian territories in particular) with its own affirmation of this view.⁸³

65. Here, it is a matter not, as earlier, of interpreting a treaty provision termed "jurisdiction" as having an extraterritorial meaning, but, rather, of affirming the extraterritorial applicability of the obligations in the instrument by reading into it a concept for applicability called "jurisdiction" which has an extraterritorial component. This takes (without acknowledgment) an approach adopted in one decision by a regional body in relation to one instrument, not at issue in the case before it, and treats it as relevant more generally, to certain other human rights treaties that do not have an explicit concept of "jurisdiction" triggering applicability.

66. A second approach to the extraterritorial scope of treaties with a free-standing conception of applicability provisions is simpler. It was adopted by the UK House of Lords in the *Roma Rights* case of 2004 concerning the posting of UK immigration officials at the Prague airport.⁸⁴ Lady Hale and Lord Steyn both assumed that the prohibition of discrimination on grounds of race in CERD applied extraterritorially, without recourse to a particular factual doctrine such as the exercise of "jurisdiction" which had to be met in order for the obligations to be in play.⁸⁵

67. The effect of the ICJ's 1998 Order on provisional measures in the *Georgia v. Russia* case is to offer further support to this "free-standing" approach to applicability. The Court stated that it:

... observes that there is no restriction of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which [by Russia in Georgia] are invoked by Georgia, contain a specific territorial limitation ... the Court consequently finds that these provisions of CERD generally appear to apply, like other

81 On the ICESCR, see *Wall* Advisory Opinion, above n.4, paras.111–112; on the ACHPR and the CRC Optional Protocol, see *DRC v. Uganda* Judgment, above n.4, paras.216–217.

82 *Wall* Advisory Opinion, above n.4, para.112.

83 *Ibid.*

84 See *Roma Rights* case, above n.63, para.4 (op. Lord Bingham).

85 See *ibid.*, paras.97–102 (op. Lady Hale); paras.44 and 46 (op. Lord Steyn).

provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory ...⁸⁶

The Court's Order called upon "[b]oth Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia" to take certain acts to comply with the Convention, a determination that assumed the extraterritorial application of CERD to Russian forces in Georgia.⁸⁷

68. This decision offers a particular approach to understanding the extraterritorial application of those treaties such as the CERD with free-standing models of applicability not expressly qualified by jurisdiction: the absence of a restriction on applicability, whether of a general character, or specific to the particular obligations in the treaty at issue, should be taken to suggest that the provisions *should* apply. In other words, as far as the significance of treaty provisions is concerned, the enquiry on extraterritorial applicability depends on not establishing this in a positive sense, but, rather, establishing whether it has been ruled out negatively though restrictive provisions. Such an approach to treaties with free-standing provisions can be seen as offering a potential explanation for the approach adopted by the UK House of Lords in *Roma Rights*, and a general doctrine to be followed in relation to such treaties, as an alternative to the approach of reading a concept of "jurisdiction" into them.

IX. The Court's contribution (4): On the "exceptional" nature of extraterritorial activity and its regulation by human rights law

69. However controversial and important extraterritorial State actions are, and however fundamental to the interests of the relevant States and those in the territories affected they may be in certain cases, taken as a whole they are exceptional when compared with the presence and activities of State authorities within their sovereign territories. Thus in the *Wall* Advisory Opinion the ICJ stated, in relation to the ICCPR, that "... while the exercise of jurisdiction is primarily territorial, it may sometimes be exercised outside the State territory".⁸⁸ The Court went on:

Considering the object and purpose of the ... Covenant ... it would seem natural that, even when such is the case, States parties to the Covenant should be bound by its provisions.⁸⁹

86 *Georgia v. Russia (Provisional Measures)*, above n.4, para. 109.

87 *Ibid.* para. 149.

88 *Wall Advisory Opinion*, above n.4, para. 109.

89 *Ibid.*

Similarly, in relation to the ICESCR, the Court stated that:

... this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies *both* to territories over which a State party has sovereignty *and* to those over which that State exercises territorial jurisdiction.⁹⁰

70. Here, then, the Court is being descriptive about the exercise of jurisdiction in the sense of a State presence (the particular activity performed by Israel at issue before it) reflecting the fact that States Parties to the Covenant (taken as a whole) do not normally engage in this activity *as a matter of fact* outside their territory. These observations are significant because of how they echo an earlier statement made by the European Court of Human Rights, and how they have potentially a significantly different import, in terms of the implications for the scope of extraterritorial applicability, from an earlier statement by the Strasbourg Court.

71. In the *Banković* decision concerning the NATO bombing of Serbia in 1999, the European Court of Human Rights stated that that jurisdiction is “essentially” territorial, with extraterritorial jurisdiction subsisting only in “exceptional” circumstances.⁹¹ However, in this observation the Court seemed to suggest that somehow the “exceptional” character of extraterritorial jurisdiction should be understood not only in a factual sense. Also, it should also be the basis for attenuating the scope of the meaning of “jurisdiction” in international human rights law, and should perform this function in an autonomous manner from the factual exceptionalism. The autonomous nature of this exceptionalism creates the possibility that even if a State *is* acting “exceptionally” as a *matter of fact* outside its territory, such a situation might not fall within its “jurisdiction” for the purposes of human rights law. In other words, only a sub-set of extraterritorial activity will be regulated by human rights law.

72. The dictum from *Banković* was affirmed at certain stages in the English courts of the *Al-Skeini* case concerning the UK’s military presence in Iraq, although by way of simple recitation only.⁹² In the Strasbourg judgment in that case, the European Court of Human Rights stated:

A State’s jurisdictional competence under Article 1 is primarily territorial... Jurisdiction is presumed to be exercised normally throughout the State’s territory... Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases...

90 Wall Advisory Opinion, above n.4, p. 180 para.112.

91 *Banković*, above n.60, para.67.

92 See *Al-Skeini* (HC), above n.63, paras.245 and 269; *Al-Skeini* (CA), above n.63, paras.75–76.

To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.⁹³

This statement seems to suggest that, necessarily, human rights law does not apply to all the extraterritorial actions of States—even if States perform “acts . . . outside their territories”, such acts can only “constitute an exercise of jurisdiction within the meaning of Article 1”, that is to be regulated by the obligations in the treaty, “in exceptional cases”.

73. This doctrine of the “exceptional” extraterritorial application of human rights obligations has only ever been affirmed in the context of the ECHR. Moreover, even in relation to that instrument it was absent from the case law before the *Banković* decision of 2001. Nonetheless, it appears to suggest a significantly different approach to “exceptionalism” from that articulated by the ICJ in the *Wall* Advisory Opinion, which was issued after *Banković*. For the ICJ, exceptionalism was only an issue in terms of the frequency of extraterritorial State action; it was not also a doctrine to limit the circumstances when this action would be regulated by human rights law when it occurred.

74. The absence of an affirmation of the latter doctrine places the *Wall* Advisory Opinion alongside the decisions of other bodies such as the Inter-American Commission of Human Rights and the Human Rights Committee, supporting the absence of such a doctrine from human rights law generally and further marginalizing the apparent affirmation of the doctrine in the context of the ECHR.

X. The Court’s contribution (5): Whether human rights treaty obligations should apply to a State acting in territory not falling within the sovereign territory of another contracting party to the treaty

75. An idea has become associated with the ECHR, based on an interpretation of a dictum from the European Court of Human Rights in the aforementioned *Banković* decision about the “legal space” or “espace juridique” of the Convention, which has fundamental consequences for the question of extraterritorial applicability. Although advanced and affirmed only with respect to the European Convention, as an idea it is transferrable to other human rights treaties.

76. This idea is as follows: a particular action taken by one State in the territory of another State would not be governed by the Convention obligations of the first State, if the second State is not also a party to the Convention, even if in other respects

93 *Al-Skeini* (ECtHR), above n.50, paras.131–132.

the act in question meets the test for extraterritorial jurisdiction under the Convention (for instance the State exercises effective territorial control). Under this view, although the concept of “jurisdiction” under the ECHR is not limited to a State’s own territory, the applicability of the treaty as a whole is limited to the overall territory of contracting States. In consequence, States acting outside the “territorial space” of the ECHR are not bound by their obligations in that instrument, even if they are exercising effective control over territory and/or individuals. This is a severe limitation as far as the ECHR is concerned, since most of the world’s States, including some of the key sites of extraterritorial action by certain European States, fall outside the “legal space” of the ECHR.

77. This concept, although articulated in relation to the ECHR, is of significance more broadly to situations where States act in territory in respect of which they lack title, and which does not form part of another State that is also bound by the same human rights obligations as they are. This would cover territory of a State that is not a party to the same human rights treaty, and non-State territory that, necessarily, does not fall within the territory of any State bound by any human rights treaties at all. It would also cover territory of a State that is party to the same treaty but subject to different obligations under it, whether through reservations, declarations or a divergent position as far as additional instruments such as optional protocols to the treaty are concerned. This is not, then, a rejection of the extraterritorial application of human rights law *in toto*; it is a rejection of human rights norms that have not yet been universally accepted/accepted at least by a State with sovereignty (as title) over the territory concerned, even if they have been accepted by the foreign State acting in that territory.

78. The significance of this idea is illustrated by the following three examples of exclusions that would be effected by this limitation. In the first place, no European State acting in Afghanistan, or taking action in the territorial waters of States and/or the high seas off the Horn of Africa with respect to so-called “piracy”, or taking migration-related action in the territorial waters of North African States and/or the high seas in the Mediterranean, would be bound by the ECHR. In the second place, no action by any State on the high seas, or off the coast of the Western Sahara (a non-State territory), whether piracy or migration-related, is covered by any human rights treaty obligations whatsoever. In the third place, Israel would not be bound by any of its international human rights treaty obligations with respect to the Palestinian territories.

79. This sets up a two-tier system of human rights protection: States may act abroad in a manner that impacts on human rights, but such action is only regulated by human rights obligations if these had already been in operation in the territories in question. Such a system echoes legal distinctions operating in the colonial era in levels of civilization and as between the metropolis and the colony as far as the level of rights protection is concerned. Indeed, with the ECHR the distinction in rights protection necessarily operates according to a European/non-European axis—Turkey in northern Cyprus: yes; that State and other European States in Iraq: no.

80. Whether or not such an exclusion actually operates with respect to the ECHR and its Protocols has been addressed in both case law and academic commentary.⁹⁴ Such discussion has included coverage of broader normative issues concerning whether the absence of such a limitation, and the consequent application of human rights standards that were not previously applicable in the territory, would constitute “human rights imperialism” and also potentially risk, where it is co-applicable, adherence to certain norms of occupation law.⁹⁵

81. In *DRC v. Uganda*, the Court held that the nature of the extraterritorial action by the State at issue, Uganda, met the test for triggering the law of occupation. Applying Uganda’s human rights obligations was not capable of raising a “legal space” problem as set out above, however, because the DRC was also a party to the treaties at issue. Similarly, in *Georgia v. Russia*, the Court was concerned with the extraterritorial application of a human rights treaty that was binding on both the State acting extraterritorially, and the State in whose territory the former State was acting. These two cases were equivalent, then, to the Strasbourg cases about Turkey in northern Cyprus: one State being bound by its obligations when acting in the territory of another State also a party to the treaty or treaties containing the obligations at issue. Everything was happening within the “legal space” of the treaty or treaties.

82. In the *Wall* Advisory Opinion, however, the Court was considering the applicability of human rights treaties that were not already in operation in the particular sense that the Territory—Palestine—did not itself constitute a State party to human rights treaties, nor was it regarded as forming part of the territory of another State party to such treaties. The situation was, therefore, in this sense outside the “legal space” of these instruments. It might have been said, then, that to apply the treaty obligations to Israel in the Palestinian territories would fall foul of a limitation on applicability to the “legal space” of the treaties at issue. However, such a view was not expressed by the Court, and the treaties were regarded as applicable to Israel, thereby necessarily rejecting the “legal space” limitation idea in its entirety.

XI. Significance of the decisions on extraterritoriality

XI.A. Significance for the law on extraterritoriality

83. When the ICJ issued the *Namibia* Advisory Opinion in 1971, the development of international human rights treaty law, and its expert-body interpretation, was at a very early stage—the two global human rights Covenants, for example, had been adopted (in

94 See Banković, above n.60; Al-Skeini (DC), above n.63; Al-Skeini (CA), above n.63; Al-Skeini (HL), above n.63; Al-Skeini (ECtHR), above n.50; Ralph Wilde, *Compliance with Human Rights Norms Extraterritorially*, above n.4.

95 See Ralph Wilde, *Compliance with Human Rights Norms Extraterritorially*, above n.42.

1966) but were not yet in force (that happened in 1976).⁹⁶ The question of the extraterritorial application of this law had not been subject to any general expert determination.⁹⁷ When that happened later, the ideas expressed by the Court can be clearly identified. Although, then, the Court did not itself pronounce upon international human rights treaty law for some time after *Namibia*, that decision nonetheless deserves a central place in the canon of international human rights law jurisprudence not only for the commonly acknowledged significance it has for UN law and the law of self-determination,⁹⁸ but also because of this link with later expert-body determinations on the extraterritorial application of human rights law.

84. Moreover, when the Court then offered its own contribution on the latter subject to sit alongside the expert-body determinations, this had an important role in consolidating and supplementing a critical mass of authoritative interpretation on what was and remains the highly contested and fundamentally important question of whether human rights treaty obligations apply extraterritorially.

85. The ICJ's findings on the extraterritorial application of human rights law are contained in a few passages, offering brief (if any) rationales, and forming part of decisions covering a much broader set of issues. The other case law on this topic, by contrast, in some instances includes lengthy treatment with significant reasoning and engagement with background and underlying matters.⁹⁹ Yet in a few brief statements in three decisions, the Court bolstered the case for an affirmative answer to this question, and in a manner that widened the scope of the judicial and quasi-judicial conversation from an isolated, treaty-specific treatment by dedicated interpretation bodies on what is a common matter across the human rights treaty framework.

86. The case law in this field is still somewhat sparse, and so the Court's contributions are significant, in reinforcing existing positions already articulated by expert bodies (and further marginalizing the respective contrary positions affirmed by some States) and bringing its own view to bear in relation to certain instruments that had not previously been subject to expert determination on the extraterritoriality issue. It might be said that the three decisions, covering as they do six human rights treaties (including both the UN Covenants), in consistently affirming extraterritorial applicability suggest a general orientation on this topic that favours human rights law operating beyond borders. Such an approach reinforces the case for applicability made in decisions by other bodies, and enhances the future prospects for such a case to continue to prevail when it is subject to determination in the future, whether at the Court or elsewhere.

96 See ICCPR, above n.6; ICESCR, above n.6.

97 See the decisions cited above nn.57–58.

98 For that common acknowledgement, see the sources cited above, n.2, and Bruno Simma, above n.1.

99 See the cases cited above, nn.50, 57, 59, 60, 63.

XI.B. The special fit between the Court and the extraterritoriality issue

87. Earlier it was observed that the relative balance in frequency between addressing fundamental matters of law and applying the law to the facts is tilted more towards the former in the case of the ICJ and the latter in the case of human rights tribunals. It was speculated that this might make the Court relatively more confident and expert in matters of interpretation. The significance of this general point is acute when it comes to the question of extraterritorial applicability, because here interpretation bodies have to determine the fundamental question of whether the law is even in operation to begin with. Not only, moreover, is there a significant link between the topic of extraterritorial applicability, as a fundamental question, and the relative experience of the ICJ in addressing questions of this type. Also, more specifically, the particular way in which the question is fundamental—being about what law applies—is also significant to the Court’s work, where cases often involve determinations of applicable law, as compared to human rights bodies, where questions of interpretation are more commonly limited to what the law means, not also what law is to be interpreted in the first place.

88. Indeed, in two of the three cases under present evaluation—the *Wall* Advisory Opinion and *DRC v. Uganda*, human rights law was one of multiple areas of international law that were potentially applicable, and so determinations on applicability had to be made across multiple legal regimes. Before a human rights expert body the question of the applicability of the relevant treaty is effectively determinative as far as the jurisdiction of the tribunal is concerned: if the law is not applicable, then, necessarily, the tribunal has no jurisdiction over the situation at issue. An equivalent situation prevailed only in the *Georgia v. Russia* case; in the other two decisions, a finding on the applicability of human rights law was not essential for there to be a case. Moreover, it might be speculated that the frequency of jurisdictional disputes before the ICJ, regarded by commentators in the context of the functioning of international mechanisms of dispute settlement as a deficiency in the system,¹⁰⁰ does at least have the

100 For example, writing in 2000, in a personal capacity, Rosalyn Higgins observed:

There is scarcely a case based on the optional Clause in which the defendant State does not insist that the Court does *not*, in the particular event, have jurisdiction—usually because a reservation is said to apply to the matters at hand. So the Court has *first* to hold hearings to determine its own jurisdiction. This delays the coming to the merits. In the hands of competent counsel the prospects for delay and challenge as to jurisdiction may be very extended indeed.

The net result is that, even where the challenges have not much strength, the coming on of the merits is long delayed. And a further result is that too large a percentage of the Court’s time is spent on resolving its own jurisdiction. It is really not satisfactory that it should be thus after fifty years of this Court’s existence, and eighty years have passed since the Permanent Court was established. This state of affairs reflects a depressing immaturity in international relations.

Rosalyn Higgins, above n.8, section V (emphasis in original).

advantage of making the Court very familiar with contests which determine whether or not cases will be heard in the first place.

89. As discussed earlier, involvement in extraterritorial activity, although significant and often controversial, is unusual when considered in the broader context of all the things that a State normally does and how this impacts on human rights. In the main, therefore, international human rights bodies considering the extent to which State activities comply with human rights obligations spend most of their time addressing what is happening within any given State, as far as that State's obligations are concerned, and relatively little time on extraterritorial activity. In consequence, their treatment of extraterritorial issues, including the entry-level question of applicability, constitutes but a small fraction of their jurisprudence. At the ICJ, by contrast, no doubt largely determined by the inter-State character of its jurisdiction, most jurisprudence on human rights law has been about the extraterritorial context. The partial nature of the ICJ's jurisdiction, then, has led to the dominance of extraterritorial human rights issues within the corpus of its human rights jurisprudence generally, when compared to the jurisprudence of the specialist bodies.

90. Not only does the inter-State character of the Court's jurisdiction mean that human rights issues in the extraterritorial context are more likely to come up. Also, the Court's relative familiarity with extraterritorial issues more generally means that its treatment of the human rights aspects falls within the broader sphere of inter-State activity with which it is comfortable and experienced. Although its movement into the human rights field is relatively recent when compared to the activity of human rights bodies, paradoxically it is the Court, not human rights bodies, that has had a long-standing role in adjudicating international legal matters that concern the transnational or cross-border context. A related point is that the extreme, controversial and sometimes, for the populations and States involved, existential nature of the subject-matter at issue—war, occupation etc.—is, for the Court, if not the norm, certainly more familiar, in terms of the frequency with which it comes up, than it is to human rights bodies. Determining the question of extraterritorial applicability is the gateway, potentially, to adjudicating, for example, on the aspects of the hugely contested matter of the conduct of an armed conflict and/or occupation. The ICJ is much more used to crossing such thresholds (albeit usually applying other areas of law) than human rights bodies are.

XI.C. Broader lessons for debates on the role of the ICJ in human rights

91. Although, then, the Court has had a significant role in the development of authoritative jurisprudence on the extraterritorial application of international human rights treaty law, the foregoing analysis indicates that there are special factors suggesting an exceptional fit between the Court's broader role and this particular issue, as distinct from human rights matters more generally. What, then, if anything, can be drawn from the extraterritoriality case study for the broader question of the role of the

Court compared to that of specialist tribunals on human rights issues generally, as distinct from extraterritorial human rights issues in particular?

92. At the very least, it suggests that the view that the Court, as a generalist and inter-State body, is somehow always to be assumed to be in an inferior position when it comes to making pronouncements upon human rights issues when compared to specialist bodies is incorrect. Within this general insight, it suggests that one of the explanations given for such an assumption, the inter-State character of the Court's jurisdiction, may sometimes not only fail to support the assumption, but also push things in the opposite direction, leading if anything to comparative advantage on the part of the Court. More generally, indeed, for this reason and/or others it suggests that the Court might be if anything in a better position to adjudicate on human rights matters in some instances.

93. The question, then, is whether this lesson from extraterritoriality is transferable to other situations, and, if so, in which circumstances. The foregoing analysis suggests that the following features of the Court's role and character need to be considered, in terms of their significance to the particular human rights topic at hand: its inter-State character; its familiarity with fundamental legal questions; its long-standing practice of and experience in ranging across all areas of law and applying multiple fields of law simultaneously, in terms of more than one area of human rights law (e.g. multiple human rights treaties) and other areas of law in addition to human rights law.

94. It will be for work on other areas of human rights law to test whether not one or more of these factors might sometimes push towards an appreciation that the ICJ might "add value" when compared to treatment by a specialist tribunal. But one example might be offered in overview.

95. Most States are bound by multiple human rights treaties, but international scrutiny bodies are typically treaty-specific. In the absence of a "World Court of Human Rights" and/or an effort to harmonize/consolidate the international reporting mechanisms beyond the general reviews performed by the Human Rights Council, the ICJ is in a unique position, in principle, to be able to address a particular situation with reference to the entire applicable normative framework as a matter of human rights (and also consider, and in a potentially more even-handed way, not being especially tied to one particular instrument as its starting point, how the meaning of this framework is mediated by the interplay with other applicable law). Just as on the question of whether human rights obligations apply extraterritorially the Court was, when the terms of its jurisdiction permitted it, able to look at the entire legal picture rather than a sub-set of it (viz. in *DRC v. Uganda* and the *Wall* Advisory Opinion, but not in *Georgia v. Russia*) so more generally, in any context, it may sometimes be in a position to offer a more complete treatment of compliance with the applicable law (assuming, of course, that in the particular circumstances this is desirable).

96. Finally, the case study on extraterritoriality suggests that there is merit in what was said earlier about the utility of disaggregating appraisals of the Court's potential role in terms of meaning/interpretation issues, on the one hand, and application/

enforcement issues, on the other. The Court's role on former issues is different, and certain matters cut differently when compared to a consideration of them in the context of latter issues. For example, the "State-centric" nature of the Court does not, on matters of interpretation, degrade its potential in the field of human rights interpretation in the same way as it might in the realm of enforcement. Clearly, this nature may render the Court's contributions limited in quantum and scope overall (few cases, no direct remedies for individuals) but when one focuses on interpretation in particular, the limitations appear different, given that a few decisions on key questions can have a ripple effect in influencing how these questions are then addressed across human rights bodies generally. Making general determinations which have the potential to be followed in any individual case where the same legal principles come to be applied by specialist bodies is a significant, not limited, function. It would be fanciful to expect the ICJ to become a major player in the enforcement of human rights to rival specialist tribunals in this respect. But the Court's jurisprudence on the question of whether human rights treaties apply extraterritoriality suggests, by contrast, the potential for a much more significant role when it comes to interpretation matters on fundamental issues.