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# THE EUROPEAN UNION'S HUMAN RIGHTS OBLIGATIONS TOWARDS DISTANT STRANGERS

*Aravind Ganesh\**

## INTRODUCTION

The European Union has perfect, legally enforceable human rights obligations towards distant strangers, i.e. noncitizens outside of the territory of its member states. These include “positive” obligations to “protect” and “fulfill,”—that is, to prevent third parties from causing human rights violations, and to establish mechanisms for the vindication of those rights—rather than just “negative” obligations to “respect” human rights. The argument has two limbs: (1) in order to achieve its goals in numerous policy areas, the European Union asserts not just *power* extraterritorially, but *authority*; and (2) the entire spectrum of human rights obligations potentially arises from relationships of political authority and obedience.

Section I begins by setting out certain provisions added by the Lisbon Treaty requiring the European Union to promote human rights, democracy, and the rule of law in all its “relations with the wider world.”<sup>1</sup> Section II then recounts a recent interpretation of these provisions, which understands them primarily as mandating compliance with international law, and thus largely denies extraterritorial human rights obligations to protect. While the fundamentals of this “compliance” reading are correct, Section III demonstrates that the notion of international law involved here entertains an expansive view of prescriptive jurisdiction, that is, a political institution’s authority to prescribe rules binding conduct. Indeed, despite precedent from the General Court<sup>2</sup> claiming otherwise, the European Union regularly creates *legal* effects outside its borders, and has always

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1. Consolidated Version of the Treaty on European Union, art. 3(5), Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TEU].

2. The General Court is the lower instance of the EU judiciary. Decisions by the General Court are appealed to the Court of Justice of the European Union (CJEU). *See Court of Justice of the European Union – Overview*, EUROPA, <http://bit.ly/1CikN11> (last visited Aug. 1, 2016).

done so. This is reflected both in the jurisprudence of the Court of Justice of the European Union (CJEU), as well as in EU legislation, particularly in areas such as competition, financial, and environmental regulation, all of which have profound implications for the human rights of distant strangers.

Section IV argues, from a premise of human dignity as lying in *autonomy*, that human rights obligations arise only in relations of political authority, not mere factual power. By reference to Strasbourg case-law on extraterritorial human rights jurisdiction, it demonstrates that the creation of legal effects abroad is both necessary and sufficient to give rise to human rights obligations there, and rejects accounts of human rights jurisdiction based upon aspects of factual power, such as the “state control” and “capability” theories. If, as this paper argues, the European Union regularly governs persons overseas, this raises the specter of imperialism, which is touched upon in the conclusion.

## I. THE PROVISIONS

The provisions grounding the forthcoming argument are scattered throughout the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).<sup>3</sup> Article 3(5) of the TEU, the first of these, provides that

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Situated in the “Common Provisions” of Title I, this provision is of plenary application across all EU policy areas. The “values” in the first sentence are specified in Article 2 of the TEU as “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.”

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3. Note that ordinary rules of treaty interpretation do not apply. EU treaties have from the very beginning been subjected to ‘dynamic’, ‘purposive’ or ‘teleological’ methods of interpretation aimed at ensuring their *effet utile* and effectiveness. See Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUD. 1, 1-4 (2007); JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 68-80 (2002) (citing Case 8/55 Fédération Charbonnière de Belgique v. High Authority, 1954-6 E.C.R. 292; Case 22/70, Comm’n v. Council (ERTA), 1971 E.C.R. 273); Treaty on European Communities art. 300 [hereinafter TEC], now re-numbered by the Treaty of Lisbon as TFEU art. 352, at Consolidated Version of the Treaty on the Functioning of the European Union art. 352, 2008 O.J. C 115/47, at 196.

Secondly, Article 21(1) of the TEU, located in the chapter on external relations, provides that,

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Article 21(2) of the TEU provides that the European Union “*shall* define and pursue common policies and actions, and *shall* work for a high degree of cooperation in all fields of international relations, in order to . . . consolidate and support democracy, the rule of law, human rights and the principles of international law;”<sup>4</sup> “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;”<sup>5</sup> and “promote an international system based on stronger multilateral cooperation and good global governance.”<sup>6</sup>

Finally, Article 21(3) of the TEU states that,

The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

The first paragraph governs more than just the European Union's external policies, but not the purely internal. The phrase “external aspects of [the European Union's] other policies” refers to such things as the “external dimension” of competition law, for example, chapters on EU competition

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4. TEU art. 21(2)(b) (emphasis added).

5. TEU art. 21(2)(d). Subsections (b) and (d) have featured prominently in the EU sanctions regime, having been invoked by the General Court to express ‘objectives of general interest’ justifying the limitation of the right to property under Article 17(1) of the Charter of Fundamental Rights. *See, e.g.*, Case T-256/11, *Ezz and Others v. Council*, 2014 ECLI:EU:T:2014:93, ¶ 199 (*aff'd* Case 220/14, *Ezz and Others v. Council*, 2015 ECLI:EU:C:2015:147); Case T-133/12, *Ben Ali v. Council*, 2014 ECLI:EU:T:2014:176, ¶¶ 48, 70. *See also* Case T-119/11, *Gbagbo v. Council*, 2013 ECLI:EU:T:2013:216, ¶ 77 (*aff'd* C-397/13 P, *Gbagbo v. Council*, 2014 ECLI:EU:C:2014:46) (citing Article 21(1) TEU as a standard for evaluating abuses of power).

6. TEU art. 21(2)(h).

rules in bilateral agreements.<sup>7</sup> The second paragraph, however, introduces a principle of consistency or coherence applicable across external policy and the European Union's "other," that is, *internal* policies, thus blurring the line between the internal and external. One objection should be dispatched at this point. Enzo Cannizzaro argues that Article 21 of the TEU is limited to the Common Security and Foreign Policy (CFSP) pillar, on the basis that "Article 23 [of the TEU] assigns the pursuit of the political objectives laid down by Article 21(1) and (2) to the primary competence of the CFSP."<sup>8</sup> Lorand Bartels responds correctly that this is a misreading of Article 23 of the TEU, which provides that the conduct of the CFSP "shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with" the general provisions on EU external relations, such as Article 21 of the TEU. This cannot be read to mean the CFSP is the *only* means by which the political objectives in Article 21 of the TEU are to be pursued.<sup>9</sup>

What implications do these provisions have for legal relations between the EU and distant strangers? Although they were initially dismissed as aspirational and "redolent of motherhood and apple pie,"<sup>10</sup> this is no longer tenable because of the *Air Transport Association of America (ATAA)*<sup>11</sup> judgment, which will be discussed below. Consider two semi-hypothetical scenarios, both concerning the right to food. Firstly, when formulating agricultural policy, does the European Union have to take into account the effects of subsidies upon developing country farmers? Secondly, imagine a merger planned between two supermarket chains. The merger will not affect consumer welfare within the European Union, but will likely result in the creation of an entity with monopsony power in downstream markets for coffee, tea, and other commodities located in developing countries. Its monopsony power may be so great that it deprives farmers of the ability to earn enough income to buy adequate food and

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7. Anne-Marie van den Bossche, *EU Competition Law in 3D*, in *THE EUROPEAN UNION IN THE WORLD: ESSAYS IN HONOUR OF MARC MARESCHEAU*, 365, 372-78 (Inge Govaere et al. eds., 2014).

8. Enzo Cannizzaro, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels*, 25 *EUR. J. INT'L L.* 1093, 1098 (2014).

9. Lorand Bartels, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: Rejoinder to Enzo Cannizzaro*, *EJIL: TALK, DEBATE!* (Jan. 15, 2015), <http://www.ejiltalk.org/rejoinder-to-enzo-cannizzaro/>. See also opinions of Advocate General Kokott in Case C-263/14, *Parliament v. Council*, 2015 ECLI:EU:C:2015:729, ¶ 72 (citing Articles 21(1), 21(2)(b), and 21(3) of the TEU to opine that the "rule of law and protection of human rights are, in general, among the principles governing the Union's external action which are to be observed and implemented not only, but also within the framework of the CFSP. . ."), and Advocate General Bot in Case C-658/11, *Parliament v. Council*, ECLI:EU:C:2014:41, ¶¶ 85-90 (Jan. 30, 2014); Case C-130/10, *Parliament v. Council*, 2012 ECLI:EU:C:2012:50, ¶¶ 62-64 (the provisions of Article 21(2) of the TEU bind all EU external action, including the CFSP).

10. ALAN DASHWOOD ET AL., *WYATT AND DASHWOOD'S EUROPEAN UNION LAW* 903 (2011) (describing Article 21(1) TEU).

11. Case C-366/10, *Air Transp. Ass'n of America v. Sec'y of State for Energy and Climate Change*, 2011 E.C.R. I-02735.

health care, or to send their children to school.<sup>12</sup> What if one of these developing countries—call it Ruritania—champions the merger despite its devastating effects upon rural communities, because it has embarked on an economic policy of industrial development? Suppose Ruritania is not party to any applicable human rights treaties. What should the Commission (the European Union merger regulator) do? Should it approve the merger, or regulate it?

## II. THE COMPLIANCE READING

In a recent article, Bartels argues that the provisions (1) require the human rights norms internally applicable in the European Union to be respected by it in its external conduct,<sup>13</sup> and (2) mandate compliance with international law by turning international human rights norms into norms of EU law binding upon EU institutions and actions.<sup>14</sup> As such, the provisions regulate the European Union's *own* conduct, rather than those of third parties. He thus concludes that negative obligations to respect human rights apply universally, whereas positive obligations to protect and to fulfill are limited to EU territory.

The first limb of Bartels' analysis concerns EU law. He argues that the provisions, particularly the first indent of Article 21(3) of the TEU, impose obligations under EU law that prohibit the European Union, say, from imposing sanctions upon a third country if it would cause starvation there, or from entering into an agreement with another state to spy on its citizens in violation of that state's human rights obligations. However, regarding obligations to protect and fulfill, Bartels finds the provisions to be "much more muted."<sup>15</sup> Articles 3(5) and 21(1) of the TEU require that the European Union "contribute" to the advancement of human rights, and that its action on the international scene be "guided" by the principles of the universality and indivisibility of the same. Such language conceivably only gives rise to obligations to cooperate internationally, for instance through intergovernmental and civil society channels. Because the provisions do not specify any particular manner by which the European Union is to achieve these ends, Bartels considers them legally unenforceable.<sup>16</sup>

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12. See, e.g., Tristan Feunteun, *Cartels and the Right to Food: An Analysis of States' Duties and Options*, 18 J. INT'L ECON. L. 341, 342 (2015); Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1510-11 (2013); Olivier De Schutter (Special Rapporteur on the Right to Food), *Briefing Note 03: Addressing Concentration in Food Supply Chains: The Role of Competition Law in Tackling the Abuse of Buyer Power* (Dec. 2010); Olivier De Schutter (Special Rapporteur on the Right to Food), *Rep. to the 13th Session of the Human Rights Council: Agribusiness and the right to food*, ¶¶ 8-9, U.N. Doc. A/HRC/13/33, 3 (Dec. 22, 2009); WORLD BANK, *WORLD DEVELOPMENT REPORT 2008: Agriculture for Development* 135-37 (2007).

13. Lorand Bartels, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, 25 EUR. J. INT'L L. 1071, 1074-75 (2014).

14. *Id.* at 1078-87.

15. *Id.* at 1074.

16. *Id.* at 1075.

Bartels' second limb deals with international law, arguing that "the EU is also required to respect international human rights obligations to the extent these are binding on the EU under treaties or customary international law."<sup>17</sup> The theme of *compliance* is emphasized in numerous EU official and judicial pronouncements. For instance, a December 2011 Joint Communication by the Commission and CFSP High Representative (Joint Communication) states that "EU external action has to comply with the rights contained in the EU Charter of Fundamental Rights which became binding EU law under the Lisbon Treaty, as well as with the rights guaranteed by the European Convention on Human Rights."<sup>18</sup> Moreover, the General Court in *Kadi II* hinted at the idea when it cited Articles 3(5), 21(1) and (2) of the TEU, and Declaration No. 13 annexed to the Lisbon Treaty, in the course of observing that "some" had expressed "certain doubts" as to whether the CJEU's *Kadi I* judgment was in compliance with international law.<sup>19</sup> However, by far the most important authority relied upon for the compliance reading is the *ATAA* decision, where the CJEU observed that "[u]nder Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law," and relied upon this as grounds for finding that "when it adopts an act, [the European Union] is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union."<sup>20</sup>

From this premise, Bartels denies extraterritorial positive human rights obligations, reasoning that if the provisions are about mandating compliance with international law and international human rights law, there can be no obligation to protect human rights from violation by third parties extraterritorially, because neither international law nor international human rights law requires this.<sup>21</sup> Bartels tenders two arguments to this end, while this Article anticipates the third: (1) states do not acquire extraterritorial human rights obligations as a result of the mere extraterritorial *effects* of their domestic policy; (2) actions of third parties cannot be attributed to states or international organizations (IOs) in the absence of intentional assistance, direction, control, or adoption;<sup>22</sup> and (3) any measures to protect the human rights of distant strangers may constitute interference with the sovereign rights of the states in which the affected individuals are situated. Thus, while the provisions allow the European

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17. *Id.* at 1078.

18. *European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Communication on Human Rights and Democracy at the Heart of EU External Action—Towards a More Effective Approach*, at 7, COM (2011) 886 final (Dec. 12, 2011).

19. T-85/09, *Kadi v. Comm'n*, 2010 E.C.R. II-5177, ¶ 115 (discussing Joined Cases C-402/05 P and C-415/05 P. *Kadi & Al Barakaat v. Council & Comm'n*, 2008 E.C.R. I-6351).

20. Case C-366/10, *Air Transp. Ass'n of America*, 2011 E.C.R., ¶ 101; *see also id.* ¶ 123.

21. *See infra* Section II(A)-(C).

22. *See infra* Section II(A) & (B).

Union to promote and advance its human rights agenda throughout the world, this is to be carried out multilaterally through political channels.

In addition, Bartels raises the issue of standing for judicial review under EU law, which in his view closes off any opportunity for distant strangers to challenge measures in violation of even the limited obligations provided by the compliance reading.<sup>23</sup>

The compliance reading possesses considerable support in academic commentary and beyond. For instance, a piece written before the *ATAA* decision describes Article 21 of the TEU as espousing a “liberal institutionalist school of international relations,” preferring international cooperation to approaches that may lead to conflict,<sup>24</sup> while a piece from 2008 considers that the “substantive [external] mandate as expressed in Article 3(5) TEU is to be achieved by developing relations and building partnerships with third countries and international organisations which share the Union’s principles and values, and promoting multilateral solutions to common problems [as required by] (Article 21(1) TEU).”<sup>25</sup>

In the following paragraphs, this Article canvasses the four arguments against positive extraterritorial human rights obligations as postulated by the compliance reading.

#### A. Human Rights Jurisdiction

As a rule, a state bears responsibility for the protection of human rights only within its “human rights jurisdiction,” traditionally identified with territorial control, on the basis of the *Namibia* opinion.<sup>26</sup> This applies equally across civil and political rights, as contained in the International Covenant on Civil and Political Rights (ICCPR), and socioeconomic rights. For instance, in the *Wall* opinion, the ICJ explained the unique lack of a jurisdictional stipulation in the International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>27</sup> as arising from “the fact that this Covenant guarantees rights which are essentially territorial . . .”<sup>28</sup> While the Court opined that Israel had obligations under the ICESCR for events

23. See *infra* Section II(D).

24. MICHAEL EMERSON ET AL., *UPGRADING THE EU’S ROLE AS GLOBAL ACTOR: INSTITUTIONS, LAW AND THE RESTRUCTURING OF EUROPEAN DIPLOMACY* 16 (2011).

25. Marise Cremona, *Coherence through Law: What Difference will the Treaty of Lisbon Make?*, 3 *HAMBURG REV. SOC. SCI.* 11, 35 (2008).

26. Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, ¶ 131 (June 21). While the ICJ spoke only of South Africa’s obligations as the former mandatory power in the territory, scholars view this pronouncement as beginning the debate on the extraterritorial application of human rights obligations. See Ralph Wilde, *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*, 12 *CHINESE J. INT’L L.* 639, 643, 661 (2013).

27. See International Convention on Economic, Social and Cultural Rights art. 14 (mentioning territorial jurisdiction when enumerating the obligation of progressive implementation of a plan of free compulsory education).

28. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶¶ 111-13 (July 9).



occurring in the Occupied Territories, it emphasized that the norms in the ICESCR, ICCPR, and the Convention on the Rights of the Child (CRC) applied extraterritorially only if the relevant extraterritorial acts were carried out “in the exercise of its jurisdiction outside of its own territory.”<sup>29</sup> Currently, the most cited monograph on extraterritorial human rights jurisdiction deems most positive human rights obligations inapplicable in the absence of territorial control, on the grounds that they are incapable of being fulfilled effectively.<sup>30</sup> Thus, human rights jurisdiction boils down to presence in foreign territory, presumably involving “boots on the ground.”<sup>31</sup>

Certainly, numerous treaty bodies hold that the creation of substantial and foreseeable effects gives rise to human rights jurisdiction.<sup>32</sup> However, their pronouncements suffer from problems of content and status. Some Committee on Economic, Social and Cultural Rights (CESCR) General Comments are couched in terms of an exhortatory “should” rather than a prescriptive “must,” a choice Bartels considers significant.<sup>33</sup> Moreover, while academics and activists invoke these statements promiscuously,

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29. *Id.* ¶ 111; *see also* Application of the International Convention of the Elimination of All Forms of Racial Discrimination (Geo. v. Rus.), Provisional Measures, Judgment, 2008 I.C.J. 353, ¶¶ 109, 149 (Oct. 15) (holding the Convention on the Elimination of all Forms of Racial Discrimination applicable to extraterritorial state acts and ordering Georgia and Russia to do “all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination.”); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 219 (Dec. 19) (applying same reasoning with respect to the ICCPR and the CRC).

30. MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011). *See infra* Section IV(C)(2).

31. Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 *LEIDEN J. INT'L L.* 857, 868 (2012).

32. *See, e.g.*, U.N. Comm. on Econ. Soc. and Cultural Rights, CESCR General Comment No. 12: The Right to Adequate Food, U.N. Doc. E/C.12/1999/5, ¶ 36 (May 12, 1999) (“In implementing this commitment [to take joint and separate action to achieve the full realization of the right to adequate food], States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”); U.N. Comm. on Econ. Soc. and Cultural Rights, CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR), 51, U.N. Doc. E/C.12/2000/4, ¶ 39 (Aug. 11, 2000) (“States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.”); U.N. Comm. on Econ. Soc. and Cultural Rights, General Comment No. 15: The right to water, U.N. Doc. E/C.12/2002/11, ¶ 31 (Jan. 20, 2003) (“International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.”).

33. Bartels, *supra* note 13, 1085-86. General Comment No. 14 on the right to health, *supra* note 32, does not mention “should.”

courts and governments have always remained more skeptical of them.<sup>34</sup> For instance, they have almost never been cited by the ICJ. A rare exception was in *Diallo*, where the Court described *General Comment No. 15* of the UN Human Rights Committee (HRC) as having “great weight.” However it immediately emphasized that it was “in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [ICCPR] on that of the [HRC] . . . .”<sup>35</sup> The situation in domestic or regional tribunals is similar, if not more dire. In *Grootboom*, the South African Constitutional Court paid lip service to the CESR’s *General Comment No. 3* laying down the “minimum core” doctrine,<sup>36</sup> but then disparaged it significantly, eventually rejecting its approach to construing the right to adequate housing under the South African Constitution.<sup>37</sup> Other treaty bodies have fared even worse. About the U.N. Torture Committee, Lord Bingham in the House of Lords noted that “the Committee is not an exclusively legal and not an adjudicative body; its power . . . is to make general comments . . . . Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.”<sup>38</sup> In his speech in the same case, Lord Hoffman bluntly declared the following: “as an interpretation of article 14 [of the U.N. Torture Convention] or a statement of international law, I regard it as having no value.”<sup>39</sup>

Crucially, the Strasbourg Court rejected a human rights “effects doctrine” in *Banković*, holding that, “from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial,”<sup>40</sup> and “the applicant’s submission [was] tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State,

34. See, e.g., Rep. of the Standing Senate Comm. on Human Rights, Promises to Keep: Implementing Canada’s Human Rights Obligations (2001) (Can.), <http://www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm> (last visited Aug. 1, 2016) (“[T]he views and decisions of these treaty-monitoring bodies are not binding on Canada, either under international or domestic law.”); NORWEGIAN MINISTRY OF FOREIGN AFFAIRS, REPORT NO. 21 TO THE STORTING (1999-2000), Focus on Human Dignity-A Plan of Action for Human Rights, chapter 4, Box 4.2, <https://www.regjeringen.no/nb/dokumenter/stmeld-nr-21-1999-2000-/id192704/> (last visited Aug. 1, 2016) (“[T]he recommendations and criticism of the monitoring committees are not legally binding, but they are given great weight by the Norwegian authorities. . . .”), [Overvåkningkomiteenes anbefalinger og kritikk er ikke rettslig bindende, men de blir tillagt stor vekt av norske myndigheter, og inngår som en viktig premis i et kontinuerlig arbeid for å sikre en lojal gjennomføring av menneskerettighetskonvensjonene].

35. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, ¶ 66 (Nov. 30).

36. U.N. Comm. On Econ., Soc. & Cultural Rights, Rep. on the Fifth Session, Supp. No. 3, Annex III, ¶ 10, U.N. Doc. E/1991/23 (1991).

37. *Gov. of the Republic of S. Afr. v. Grootboom and Others* 2001 (1) SA 46 (CC) at ¶ 33 (S. Afr.).

38. *Jones v. Ministry of Interior for Saudi Arabia* (2006) UKHL 26, [2007], 1 A.C. (HL) 270, ¶ 23 (appeal taken from Eng.) (U.K.).

39. *Id.* ¶ 56.

40. *Banković v. Belgium and others*, 2001-XII Eur. Ct. H.R. 335, ¶ 59.

wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.”<sup>41</sup> Although Strasbourg jurisprudence has taken many turns since *Banković*, this particular holding is still good law.

### B. Attribution and State/IO Responsibility

Human rights abuses caused by private Non-state Actors (NSAs) cannot be attributed to states or IOs unless they knowingly aided or abetted the NSA,<sup>42</sup> directed or controlled it,<sup>43</sup> or coerced it to that end.<sup>44</sup> None of these conditions obtain in either of the hypotheticals, so the European Union cannot be held responsible under either the *Nicaragua*<sup>45</sup> or the *Tadić*<sup>46</sup> tests. The *Commentary to the Maastricht Principles* argues that the principle in the *Trail Smelter Arbitration*<sup>47</sup> and the *Corfu Channel* case,<sup>48</sup> under which states have a general duty not to act in a way that causes harm outside their territory, should be extended to create liability for extraterritorial human rights violations.<sup>49</sup> For this to make sense, however,

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41. *Id.* ¶ 75.

42. See Rep. of the Int'l Law Comm'n to the G.A., Articles on the Responsibility of States, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, art. 16 (2001) *reprinted in* 2 Y.B. INT'L L. COMM'N 37 (2001), U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter ARS]; Rep. of the Int'l Law Comm'n to the G.A.: Articles on the Responsibility of International Organizations, U.N. GAOR, 66th Sess., Supp. No. 10, U.N. Doc. A/66/10, art. 14 (2011) *reprinted in* 2 Y.B. INT'L L. COMM'N 17, U.N. Doc. A/CN.4/L.778, annexed to G.A. Res. 66/100, U.N. Doc A/RES/66/100 (27 Feb. 2012) [hereinafter ARIO].

43. See ARS, art. 17; ARIO, art. 15.

44. See ARS, art. 18; ARIO, art. 16.

45. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep 14, ¶¶ 108, 115-16 (June 27) (setting out two tests for state responsibility: (1) where the actor is an *alter ego* of the state, or (2) where a specific operation was carried out within the control and instruction of the state).

46. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment of Appeals Chamber, 39-62 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999) (setting out an “overall control” test for state responsibility).

47. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1941) (holding that “under the principles of international law. . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein. . .”).

48. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. at 22 (Apr. 9) (grounding Albania's obligation to inform British ships about presence of mines on “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”).

49. See commentary to Principle 3, ¶ 9, in Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084, 1095-96 (2012) (finding that because “customary international law prohibits a state from allowing its territory to be used to cause damage on the territory of another state. . . [there is now] a duty for the state to respect and protect human rights extraterritorially”). See also *Loizidou v. Turkey*, App No. 15318/89, 23 Eur. H.R. Rep. 513, ¶ 62 (1995) (finding that states may be responsible for violations of international human rights treaty obligations where “acts of their authorities, whether per-

there must be a wrong to complain of, and to say that that wrong consists of a human rights violation, there must be a human rights relationship between a right-holder and a duty-bearer.<sup>50</sup> But that is precisely the question at hand. The *Maastricht Commentary* is premature, resulting in the human rights effects doctrine that was rejected in *Banković*. A better understanding of the *Trail Smelter/Corfu Channel* doctrine is that it pertains to liability for tortious injury *between states*.<sup>51</sup>

### C. General Jurisdiction under International Law

If compliance with international law is the heart of the matter, then measures to protect human rights extraterritorially might be prohibited, rather than just not required. The European Union would have no competence—much less an obligation—to protect the human rights of distant strangers, if that would result in interference with the sovereignty of other states. It is this consideration that makes geographical limits to the protections afforded by human rights treaties necessary, such that jurisdictional limits are to be implied even if the relevant document does not specify any, as was the case with the ICESCR in the *Wall* opinion.<sup>52</sup>

International law requires all state action to be based on at least one of the classical grounds of jurisdiction: namely territoriality, nationality, universality, or the protective principle. Outside of a massive humanitarian disaster causing hordes of refugees to pour into the European Union, it is difficult to imagine how the universality, passive personality, or protective principles could be invoked to justify measures to address foreign violations of socioeconomic rights like the right to food. (Precisely such a disaster is arguably taking place at the time of writing.) This leaves territoriality and nationality. Regarding the former, there is the effects doctrine, a variant of objective territorial jurisdiction. Its seminal expression was in *Alcoa*, where Judge Learned Hand deemed it “settled law . . . that any

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formed within or outside national boundaries. . . produce effects outside their own territory”).

50. Bartels, *supra* note 13, at 1082.

51. The “rights of other States” mentioned in *Corfu Channel*, (U.K. v. Alb.) 1949 I.C.J. at 22, include rights to their nationals not being subjected to non-physical abuse and humiliation. *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo), Compensation, 2012 I.C.J. Rep. 324, ¶ 18 (June 19). These however, are the State’s *own* rights. The State has full discretion as to whether to commence litigation on behalf of its national, which it may compromise or settle without consulting the national. If it wins reparations, it has no obligation to hand any of it to the national. See ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 17-18 (2009); *Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Spain), 1970 I.C.J. Rep. 3, 45 (Feb. 5) (“Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action.”).

52. Cf. Violeta Moreno-Lax & Cathryn Costello, *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS—A COMMENTARY* 1657, 1658 (Steve Peers et al. eds., 2014) (arguing that the EU Charter of Fundamental Rights does not have any “threshold jurisdictional criterion,” partly because it lacks an express jurisdictional clause).

State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends . . . .”<sup>53</sup> This offers no help to distant strangers, because the reprehended consequences are felt outside the EU’s borders. As for nationality, §403(1) of the *Third Restatement of Foreign Relations Law* provides that “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable” and two of the eight factors to be taken into account are “the extent to which another state may have an interest in regulating the activity”<sup>54</sup> and “the likelihood of conflict with regulation by another state.”<sup>55</sup> Also relevant is the principle of nonintervention enshrined in the U.N. Charter<sup>56</sup> and in the U.N. General Assembly declarations on Inadmissibility of Intervention in the Internal Affairs of States<sup>57</sup> and Friendly Relations.<sup>58</sup> In *Nicaragua*, the ICJ invoked these instruments to hold that the principle of nonintervention “forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States,” explaining that a “prohibited intervention must accordingly be one bearing on matters in which *each State is permitted . . . to decide freely . . .* Intervention is wrongful when it uses methods of coercion *in regard to such choices, which must remain free ones.*”<sup>59</sup> The European Union’s condemnation of Ruritania policy might influence Ruritania’s scope of action, but it does not take

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53. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir., 1945). The *Alcoa* doctrine has since been severely restricted by U.S. courts. *See* Foreign Trade Antitrust Improvement Act (FTAIA) of 1982, 15 U.S.C. §6a (stating territorial jurisdiction is established only where extraterritorial conduct has “direct, substantial, and reasonably foreseeable effect” on trade or commerce in the U.S.); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (limiting extraterritorial antitrust control to conduct that “was meant to produce and did in fact produce some *substantial* effect in the United States”) (emphasis added); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (stating customers in the United States cannot claim under the Sherman Act where affected by extraterritorial anticompetitive conduct giving rise to foreign effects completely independent of effects within the United States); *Morrison v. Nat’l Australia Bank*, 130 S. Ct. 2869 (2010) (restricting the application of U.S. securities law to securities traded on U.S. exchanges, and expanding the presumption against extraterritorial legislative intent); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1673-74 (2013) (finding the presumption against extraterritorial legislation precludes claims under Alien Tort Statute lacking sufficient connections with the United States).

54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(g) (AM. LAW INST. 1987).

55. *Id.* § 403(2)(h).

56. U.N. Charter art. 2, ¶ 7.

57. G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Dec. 21, 1965).

58. G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

59. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 205 (June 27) (emphasis added).

away Ruritania's ability to make choices.<sup>60</sup> What would, though, is if the Commission were to effectively "sign it up" to the ICESCR by regulating the merger for the benefit of Ruritarians.

#### D. Standing

Bartels includes a final, seemingly devastating point that severely curtails the meaningfulness of even the few limited obligations under the compliance reading. Article 263 of the TFEU provides that individual standing to bring judicial review arises only against EU acts (1) addressed to the applicant or of *direct and individual concern* to them, and (2) against regulatory acts of *direct concern* to the applicant and not entailing implementing measures. Numerous Advocates General have opined that many socioeconomic rights, and some civil and political rights, depend upon further specific implementation by states, and are therefore insufficiently unconditional and precise for direct effect.<sup>61</sup> Article 263 of the TFEU also limits judicial review to legislative acts or acts "intended to produce legal effects vis-à-vis third parties." Factual effects are not enough. In *Commune de Champagne*, the General Court invoked the principle of sovereign equality as found in Article 2(1) of the U.N. Charter and the then Article 299 of the TEC (now Article 355 of the TFEU), limiting the application of the Treaty on European Communities to the territory of the European Community, to find that "an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, cannot create rights and obligations outside the territory thus defined."<sup>62</sup> This means distant strangers can never meet the standing requirements to review an EU unilateral act on the basis of violations of their human rights extraterritorially, but will instead have to repose their hopes in EU institutions or member states who, as "privileged applicants," are not fettered by normal standing requirements.<sup>63</sup> Such privileged applicants, however, are unlikely to undertake litigation on behalf of distant strangers.<sup>64</sup>

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60. *Id.* ¶¶ 244-45.

61. *See, e.g.*, opinions of Advocate General Trstenjak in Case C-282/10, *Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, ¶105, 2014 ECLI:EU:C:2011:559; and Joined Cases C-350/06, *Gerhard Schultz-Hoff v. Deutsche Rentenversicherung Bund*, & C-520/06, *Stringer and others v. H.M. Revenue and Customs*, 2009 E.C.R. I-179, ¶¶ 37, 50 (stating the signatory EU member states had broad discretion with regard to the implementation of workers' rights created by treaty, thereby precluding direct effect); Case 236/87, *Bergemann v. Bundesanstalt für Arbeit*, 1988 E.C.R. 5132, ¶ 30 (Opinion of Advocate General Lenz) (finding Article 10 of the ICESCR "not sufficiently precise for it to be possible to deduce from them an obligation on the public authorities to take specific and concrete measures").

62. Case T-212/02, *Commune de Champagne v. Council*, 2007 E.C.R. II-2023, ¶¶ 89-90 (denying standing for individual Swiss applicants to challenge EU international agreement on basis of effects caused in Switzerland). *See also* Joined Cases T-108/07 & T-354/08, *Spira v. Comm'n.*, 2013 ECLI:EU:T:2013:367, ¶ 123 (finding Commission requests for information do not create legal rights and duties outside EU).

63. *See* Bartels, *supra* note 13, at 1088 n.89.

64. *Id.* at 1089.

It is submitted that the recent decision of the General Court in *Front Polisario v. Council*<sup>65</sup> does not alter the state of the law in this regard. In that case, the General Court annulled a Council decision adopting an Association Agreement between the European Union and Morocco, on the grounds that the Commission had failed to take into account the possibility that Morocco, as the occupying power in the Western Sahara, might exploit the natural resources there for its own benefit, rather than that of that of the inhabitants of the Western Sahara.<sup>66</sup> The Court reasoned that the Front Polisario, the national liberation movement in the Western Sahara, possessed personality under EU law,<sup>67</sup> and that its standing to challenge the association agreement arose from the fact that the association agreement purported to bind it despite being a non-party.<sup>68</sup> The Court only obliquely addressed the implications of the treaty for the rights of individual Sahrawis, and explicitly rejected the argument that the provisions prohibited the European Union from entering into an association agreement with Morocco, on grounds of human rights violations committed in the region by the latter.<sup>69</sup> An individual Sahrawi would likely not have had standing to challenge the association agreement.

In fact, the lack of standing for judicial review might not be such an insurmountable barrier.<sup>70</sup> The European Union's restrictive standing rules foreclose judicial review to most domestic plaintiffs as well, such that most EU litigation is brought by way of the preliminary reference from national courts rather than by direct action. Distant strangers might challenge EU measures in this way, particularly if they must first be implemented by the Member States. Nevertheless, Bartels' point is valid. The *Commune de Champagne* rule would foreclose judicial review in either of our hypothetical scenarios.

### III. AN UNUSUAL CONCEPTION OF INTERNATIONAL LAW

While much of the compliance reading is correct, this Article's disagreements lie primarily with the "international law" limb of Bartels' argument. If one focuses on what was done rather than said in *ATAA*, it becomes evident that the concept of "international law" to be complied with is a singularly peculiar one, allowing for geographically unbounded prescriptive jurisdiction. The paper demonstrates this *doctrinally*, by showing that the theory of jurisdiction expressed in *ATAA* is similar to the so-called "*Lotus* principle," and *analytically*, by showing that *ATAA* relied on

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65. Case T-512/12, *Front Polisario v. Council*, 2015 ECLI:EU:T:2015:953.

66. *Id.* ¶¶ 225-47.

67. *Id.* ¶¶ 52-54, 60.

68. *Id.* ¶¶ 94-111 (citing Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010 E.C.R. I-1289, ¶ 44).

69. *Id.* ¶¶ 143-48, 159-67.

70. Brian Libgober, *Can the EU be a Constitutional System Without Universal Access to Judicial Review*, 36 MICH. J. INT'L L. 353, 355 (2015) (arguing that rules of standing for EU judicial review are not particularly onerous compared to counterparts in individual Member States, particularly in the wake of the Lisbon Treaty changes).

a command rather than an inducement or threat. Thus, at least some EU measures create not just effects, but *legal* effects, overseas.

In *ATAA*, the CJEU upheld the legality of the EU Emissions Trading Scheme Directive,<sup>71</sup> which required all aircraft entering or leaving airports in the EU to offset their carbon emissions, even those made over foreign airspace or the high seas. The Court began by asserting a number of commonplaces, namely: the priority of international agreements over EU secondary legislation, that the European Union was bound by norms of customary international law (such as the freedom of the high seas and of airspace belonging to the jurisdiction of the territorial state underneath), and the general obligation of the EU to exercise its competences in light of the international legal requirements.<sup>72</sup> However, the Court proceeded to find the imposition of emissions fees over such airplanes in full accordance with treaty and customary international law.

The CJEU did not rely upon the nationality or protective principles, nor could it have: the whole point was to subject *foreign* airplane operators to the same burdens as European operators, and no security interests were involved. Territoriality was the sole reed that could have justified the Emissions Trading Directive, and the Court invoked it in a singular fashion. Jurisdiction was not premised upon the effects doctrine, as Advocate General Kokott urged in her opinion.<sup>73</sup> The effects doctrine is problematic in environmental law, because environmental effects are often neither territorially specific nor substantial enough to meet *de minimis* thresholds. Indeed, if effects upon the local environment alone could justify prescriptive jurisdiction, there would be no need for the planes to land in EU territory. The Commission could calculate each airline operator's global emissions and bill it accordingly.<sup>74</sup> In any case, *ATAA* was not so much about avoiding undesired effects as about advancing a policy goal: the European Union's "environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory . . ."<sup>75</sup> While the judgment mentions that the airplanes' extraterritorial conduct "contribut[ed] to the pollution of the air, sea or land territory of the Member States,"<sup>76</sup> this appears almost as an afterthought; the only necessary

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71. Air Trans. Ass'n of America, 2011 E.C.R., ¶¶ 156-57. See also Council Directive 2008/101, 2008 O.J. (L 8) 3 (EC) (amending Council Directive 2003/87, 2009 O.J. (L 8) 3 (EC)).

72. Case C-366/10, Air Trans. Ass'n of America, 2011 E.C.R., ¶¶ 50, 101, 123.

73. Opinion of Advocate General Kokott, Case C-366/10, Air Transp. Ass'n of America, 2011 E.C.R., ¶ 154.

74. Geert De Baere & Cedric Ryngaert, *The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Policy*, 18 EUR. FOREIGN AFF. REV. 389, 401 (2013). See Lorand Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, 23 EUR. J. INT'L L. 429, 459 (2012).

75. Case C-366/10, Air Trans. Ass'n of America, 2011 E.C.R., ¶ 128. The international agreements in question are the Framework Convention and the Kyoto Protocol.

76. *Id.* ¶ 129.



grounds for establishing jurisdiction over the aircraft was *presence* in EU territory. Instead, the Court held that the imposition of charges upon foreign airplanes for emissions made over the high seas or over third states offended neither the customary rules of territorial jurisdiction nor the sovereignty of third states over their airspace, because the charges were collected *after* the airplanes entered EU territory,<sup>77</sup> at which point they became subject to the “unlimited” jurisdiction of the EU and the relevant member state.<sup>78</sup> In any event, the European Union was held competent to specify the terms upon which commercial trade is carried on within EU territory, which could include a high level of protection for the environment.<sup>79</sup>

The reasoning in *ATAA* is reminiscent of a strategy described in F.A. Mann’s classic exposition of the concept of jurisdiction, whereby a regulating state maintains it is not in any way regulating matters extraterritorially but merely pronouncing upon the effect of foreign conduct domestically. Considering a hypothetical statute prohibiting marriages between persons below sixteen years of age intended to apply irrespective of nationality, domicile, or residence, Mann declared that “[s]uch legislation doubtless constitute[d] an excess of jurisdiction.”<sup>80</sup> In an earlier piece, Bartels developed on Mann’s insight to advocate the following test for extraterritoriality: “The first step is to define legislation as ‘extraterritorial’ according to the *legal* connection between the legislation and the extraterritorial subject-matter; the second is to ask whether this amounts to a denial of opportunities normally open to the person against whom enforcement is directed.”<sup>81</sup> Note that for Bartels, a “legal connection” is not the same thing as a legal effect: in his view, “a measure defined by something located or occurring abroad should be considered just as extraterritorial as a measure specifically mandating or forbidding conduct abroad.”<sup>82</sup> It suffices for the measure to be “directed” at, or “*made applicable* to conduct abroad in a relevant sense.” Thus, tariffs and subsidies are territorial, while Process and Production Methods (PPM) measures—that is, measures which restrict entry to foreign goods on the basis of the manner in which they were produced abroad—are extraterritorial.<sup>83</sup> The Emissions Trading Directive was directed at foreign airplane operators, because it

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77. *Id.* ¶¶ 124-26.

78. *See id.* ¶¶ 124-25. At ¶ 124, the CJEU speaks of both the EU and the relevant Member State having unlimited jurisdiction over the aircraft, while ¶ 125 speaks only of the EU.

79. *Id.* ¶ 128 (citing TFEU art. 191(2)).

80. F.A. MANN, *THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW* 11 (1964).

81. Lorand Bartels, *Article XX of the GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 *J. WORLD TRADE* 353, 381 (2002) (internal quotations omitted). *See generally id.* at 381-86.

82. *Id.* at 381 (citing *Lepre v. Lepre* [1963] 2 WLR 735 (Eng.)) (disregarding for excess of jurisdiction a Maltese decree voiding all marriages by Roman Catholic Maltese citizens not conducted according to Catholic rites); discussed by MANN, *supra* note 80, at 12.

83. *Id.* at 381-82.

turned on conduct abroad, and, had it come into effect, would have resulted in a reduction of the opportunities those operators had enjoyed before. As such, the supposed authority for interpreting Article 3(5) of the TEU as mandating compliance with international law is itself difficult to reconcile<sup>84</sup> with Bartels' own extremely respectable interpretation of it.<sup>85</sup>

#### A. *Lotus and the Spatial Scope of EU Law*

In their commentary upon the *ATAA* decision, Geert De Baere and Cedric Ryngaert consider the reference to *Poulsen and Diva Navigation* (involving the application on the high seas of Regulation 3094/86,<sup>86</sup> prohibiting the fishing of salmon and sea trout), rather than the language about "unlimited" jurisdiction over airplanes in EU territory, as revealing the Court's real rationale behind the justification for the extraterritorial emissions charges. In *Poulsen*, the ECJ upheld the application of that environmental protection measure over the high seas through a similarly expansive claim of prescriptive jurisdiction.<sup>87</sup> Accordingly, De Baere and Ryngaert suggest that the CJEU in *ATAA* was proposing a "novel ground of jurisdiction [aiming] at the protection of global public goods that are insufficiently protected by international solutions," whereby

individual States or regional groupings such as the EU should be allowed to 'go it alone', provided that the global public goods which they protect are laid down in international instruments with a global reach (whether or not they are binding, such as the Kyoto Protocol), and provided that a territorial link with the regulator can be discerned.<sup>88</sup>

Evidently, there is much more taking place than compliance with existing international law. However, De Baere and Ryngaert perhaps track the facts of *ATAA* too closely. By the phrase "in particular," the Court implies

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84. See Eyal Benvenisti, *Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?* (GlobalTrust Working Paper Series No. 02/2013), [http://globaltrust.tau.ac.il/wp-content/uploads/2013/03/Legislating\\_for\\_Humanity\\_WPS-2-13-ISSN.pdf](http://globaltrust.tau.ac.il/wp-content/uploads/2013/03/Legislating_for_Humanity_WPS-2-13-ISSN.pdf) (observing that the CJEU's notion of sovereignty "which does not recognize any limits to the prescriptive jurisdiction of the European states is incompatible with basic principles of international law on state jurisdiction").

85. For a view similar to Bartels', see *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 264-65 (2010) (looking to the "focus" or the "solicitude" of a particular statute in assessing whether it had an extraterritorial purpose).

86. Council Regulation 3094/86, 1986 O.J. (L 288) 1.

87. Case C-286/90, *Anklagemyndigheden v. Poulsen and Diva Navigation*, 1992 E.C.R. I-06019, ¶¶ 28-29, 34.

88. De Baere & Ryngaert, *supra* note 74, at 401. See also Benvenisti, *supra* note 84, at 12-13 (regarding *ATAA* as an example of an emerging trend in international law recognizing unilateral jurisdiction to provide global public goods); Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1, 19-20 (2014) (viewing the EU's inclusion of international flights in the Emissions Trading Directive as involving "a redefinition of the jurisdictional limits on extraterritorial action, or at least a 'territorial extension' in response to transboundary challenges") (citations omitted).

that the goods sought to be protected need not necessarily be desirable according to established international consensus. The European Union has enforced purportedly universal rules “before the relevant international standards have entered into force, when the international standards are in a form that is not binding, and where they have been ratified by only a small number of states.”<sup>89</sup>

Nor is the *ATAA* theory of jurisdiction restricted to furthering benign purposes, such as environmental protection or human rights. Scott claims that *ATAA* expresses a new theory of territorial jurisdiction termed “territorial extension,” which she distinguishes from impermissible extraterritoriality. In her view, a measure is extraterritorial if it “imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state,” while territorial extension obtains when “application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad.”<sup>90</sup> She argues that the European Union only rarely asserts extraterritorial jurisdiction, but that it often resorts to territorial extension, finding examples in the regulatory domains of climate change, environment, maritime transport, air transport, financial services, and competition.<sup>91</sup>

While De Baere, Ryngaert, and Scott all consider *ATAA* as a new development in international law, it is actually reminiscent of the “*Lotus* principle” enunciated in certain dicta by the Permanent Court of International Justice (PCIJ) in *Lotus*, the oldest and perhaps only full exposition of the concept of jurisdiction by an international court.<sup>92</sup> As is well known, the PCIJ held in *Lotus* that Turkey could exercise criminal jurisdiction over a French national in connection with a collision between a French steamship and a Turkish vessel in the high seas that resulted in the deaths of eight Turkish nationals. The official grounds of the PCIJ decision relied upon the technical reason that a vessel, as was the law at the time, constituted part of the territory of its flag state.<sup>93</sup> However, in an *obiter* passage,

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89. Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 112 (2014) (citing Commission Regulation 391/2009, 2009 O.J. (L 131) 11 [hereinafter *Class Societies Regulation*], regulating ship inspection and survey organizations engaged in ensuring the safety of maritime transport, by providing certificates attesting to a particular vessel’s seaworthiness and general compliance with relevant international maritime safety and marine pollution conventions). Such bodies can operate in the European Union only if recognized by the European Union and authorized by a member state. The European Union’s grant of recognition is conditional upon compliance worldwide with EU standards on ship safety and environmental protection, even on non-EU flagged ships outside of EU territory. These standards and their scope of application exceed those set out in international instruments currently being negotiated within the framework of the International Maritime Organization. *See id.* at 101-02, 111-13.

90. *Id.* at 89-90. Scott’s phrase “imposes obligations” is problematic. As will be demonstrated in Section III(B), certain examples she characterizes as extraterritorial never actually impose “obligations” *per se*.

91. *Id.* at 95-96.

92. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sep. 27).

93. *Id.* at 25. The facts are recited at 10-12.

the PCIJ laid out for the first time the distinction between enforcement and prescriptive jurisdiction, observing that, whereas sovereign states were prohibited from exercising their enforcement jurisdiction upon the territory of any other state absent an affirmative rule of international law, the opposite applied for prescriptive jurisdiction: sovereign states are free to assert prescriptive jurisdiction outside their territory in the absence of a prohibitive rule. The Court's exact words were:

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.<sup>94</sup>

As is well known, however, the *Lotus* principle is very widely disparaged. Mann deemed it “a most unfortunate and retrograde theory . . . [which] cannot claim to be good law,”<sup>95</sup> while Judge Fitzmaurice in *Barcelona Traction* read *Lotus* restrictively as merely stating a presumption in favor of the validity of claims of prescriptive jurisdiction.<sup>96</sup> Ryngaert points to how jurisdictional principles in comparative criminal law have evolved to recognize a prohibition on extending a state's prescriptive jurisdiction beyond its physical borders, in a “scathing indictment” of “the *Lotus*-like jurisdictional merry-go-round with States doing whatever they like . . . .”<sup>97</sup> Instead, “[u]nder the customary international law of jurisdiction, as historically developed, extraterritorial prescriptive jurisdiction is arguably prohibited in the absence of a permissive rule.”<sup>98</sup>

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94. *Id.* at 18-19.

95. MANN, *supra* note 80, at 35. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 77 (1994); A.V. LOWE, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 263 (1981).

96. *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. Rep. 3, 105 (Feb. 5) (separate opinion by Fitzmaurice, J.) (observing that while “[i]t is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters . . . It does however (a) postulate the existence of limits . . .”). See also *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. Rep. 37, ¶ 4 (Feb. 14) (separate opinion by Guillaume, J.) (observing that “classic international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad. But as the Permanent Court stated, once again in the ‘*Lotus*’ case, the exercise of that jurisdiction is not without its limits”) (citations omitted).

97. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 34 (2d ed., 2015).

98. De Baere & Ryngaert, *supra* note 74, at 35.

Given the intensely controversial nature of *Lotus*-style assertions of prescriptive authority, one cannot expect it to be admitted openly.<sup>99</sup> The CJEU is assisted in this regard by the fact that its judgments are written by committee in an oracular fashion, masking each judge's individual views. However, some clues to what transpires in at least some of the judges' minds might be discerned from the opinions of the Advocates General, whose goal is to convince a majority of the bench. In this light, consider the reliance upon *Lotus* by Advocate General Jääskinen in his opinion in *United Kingdom v. Parliament and Council*, where the United Kingdom sought to annul the cap on bankers' bonuses imposed by Directive (EU) 2013/36. In its application, the United Kingdom urged the "compliance" reading of Article 3(5) of the TEU, arguing that to "the extent that Article 94(1)(g) [of the Directive] is required to be applied to employees of institutions outside the EEA, it infringes Article 3(5) TEU and the principle of territoriality found in customary international law."<sup>100</sup> Advocate General Jääskinen opined that the United Kingdom "would simply be wrong if it sought to claim that only territorial jurisdiction to legislate is permitted under international law,"<sup>101</sup> because the *Lotus* decision could be "relied on in the determination of a State's or other comparable subject's jurisdiction to prescribe, in other words to subject facts and conduct to the scope of application of its legislation, in contradistinction with the jurisdiction to enforce its power in any form in the territory of another State."<sup>102</sup> Advocate General Jääskinen then recommended the dismissal of the United Kingdom's argument, saying that "there can be no violation of Article 3(5) TEU because no such principle of international law against extraterritoriality . . . exists."<sup>103</sup>

Thus, the compliance reading might indeed be correct in understanding the provisions as primarily mandating compliance with international law. The catch, however, is that the kind of international law to be complied with entails particularly expansive ideas about prescriptive jurisdiction.<sup>104</sup>

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99. See Benvenisti, *supra* note 84, at 12 (observing that the aims of *ATAA* can "be read only between the lines and with great effort").

100. Case C-507/13, *United Kingdom v. Parliament and Council*, Application of United Kingdom, 359 O.J. C 4, 6th plea (Sept. 20, 2013). The U.K. withdrew its application before the CJEU rendered judgment.

101. Case C-507/13, *United Kingdom v. Parliament and Council*, EU:C:2014:2394, ¶ 38 (Nov. 20, 2014) (opinion of Advocate General Jääskinen).

102. *Id.* ¶ 37 (citing Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 & 125/85 to 129/85, *Ahlström Osakeyhtiö and Others v. Comm'n (Wood Pulp I)*, 1988 E.C.R. 5193, ¶¶ 27-30 (May 25, 1988) (opinion of Advocate General Darmon)).

103. *Id.* ¶ 41.

104. In fact, this vision of international law and prescriptive jurisdiction might strike even its proponents as preposterous. Both Advocates General Darmon and Jääskinen betray some half-heartedness by even asking whether *Lotus* was 'still sailing,' and the CJEU in *ATAA* cited *Lotus* only in support of a technical point about the law of the sea. Case 366/10, *Air Trans. Ass'n of America*, 2011 E.C.R., ¶ 104.

B. *Power, Authority, and the Nature of 'Territorial Extension'*

There is an ambiguity in the PCIJ's language about "exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad."<sup>105</sup> What does it mean for an exercise of jurisdiction to "relate to acts abroad"? The relation between the measure and the overseas conduct may be one of influence, incentivization, or manipulation—a relation of *power*. Alternatively, the measure may purport to *govern* conduct abroad, by directly telling persons there what to do: a relation of *authority*. This subsection demonstrates analytically that the exercise of jurisdiction involved in territorial extension sometimes entails not just an exercise of power, but a claim of authority.

While a complete treatment of this most ancient and intractable controversy is beyond the scope of this paper, something of the distinction drawn here between power and authority is captured in H.L.A. Hart's distinction between being ordered to hand over one's money by a gunman and being commanded to do so by an official.<sup>106</sup> The results of non-cooperation may be similar or identical in both cases, but we tend to say you are "obliged" by the gunman's order but "obligated" by the official's command. Only the latter utterance implies a *binding* of your will.

One might be led from this to think that power and authority were entirely separate things. Such a view is most often ascribed to Hannah Arendt, who differentiated authority from "coercion by force" and also from "persuasion through arguments," on the grounds that, "where force is used, authority itself has failed . . . [w]here arguments are used, authority is left in abeyance."<sup>107</sup> On this view, "authority" comes from a semi-mystical realm outside of ordinary politics, such as a religious cult, tradition, or a mixture of both. The same idea is echoed by Hart, whose account springs from secondary rules of recognition that reflect an "attitude of shared acceptance"<sup>108</sup> by the members of the legal community of the criteria by which they can recognize the primary rules of obligation binding upon them. Hartian secondary rules do not themselves deal with coercion.

Contrary to Arendt and Hart, this paper assumes that authority is not separate from power, but a very specific *type* of it. It seems strange to say that an act of punishment by a parent of a child or of a criminal by the State in any way detracts from or diminishes the parent's or state's authority.<sup>109</sup> Instead, it reinforces and problematizes it. Indeed, it is not the phe-

105. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 27).

106. See H.L.A. HART, *THE CONCEPT OF LAW*, ch. 2 (2d ed., 1994). For a similar approach to illustrating the difference between power and authority, see EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* 3 (2011).

107. HANNAH ARENDT, *What is Authority?*, in *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 91, 92-93 (1961).

108. HART, *supra* note 106, at 102.

109. Arendt acknowledges that her concept of authority no longer exists, having disappeared with the advent of modernity, which she identifies with Machiavelli. ARENDT, *supra* note 107, at 136-39.

nomenon of authority, but violence or coercion that is the fundamental problem of all legal and political theory. Ronald Dworkin's objection to positivist accounts of law built upon the social acceptance of standards without reference to their moral implications, arises from the fact that those standards serve to channel and direct violence.<sup>110</sup> Law's intimate connection with violence requires such social standards to be morally defensible, so legal philosophy is therefore necessarily a department of moral inquiry. However, the connection between morality and law is not direct. As Arthur Ripstein observes, the lawyer does not begin by asking the philosopher's question of "how people *ought* to treat each other," but by asking "the distinctly political question of how they may legitimately be *forced* to treat each other."<sup>111</sup> Therefore, political authority is necessarily a *kind* of power: "a kind of capability to *do* something."<sup>112</sup> Crucially however, it also entails a normative element: it is a "normative power to change another's normative relations."<sup>113</sup> Authority has two components: prescription and enforcement. It is the claim of a dual entitlement to "tell you what to do, and to force you to do as you are told."<sup>114</sup>

Of course, it may often be difficult to determine whether particular instances are of power or authority: consider the recommendations of the informal Basel Committee on banking regulation, or a parking ticket issued by a privatized traffic police force. However, the twin criteria of prescription and enforcement serve as useful markers. Political authority differs both from "soft power" wielded by private corporations and standard-setting organizations, and from non-practical forms of authority wielded by experts. Although there may be significant overlap in prac-

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110. RONALD DWORKIN, *LAW'S EMPIRE* 93 (1986)

Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.

111. Arthur Ripstein, *Authority and Coercion*, 32 *PHIL. & PUB. AFFS.* 2, 6 (2004).

112. NICOLE ROUGHAN, *AUTHORITIES: CONFLICTS, COOPERATION, AND TRANSNATIONAL LEGAL THEORY* 19 (2013).

113. Scott J. Shapiro, *Authority*, in *OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 398 (Jules Coleman et al. eds., 2002). See also JOSEPH RAZ, *THE AUTHORITY OF LAW* 17-18 (1979) (defining normative power as the ability to change "protected reasons," comprising "both a reason for an action and an [exclusionary] reason for disregarding reasons against it." The homely example Raz uses for illustrating this point is of a father overruling a mother's instruction to their son to wear a certain coat when going out at night. The fact the father is able to do so, means he has authority in the family).

114. Ripstein, *supra* note 111, at 2. Of course, the making of commands is only one aspect of governing—authorities also create/modify legal rights and duties, i.e. by making rules governing the drafting of contracts, wills, etc. Authority therefore includes not just the entitlement to tell you what to do, but also how to go about in doing the things you want to do. For the sake of brevity, the phrase 'tell you what to do' in the rest of this work should be understood to include the entitlement to create legal capacities.

tice—experts may be appointed to high office, or private standards given force of law by legislation—the pronouncements, standards, and recommendations of experts and informal bodies cannot in and of themselves amount to practical authority, because no one is *obligated* thereby.<sup>115</sup> An exercise of ordinary power, be it influence, manipulation, or outright violence, does not include a claim that the subject has a moral duty to obey. An assertion of political authority, however, does.<sup>116</sup> Compliance with standards set by informal or private organizations can only be for prudential reasons; one may lose access to certain markets if one declines to comply. Thus, one may be “obliged,” but never “obligated,” to follow those standards. As for epistemic authority, there may be good reason to follow expert advice. However, the expected response to expertise or “epistemic authority” is *deference*, implying choice, and therefore an equality of status between the giver and the recipient. As Nicole Roughan observes, “my doctor knows far more about medicine than I do, but decisions about my treatment are ultimately mine to make, not hers.”<sup>117</sup> The imperatives of epistemic authority are of *belief*: an expert’s credentials provide reasons to believe her advice is wise. In contrast, subjects of practical authorities, such as children vis-à-vis their parents, are expected not to defer, but to *obey*.<sup>118</sup>

With this in mind, it may be taken as given that the European Union as the world’s largest trading bloc wields considerable power in the wider world. Anu Bradford describes a “Brussels Effect,” whereby EU regulatory regimes set global standards in a way resulting in a “race to the top” rather than to the bottom.<sup>119</sup> There are extensive political science litera-

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115. ROUGHAN, *supra* note 112, at 20.

116. Joseph Raz, *Authority and Justification*, in *AUTHORITY* 115, 116 (Joseph Raz ed., 1990) (“The exercise of coercive or any other form of power is no exercise of authority unless it includes an appeal to compliance by the person(s) subject to the authority. That is why authority is typically exercised by giving instructions of one kind or another. But appeal to compliance makes sense precisely because it is an invocation of the duty to obey.”); *id.* at 118 (“Having de facto authority is not just having an ability to influence people. It is coupled with a claim that those people are bound to obey.”).

117. ROUGHAN, *supra* note 112, at 20.

118. *Id.* at 109

Authority relationships exist where one institution or person is subject to the authority of another, while relations of deference can arise between institutions and persons who are not in authority relations, not indeed in any sort of hierarchical relationship. Deference entails that an agent who defers has the capacity and the normative power to decide for herself; she simply chooses not to. This seems to be a necessary characteristic of deference to distinguish it from obedience: if you have legitimate authority over me, my obligation is to obey, not to defer.

119. Anu Bradford, *The Brussels Effect*, 107 *Nw. U. L. REV.* 1, 4, 8 (2012). See also Graham Greenleaf, *The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108*, 2 *INT’L DATA PRIVACY L.* 68, 76 (2012) (suggesting “a strong inference that European privacy standards have been, either directly or indirectly, influential [as an impetus for adopting internet data privacy laws] in all of these [twenty-nine] Latin American, Asian, African, and Australasian countries”).



tures on “Normative Power Europe”<sup>120</sup> and “Market power Europe,”<sup>121</sup> both of which agree the European Union wields tremendous power in the world, even as they disagree about the kinds of power and the motivations behind it. The task at hand, however, is to demonstrate whether something more is involved. Contrast the European Union’s method of asserting jurisdiction with the WTO Appellate Body’s jurisprudence on PPMs, upheld in principle by the Appellate Body even if the actual measures so far have been struck down for lack of consultation with other WTO Members.<sup>122</sup> As discussed above, PPMs raise the issue of extraterritoriality because by focusing on the manufacturing process, they purportedly regulate production in the exporting state rather than the effects of products in the importing state.<sup>123</sup> Scott asserts that the technique of “territorial extension” is supported by the PPM jurisprudence of the WTO Appellate Body, thereby suggesting that it is either an accepted or emerging theory of territorial jurisdiction.<sup>124</sup>

This Article submits that there is a subtle but crucial difference between PPMs and territorial extension. The typical PPM aims to achieve its objective by placing conditions upon the entry of the product into the jurisdiction, such as by banning it, taxing it, or excluding it from public procurement schemes.<sup>125</sup> It never actually *demand*s any conduct outside the regulating state: all it does is regulate conduct within the borders in a manner that incentivizes, induces, or manipulates individuals into doing something overseas. It affects to say, “By all means carry on as you please, if you think yourself tough enough to survive being denied access to our markets.” As an importer, such measures may interfere—perhaps severely—with your individual purposes, but they do not affect your purposiveness, that is, your ability to set your own ends. The same logic inspires the effects doctrine. As a producer, you can do whatever you want outside

120. Ian Manners, *Normative Power Europe: A Contradiction in Terms?* 40 J. COMMON MKT. STUD. 235 (2002).

121. Chad Damro, *Market power Europe*, 19 J. EUR. PUB. POL’Y 682 (2012).

122. Much of this jurisprudence involved regulatory measures aimed at advancing environmental goals. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 121, 133, 159, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *Shrimp/Turtle* Appellate Body Report]; Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996); Panel Report, *United States—Taxes on Automobiles* (not adopted), GATT Doc. DS31/R (adopted Sept. 30, 1994); Panel Report, *United States—Restrictions on the Imports of Tuna* (not adopted), GATT Doc. DS29/R (adopted May 20, 1994); Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R - 39S/206 (adopted Feb. 7, 1992); Panel Report, *United States—Restrictions on the Imports of Tuna* (not adopted), GATT Doc. DS21/R (adopted Aug. 16, 1991).

123. See Bartels, *supra* note 81, at 381-86; Laurens Ankersmit et al., *Diverging EU and WTO perspectives on extraterritorial process regulation*, 21 MINN. J. INT’L L. 14, 14 (2012).

124. Scott, *supra* note 89, at 115-16; see RYNGAERT, *supra* note 97, at 97-98.

125. Gareth Davies, *International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism*, 13 GERMAN L.J. 1203, 1208 (2012). Note, it is entirely possible a PPM might be devised directly mandating conduct abroad, for instance by imposing a simple fine.

the borders, even if it is incredibly destructive to humanity as a whole—you are perfectly entitled to your pound of flesh. The only objection is to your causing direct, substantial, and reasonably foreseeable effects within the borders. You are thus “obliged,” rather than “obligated,” to amend your conduct overseas. If you can find a way of doing what you are currently doing overseas, but in a manner that does not cause these effects locally, you are again free to carry on. Thus, neither PPMs nor the effects doctrine actually ever *bind* you extraterritorially; they merely “change the world in which you act,” rendering your means unsuitable for the purposes you originally intended.<sup>126</sup> Though the regulating state wields *power* over the producer extraterritorially, it does so by exercising its *authority*—its entitlement to create legal rights and duties—only within its borders, as it is unquestionably entitled to do in the absence of contrary agreement.

Territorial extension, at least as exemplified by *ATAA*, is different. The emissions trading scheme did not simply incentivize, manipulate, or induce the foreign airplanes to offset their overseas carbon emissions; it *demand*ed it. Certainly, the Emissions Trading Directive was not enforced while the airplanes were overflying foreign territories or the high seas, and airplane operators could have avoided its application by choosing not to enter the European Union. However, that is where the similarities end. The directive was not an *exclusionary* tool like a tariff. No Member State would have used its discretion in implementing the Directive to scramble fighter jets to prevent a noncompliant airplane from entering its airspace, or to instruct its airport control towers to deny them landing permission. Instead, such planes would have been allowed to land and take off as per normal. The competent Member State authorities would simply have sent a bill to the operator’s head office, with a threat of execution upon assets in the event of non-payment. Moreover, the scheme applied to foreign airplanes *leaving* the European Union as well. In fact, this issue was specifically litigated in *ATAA*: the Court dismissed the argument that the scheme was a tax, duty, fee or charge imposed on the fuel load in violation of the Open Skies Agreement,<sup>127</sup> holding that by its very nature the emissions trading scheme was a “market-based measure” which, if used prudently, might even turn a profit for the airline operators.<sup>128</sup> In short, territorial extension, at least as applied in *ATAA*, implies a command to do something abroad, enforceable upon establishing presence in the European Union, obligating individuals, foreign and domestic, regardless of borders. Whereas the rationale behind “typical” PPMs is one of influencing overseas conduct by threatening *exclusion* from the market, territorial extension treats overseas conduct as taking place within the domestic mar-

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126. ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 41 (2010). For a similar argument about trade restrictions, see Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 *IND. J. LEG. STUD.* 605, 623 (2013).

127. Case C-366/10, *Air Trans. Ass'n of America*, 2011 E.C.R., ¶ 21 (citing US-EU Open Skies Agreement, art. 11, 2007 O.J. (L 134)).

128. *Id.* ¶¶ 142-45.

ket, thereby *including* it within the scope of the regulatory competence. The same logic animates *Google Spain*, where the foreign parent corporation was simply included in the scope of application of the EU Data Protection Directive, on the basis of its Spanish subsidiary.<sup>129</sup> It provides another line of case law, traceable to *ICI v. Commission*, where the CJEU adopted the “single economic entity” test, whereby the presence of an undertaking in the European Union sufficed to extend jurisdiction over its affiliates and subsidiaries all over the world, such that conduct restricting competition within the common market because of the activities of subsidiaries could be imputed to the parent companies.<sup>130</sup> As an early and perceptive piece in these pages observed:

In the domestic U.S. paradigm, the role of boundaries is one of *delimitation*. The power of a court goes to the state’s boundaries, not beyond them. . . . By contrast, the role of state boundaries in the international European paradigm is one of *allocation*: the locus of an event or a party defines the place that has jurisdiction in a multilateral fashion.<sup>131</sup>

Certainly, both the typical PPM and territorial extension work on the principle that “if you want to benefit from our market, you must do it on our terms.”<sup>132</sup> The question, however, is about the *content* of those terms. The typical PPM demands conduct only within the territory, even if the objective is to influence behavior outside it. In contrast, under territorial extension, the terms can span the entire world to govern conduct outside of EU territory directly.

The most striking examples of this attitude are found in the CJEU’s extraterritorial competition decisions. Unlike the General Court,<sup>133</sup> the CJEU has never relied upon the effects doctrine in competition cases. The leading case is *Wood Pulp I*, which involved an international cartel coordinating the prices of wood pulp being sold into the European Union. The Court rejected pleas by both the Commission and the Advocate General for the adoption of the effects doctrine, holding instead that the “decisive factor . . . is the place where the [anti-competitive agreement] is implemented.”<sup>134</sup> Now, if the European Union’s ability to create legal effects—

129. Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 2014 ECLI:EU:C:2014:317, ¶¶ 48-56.

130. Case 48/69, *Imperial Chem. Indus., Ltd. v. Comm’n of European Commodities*, 1972 E.C.R. 619, ¶¶ 132-35.

131. Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1058 (2005-06). Note, Michaels discusses jurisdiction to adjudicate private disputes, rather than prescriptive jurisdiction.

132. Suzanne Kingston, *Territoriality in EU (taxation) law: A sacred principle, or dépassé?* 17 UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 06, 2015, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2585994](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585994).

133. See Case T-102/96, *Gencor v. Lonrho*, 1999 E.C.R. II-753, ¶ 90.

134. Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 & 125/85 to 129/85, *Ahlström Osakeyhtiö and Others v. Comm’n (Wood Pulp I)*, 1988 E.C.R., ¶ 16. See generally *id.* ¶¶ 11-

that is, to *govern*—really stopped at its borders, the appropriate response in *Wood Pulp I* would have been to regulate the quarterly price announcements occurring inside EU territory, not the cartel activity outside. Instead, we find that the activity of announcing prices is of no concern to the regulator, merely the presence established in order to implement such activity is important. Presence qua implementation is enough to govern behavior all over the world. The General Court's subsequent jurisprudence confirms this. In *Gencor v. Lonrho*, the General Court held that the requirement of foreseeable immediate and substantial effect could be satisfied by the mere sale of product into the European Union, irrespective of the location of the source of production.<sup>135</sup> This was confirmed in *Intel*, where the General Court firstly clarified that the *Wood Pulp I* "implementation" test and the *Gencor* "qualified effects doctrine" were alternative, rather than cumulative, requirements, and reiterated that for the former test it was not necessary for there to be direct sales into the European Union.<sup>136</sup> Again, the logic is of transitory presence in the European Union giving rise to authority to prescribe norms *governing* conduct all over the world.

Effectively, these considerations mean that the rule in *Commune de Champagne*—that is, that the European Union cannot create legal effects outside its territory—might be incorrect. In fact, *Commune de Champagne* may even be contradicted on point by prior CJEU jurisprudence. In *Boukhalfa*, the CJEU rejected a claim by Germany that EU fundamental freedoms could not be claimed by a Belgian national employed as a member of the local staff at the Belgian embassy in Algiers, under a contract subject to Algerian law. The CJEU rejected Germany's argument that the then Article 227 of the TEC<sup>137</sup> limited the application of the EU Treaties to the territory of the Member States, holding instead that the "article does not . . . preclude Community rules from having effects outside the territory of the Community."<sup>138</sup> It is also telling that the General Court

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18 (finding that although the sources of wood pulp were located outside the EU, the fact that the undertakings concerned competed for custom within it meant they were engaging in competition within the EU, such that the application of EU competition regulation to them was a valid exercise of jurisdiction under the territoriality principle). The prohibition against anticompetitive agreements requires such agreements to have as its object or effect the restriction of competition within the Common Market. However, effects are a criterion for merger regulation, not a basis for jurisdiction. *See id.* ¶ 2.

135. Case T-102/96, *Gencor*, 1999 E.C.R. II-753, ¶ 87. *See also* Case T-91/11, *InnoLux Corp. v. Comm'n*, 2014 ECLI:EU:T:2014:92, ¶ 63.

136. Case T-286/09, *Intel Corp. v. Comm'n*, 2014 ECLI:EU:T:2014:547, ¶¶ 231-44.

137. This was the same provision interpreted by the General Court in *Commune de Champagne*. 'Article 227 EC' is the numbering in the Treaty of Maastricht (1992) and the Treaty of Rome (1957), while 'Article 299 EC' is its numbering in the Treaty of Nice (2001).

138. Case C-214/94, *Ingrid Boukhalfa v. Fed. Republic of Ger.*, 1996 E.C.R. I-2253, ¶ 14. The effects concerned here are clearly legal effects. *Id.* ¶ 15 ("[T]he Court has consistently held that provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community.").

cited neither *Commune de Champagne* nor Articles 25 of the TEU and 355 of the TFEU in its recent *Polisario* decision. Properly interpreted, that provision, as well as its heirs in Articles 25 of the TEU and 355 of the TFEU, does not place geographical limits upon EU law, but specifies the High Contracting Parties bound by it.<sup>139</sup>

These considerations reveal a unique dimension to territorial extension. Whereas territorial states induce events in the external world through influence or manipulation, territorial extension—at least sometimes<sup>140</sup>—involves direct authority. Thus, one must reject both Scott's claim that territorial extension measures are not extraterritorial because there is some territorial connection with the regulating state, as well as Bartels' argument that a measure is extraterritorial if it is "directed" at, or "made applicable to conduct abroad," or even if it is intended to affect persons or conduct overseas. Territorial extension does not just *affect* conduct abroad; it potentially *governs* it. Scott's argument assumes that the place of enforcement is the crucial factor in determining whether a measure is extraterritorial, when it is actually prescription that matters. It is the act of prescription, not enforcement, that modifies your legal position; by the time a norm is being enforced against you, your legal rights and duties should ideally already have been determined. Enforcement is merely the final act in the piece.

With respect to Bartels, there is in principle no difference between tariffs, subsidies, or interest rate hikes on the one hand, and measures such as PPMs or sanctions explicitly defined by conduct or events overseas on the other: both simply *affect* people abroad. They cannot be distinguished on the basis of their "focus" or "solicitude"—agricultural subsidies are carefully calibrated by teams of economists and statisticians to erode the comparative advantage of foreign farmers by precise amounts. Thus, the real concern about PPMs is not that they regulate extraterritorial activity,<sup>141</sup> but that they may upset an agreement between state parties to open

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139. Moreno-Lax & Costello, *supra* note 52, at 1664.

140. Certain examples provided by Scott operate on the same 'exclusionary' logic of the typical PPM. See, e.g., the Class Societies Regulation, *supra* note 89.

141. Ankersmit et al., *supra* note 123, at 24 (because PPMs merely "incentivize, but do not mandate, certain behavior in other states, it is not clear to what extent they should be considered truly 'extraterritorial'"); JASON POTTS, THE LEGALITY OF PPMs UNDER THE GATT: CHALLENGES AND OPPORTUNITIES FOR SUSTAINABLE TRADE POLICY 5-6 (2008), [https://www.iisd.org/pdf/2008/ppms\\_gatt.pdf](https://www.iisd.org/pdf/2008/ppms_gatt.pdf)

[I]t is unclear how a PPM measure (or any other measure implemented through a government's legitimate authority) can be said to "infringe" upon the national sovereignty of its trading partners. If the implementation of PPM-based policy restricts access to a particular market, then it remains within the authority of the foreign jurisdiction to decide whether or not it wants to access that market. Policies that restrict market access are viable instruments under international law precisely *because* they don't infringe upon national sovereignty.

up their domestic markets to each other except in certain specified instances.<sup>142</sup>

The correct test for whether a measure engages in extraterritorial jurisdiction is to ask, “where are you when you are being told what to do?” If the answer is “somewhere overseas,” then it constitutes extraterritorial jurisdiction. This test takes seriously both the words “extraterritorial” and “jurisdiction”—the latter means “speaking the law.”<sup>143</sup> On this reading, the Emissions Trading Directive, as well as a great deal of the European Union’s competition and financial regulation, is emphatically extraterritorial. The European Union regularly claims authority all over the world, and has always done so.

#### IV. AUTHORITY AND HUMAN RIGHTS OBLIGATIONS

Human rights both constrain and justify political authority. Where the European Union claims geographically unbounded authority to prescribe laws governing conduct, it has perfect and enforceable human rights obligations towards distant strangers governed thereby, including positive obligations to protect and fulfill. It is also important for the argument of this paper that human rights obligations arise *only* from claims of authority, and never from exercises of mere power, no matter how devastating. Such an account may strike readers as incredibly austere and restrictive of human rights protections. This, however, is not necessarily the case. It is much easier for a political institution to find itself claiming authority than one thinks. On the other hand, power-based theories linking human rights obligations to factual effects either risk ruining the practice of human rights by pitting it against the values of democracy and self-determination, or unjustifiably limit obligations by making them contingent on the factual ability to effect changes in individuals’ material well-being.

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142. *Shrimp/Turtle* Appellate Body Report, *supra* note 122, ¶ 159.

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members. . . so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.

Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14, ¶ 276 (June 27) (“A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation.”); *id.* ¶ 88 (“Trade is not a duty of a State under general international law but may only be a duty imposed by a treaty.”) (Oda, J., dissenting).

143. See Bartolus de Sassoferrato’s definition of jurisdiction as the “power to punish or fix the limits of the laws over the terrified place.” CEDRIC RYNGAERT, *UNILATERAL JURISDICTION AND GLOBAL VALUES* 65 (2015) (citing STUART ELDEN, *THE BIRTH OF TERRITORY* 222 (2013); Bartolus in *Digest*, L.16.239, in *Opera*, 8:699); MANN, *supra* note 80, at 13 (“Jurisdiction is concerned with the State’s right of *regulation* or, in the incomparably pithy language of Mr. Justice Holmes, with the right ‘to apply the law to the acts of men.’”) (citing *Wedding v. Mayler*, 192 U.S. 573, 584 (1904); *Central Railroad v. Jersey City*, 209 U.S. 473, 479 (1908)).

The argument in this section takes two routes. The first, mentioned in passing, is an argument in EU law proceeding from the principles of consistency and coherence in Article 21(3) of the TEU. The second and more important argument proceeds directly from international human rights law, and claims that “human rights jurisdiction” arises if, and *only* if, a political institution asserts political authority. First, however, it would be useful to provide a brief description of the theory of human rights animating this paper.

A. *Choice, Interest, and Human Rights as Public Fiduciary Law*

As noted in the introduction, the paper justifies the practice of human rights from an understanding of dignity as *autonomy*, or the simple idea that no person is subject to the will of another. Such a view is generally contrasted against a conception of dignity as *wellbeing*: the enjoyment of certain basic material “interests” such as security and subsistence that are necessary for human flourishing.<sup>144</sup> The view of dignity-as-autonomy recognizes urgent interests as important, but not fundamentally so, because they are not fundamentally distinctive about persons. Instead, the feature that separates persons from “things” is that they have lives of their own, such that they are able to set their own purposes. This is often described as the “choice” theory of rights, because it views rights as stemming from the capacity of persons to choose their own ends, rather than from their having urgent needs.<sup>145</sup>

From this premise, it follows that there can be just three kinds of legal relationships, or sets of rights and obligations legitimately enforced by coercion: tortious, contractual, and fiduciary.<sup>146</sup> The reasoning may be summarized as follows: A thing is an entity that may be both possessed and used at the same time; if the dignity of persons resides in not being treated as things, this means simply that they cannot be possessed and used at the same time. Thus, persons may first possess or use things in pursuit of their purposes. This is the structure of tort and property rights. Second, persons may *use* other persons, as long as they do not also possess them. This is the structure of contractual rights, which are rights to the consensually granted *deeds* of others. Your employer gets to use you and your skills for her ends, but you can always quit. Third, persons may sometimes tell you what to do, by deciding for you. Your attorney’s decision to accept a settlement offer, or your agent’s decision to accept a delivery both *bind* you. However, if others *possess* you in this way, they may not also use you. Whatever decisions they make in respect of you must be for your benefit, not theirs. Thus, you may legitimately be subject to the decisions of others,

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144. See WILLIAM EDMUNDSON, AN INTRODUCTION TO RIGHTS, ch. 7 (2d ed., 2012) (comparing choice and interest theories of rights).

145. See generally RIPSTEIN, *supra* note 126, ch. 2 on the “The Innate Right of Humanity.”

146. Ripstein, *supra* note 111, at 19 (triangulating rights in terms of possession and use).

but never to their necessitating choice. This last category describes the structure of fiduciary relations.

The same fiduciary principles apply to relations of political authority.<sup>147</sup> In private fiduciary relationships, the beneficiary always needs the trustee in order to access the property that is hers; she cannot exercise her rights on her own.<sup>148</sup> The same is true of authority. Civil government administers our moral rights and duties for us and on our behalf, akin to a trustee administering property for a beneficiary. We have rights, say, not to be assaulted, and obligations, say, not to defraud others. The securing of these rights however, cannot be done privately,<sup>149</sup> but, instead, requires the setting up of civil government to enforce them in a systematic fashion, creating positive law on the basis of each individual's equal political status within the political community. Thus, authority is not just compatible with freedom, but *necessary* for it. Authoritative orders are binding because, by complying, you manifest your freedom to set your own purposes; you act according to a law you can give to yourself. The private fiduciary law is provided to ensure private fiduciary relations do not degenerate into exploitation. Similarly, human rights are the principles of public law by which persons ensure their relations with their political authorities do not degenerate into domination. They are the *legal* means by which individual subject-beneficiaries can hold their public fiduciary to account.<sup>150</sup>

Conceiving human rights as law governing the fiduciary relationship between subject persons and public authorities is preferable to viewing

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147. See *id.* at 17-18; RIPSTEIN, *supra* note 126, ch. 7. The difference between a private fiduciary and the state as a 'public' fiduciary is that the state cannot act through individual unilateral decisions, but only through *law* made, interpreted, and enforced publicly and systematically as an expression of an 'omnilateral' will. See also PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 8 (1999) ("The commonwealth or republican position. . . sees the people as trustor, both individually and collectively, and sees the state as trustee: in particular, it sees the people as trusting the state to ensure a dispensation of non-arbitrary rule.").

148. See FOX-DECENT, *supra* note 106, at 44-46 (setting out and summarizing the Kantian argument for parental authority over a child as arising from the child's right to their parents' care, which in turn arises out of parents' unilaterally having brought the child into the world).

149. Under Kantian theory, rights are impossible in a state of nature because "(e)ach person is entitled to act on his own judgment . . . not in the sense that each can rightfully act in bad faith, but because there is nothing else on which anyone could act." Ripstein, *supra* note 111, at 29. See RIPSTEIN, *supra* note 126, ch. 6.

150. Evan Fox-Decent, *From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment through a Fiduciary Prism*, in *FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST* 253, 256 (Ken Coghill et al. eds., 2013)

According to Kant, all persons have an innate right to as much freedom as can be reconciled with the freedom of everyone else. The purpose of law on this account is to honour the dignity of all persons by enshrining legal rights within a regime of secure and equal freedom, such that no person can unilaterally impose terms of interaction on others. Within Kant's regime of secure and equal freedom, fiduciary obligations ensure that those who possess and exercise unilateral administrative powers over others' legal or practical interests are precluded from denying others' innate right to equal freedom through domination or instrumentalization.



them as “tort-like.” Whereas tortious rights are “horizontal” claims against other equal private persons, human rights are resolutely “vertical,” in that they imply obligations on the part of political institutions *in their own right*, and not derivatively on behalf of individuals.<sup>151</sup> This is why states and political institutions are the primary addressees of human rights claims,<sup>152</sup> which in turn means that human rights are in fact constitutional rights.<sup>153</sup> Recall how it perennially has to be explained that the right to food is not a right to be fed, but that food be available and accessible.<sup>154</sup> The same is true of civil and political rights. The human right against torture is not a right not to be tortured by anyone *per se*. Rather, it is a right to a reasonable social guarantee against being tortured. It is not in and of itself a human rights violation for your neighbor to take you into her dungeon and waterboard you. Instead, it is a crime or a tort, and should be posited, interpreted, and enforced accordingly. A human rights violation obtains only if these are wanting. Ultimately, human rights do not respond to private moral failures; to be a victim of a human rights violation, your entire society must fail you.

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HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 50 (1945, reprinted in 2013)

[T]he sovereign national State . . . is not an end unto itself but the trustee of the welfare and of the final purpose of man. In that scheme of things it would be for international society to ensure the fulfilment of that trust through a fundamental enactment—an International Bill of the Rights of Man—conceived, not as a declaration of principles, but as part of positive law, as part of the constitutional law both of States and of the society of States at large.

151. See Samantha Besson, *The allocation of anti-poverty rights duties*, in POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM 408, 417 (Krista Nadakavukaren Schefer ed., 2014). However, Besson argues that private individuals have ‘residual’ or ‘subsidiary’ duties under human rights, these arise only before civil government has come into being or after it has collapsed. *Id.* at 417, 421. The argument presented here disagrees, holding instead that human rights are fully institutional.

152. See, e.g., CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 13-15, 109 (2009) (arguing that “[h]uman rights apply in the first instance to the political institutions of states”).

153. See Johan Karlsson Schaffer, *The point of the practice of human rights: International concern or domestic empowerment?* (Feb. 13, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2564514](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564514) (last visited Aug. 1, 2016); Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT’L L. 749 (2008); *Loizidou v. Turkey*, 23 Eur. H.R. Rep. ¶ 75 (describing the ECHR “as a constitutional instrument of European public order (*ordre public*)”).

154. See, e.g., Katarina Tomaševski, *Human Rights Indicators: The Right to Food as a Test Case*, in THE RIGHT TO FOOD 111, 148 (Philip Alston & Katarina Tomaševski eds., 1984) (“ . . . common sense would plead against a ‘right to be fed’, as the very term implies a humiliation of those who are being fed.”); Robert E. Robertson, *The Right to Food-Canada’s Broken Covenant*, 6 CAN. HUM. RTS. Y.B. 185, 188 (1989-1990) (“ . . . the right to food is not synonymous with the right to be fed, for that implies an unhealthy dependence upon others.”); Office of the High Commissioner for Human Rights, *The Right to Adequate Food: Fact Sheet No. 34*, 3 (Apr. 10, 2010) <http://www.ohchr.org/Documents/Publications/Fact-Sheet34en.pdf> (last visited Aug. 1, 2016) (listing under “Common misconceptions about the right to food” a heading entitled “The right to food is NOT the same as a right to be fed”).

The vast bulk of human and constitutional rights practice denies direct horizontal effect against private actors, preferring instead 'indirect' application through the private or criminal law.<sup>155</sup> There are, of course, a few jurisdictions where constitutional rights are directly enforceable against private actors,<sup>156</sup> but these provisions have given rise to very little jurisprudence.<sup>157</sup> The fiduciary nature of human rights is also demonstrated by the remedies awarded. In tort relationships, the plaintiff and the defendant were originally strangers to one another, and would have remained strangers, had it not been for the defendant's tort. A damages award seeks to restore this original estrangement.<sup>158</sup> In contrast, fiduciary remedies presume a unity between the trustee and the beneficiary, such that the trustee is also *accountable*, and not just liable as if to a stranger.<sup>159</sup> As was perhaps best expressed by Nugent JA of the South African Court of Appeal:

Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional

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155. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding that although private individuals are free to include racially restrictive covenants in property deeds, Fourteenth Amendment Equal Protection Clause forbids governments from enforcing them); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (finding the First Amendment protects newspapers from being sued for libel in state courts for making false defamatory statements about official conduct of public officials, unless made with malice or reckless disregard for truth.); *Retail, Wholesale, & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (Can.) (finding rights in Canadian Charter of Fundamental Rights and Freedoms do not invalidate rules of judge-made common law at issue in private litigation. Courts must nevertheless apply and develop the principles of the common law in a manner consistent with Charter values, thereby leaving some room for the indirect horizontal effect of Charter rights.)

156. See, e.g., Art. 43. CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); Ghana Const. art. 12(1); Malawi Const. § 15(1).

157. See Aoife Nolan,  *Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland*, 12 INT'L CONST. L. 61, 65, 88, *passim* (2014) (observing the general dearth of jurisprudence finding horizontal human rights); Stuart Woolman, *The Amazing, Vanishing Bill of Rights*, 124 S. AFR. L.J. 762, 763 (2007) (observing the Constitutional Court's "persistent refusal to engage in the direct application of the Bill of Rights" despite the explicit grant in Section 8(2) of the South African Constitution). The Constitutional Court has held rights to have direct horizontality in only two out of the many thousands of cases it has disposed of: *Khumalo v. Holomisa*, 2002 (5) SA 401 (CC) at ¶ 33 (S. Afr.) ("[T]he right to freedom of expression is of direct horizontal application."); *Juma Masjid Primary School v. Ahmed Asruff Essay N.O.*, 2011 (29) BCLR 10 (CC) at ¶ 60 (S. Afr.) (holding a private landowner had "a negative constitutional obligation not to impair the [students'] right to a basic education" by evicting their school).

158. See ANDREW BURROWS, *UNDERSTANDING THE LAW OF OBLIGATIONS* 10-11 (1998). See also Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1965 (2007) ("The core idea is that tort law protects people in the means that they already happen to have. One person wrongs another by either depriving him of means that he has at his disposal, or using means that belong to him in ways that he has not authorized.")

159. See, e.g., *Speight v. Gaunt*, [1883] 22 Ch. D. 727, 739 (Eng.) ("[O]n general principles a trustee ought to conduct the business of the trust in the same manner than an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation . . .").

duty to protect rights in the Bill of Rights in my view the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account.<sup>160</sup>

This reasoning also animates Article 41 of the ECHR, which provides for “just satisfaction” to victims of human rights violation only in extraordinary circumstances.<sup>161</sup>

The “public fiduciary law” conception of human rights is preferable to those by John Rawls and Charles Beitz depicting human rights primarily as reasons for interference in other political communities.<sup>162</sup> Characterizing human rights this way tends to restrict human rights to rights against the most egregious conduct, such as torture and genocide, and to deny that socioeconomic rights, women’s rights, and rights to political participation, constitute human rights proper, even though they make up a great deal of the practice.<sup>163</sup> In contrast, the authority-based theory avoids these diffi-

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160. See *Minister of Safety and Security v. Van Duivenboden*, 2002 (6) SA (SCA) 431, ¶ 21 (S. Afr.). See also *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (finding constitutional damages unavailable where “any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding damages remedy,” and even if so, if there are “any special factors counselling hesitation before authorizing a new kind of federal litigation”); *R (Greenfield) v. Secretary of State for the Home Department* [2005] UKHL 14 (HL), ¶ 19 (Lord Bingham of Cornhill) (appeal taken from Eng.) (U.K.) (holding that the Human Rights Act 1998 “is not a tort statute” and that “[i]ts objects are different and broader.”); *Chief Constable of Hertfordshire v. Van Colle*, [2008] UKHL 50, [2009] 1 A.C. 225 (HL), ¶ 138 (Lord Brown of Eaton-under-Heywood) (appeal taken from Eng.) (U.K.) (“Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights.”).

161. See *Golder v. United Kingdom*, 1 Eur. H.R. Rep. 524 (1979), ¶ 46 (holding it “not necessary to afford the applicant any just satisfaction other than that resulting from the finding of a violation of his rights”); *Dudgeon v. United Kingdom* (Art. 50), 5 Eur. H.R. Rep. 573, ¶ 18 (1983) (holding that changes in Northern Irish legislation prompted by the merits decision constituted sufficient remedy, obviating the need for pecuniary damages); *Case of OAO Neftyanaya Kompaniya Yukos v. Russia* (Just Satisfaction), App. No. 14902/04, Eur. Ct. H.R., ¶ 51 (2014), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145730&filename=001-145730.pdf> (last visited Aug. 1, 2016) (awarding EUR 1.9 billion for pecuniary damages, but holding unanimously that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company).

162. See, e.g., JOHN RAWLS, *LAW OF PEOPLES: WITH THE IDEA OF PUBLIC REASON REVISITED* 79 (2001) (§10.2: “Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy.”); BEITZ, *supra* note 152, at 8 (human rights practice “consists of a set of norms that regulate the behavior of states together with a set of modes or strategies of action for which violations of the norms may count as reasons”).

163. See Schaffer, *supra* note 153, at 10.

culties by designating the protection of equal freedom within political communities as the primary point and purpose of human rights. Moreover, while Beitz' and Rawls' accounts generally paint human rights as tools of international relations, the "public fiduciary law" theory illuminates the importance of human rights at the domestic level as *law*, the single most valuable development in the history of the human rights movement.<sup>164</sup>

The authority-based account therefore situates human rights neatly alongside the other two liberal ideals of the rule of law and democracy, as expressed in Article 21 of the TEU. More appealingly, it provides a picture of human rights, the rule of law, and democracy as integrated and mutually supporting, rather than as incompatible goods that must be traded off against each other. However, it sits very uneasily with a central orthodoxy of the human rights movement: that individuals have human rights purely by virtue of being human.<sup>165</sup> Instead, human rights depend upon the possession of a particular status: being a subject of authority. In this regard, this Article recalls Hannah Arendt's declaration that that human beings are naked outside of the state, and that it is membership in a political community that renders meaningful the "right to have rights."<sup>166</sup> As shall shortly be demonstrated, this too is a central feature of the European human rights tradition.<sup>167</sup> What this Article calls "Arendt's loophole" obtains when the individual never came within the scope of a duty-bearer's authority in the first place.

At this point, both a complication and a warning must be introduced. First the complication: the conception of human rights described here faces two kinds of competitors. The first are those conceptions of human rights as responding to *power*, like causes of action in tort.<sup>168</sup> To reiterate,

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164. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 121 (2009) (legalization serves the function of "making it clearer just what compliance [with human rights obligations] requires"); Jack Donnelly, *The Virtues of Legalization*, in *THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW* 67, 74 (Saladin Meckled-Garcia & Başak Çali eds., 2006) ("[T]he law, largely independent of its substance, has a certain authority and normative force . . . the critical leverage provided by legal authority can be of real significance, especially in the long run."). See also Schaffer, *supra* note 153, at 18.

165. See, e.g., Charles Beitz, *Human Rights and the Law of Peoples*, in *THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY* 193, 196 (Deen K. Chatterjee ed., 2004) (referring to this as the "orthodox" view of human rights); A JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 185 (2001) (" . . . *human* rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity . . . Human rights are those natural rights that are innate and that cannot be lost (that is, that cannot be given away, forfeited, or taken away).").

166. Hannah Arendt, *The Decline of the Nation State and the End of the Rights of Man*, in *THE ORIGINS OF TOTALITARIANISM* (2nd ed., Meridian Books 1958) (1951).

167. See ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* 171-389 (2010) (detailing the ECHR's origins in a "collective pact against totalitarianism").

168. See, e.g., Christian Reus-Smit, *Human rights in a global ecumene*, 87 INT'L AFF. 1205, 1210 (2011) (depicting human rights as 'power mediators' that "materially weak actors

human rights respond to *authority*. However, it is also ranged against those conceptions which understand human rights as responding to authority, but authority as described from “interest” theories of rights. There are many surface resemblances between this Article’s arguments and that of the interest-theoreticians, including the conception of political authority as denoting fiduciary obligation.<sup>169</sup> For this reason, this Article takes issue mostly with the first set of competitors, while borrowing generously from the latter. In particular, this Article is indebted to Samantha Besson’s account of human rights jurisdiction, which relies upon an interest-based definition of human rights but “ties them to the exercise of political and legal authority.”<sup>170</sup>

Next, the warning: it is crucial to keep in mind the difference between two distinct uses of the word “authority”—“authority to perform actions,” or authorization, and “authority over persons” which in turn gives rise to a distinction between *de jure* and *de facto* authority. *De jure* authority pertains to the sense in which acts by officials belonging to institutions governed by a legal framework are carried out with authority. It is therefore a combination of “authority to perform certain acts” and “authority over persons.”<sup>171</sup> In contrast, *de facto* authority consists solely of authority over persons. It need not be valid in terms of its pedigree. A judge who issues an injunction improperly does so without legal authorization, but you are nonetheless bound by it until it is discharged. Despite having no legal authorization, the judge has acted *as if she does*. In this sense we say *ultra*

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can invoke to alter the power relationship between themselves and materially preponderant political agents or institutions, usually sovereign states”).

169. See e.g., JOSEPH RAZ, *MORALITY OF FREEDOM* 5 (1986) (“[Governments] do not have a legitimate interest of their own. The only interest a government is entitled to pursue is that of its subjects.”); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013) (arguing, on Grotian and Lockean interest-based theories, that such fiduciary duties are owed not just to subjects, but to all humanity).

170. Besson, *supra* note 31, at 860-61. Besson subscribes to a ‘protected’ interest theory of human rights, whereby “a human right exists *qua* moral *right* when an interest is a sufficient ground or reason to hold someone else (the duty-bearer) under a (categorical and exclusionary) duty to respect that interest against certain standard threats vis-à-vis the right-holder.” Samantha Besson, *The Egalitarian Dimension of Human Rights*, ARCHIV FÜR SOZIAL-UND RECHTSPHILOSOPHIE BEIHEFT 19, 33 (2012). However, she also observes that “[w]hat is inviolable is not the interest . . . but the fact that everyone without exclusion ought to benefit from its protection and hence from the right to have rights that protect it.” *Id.* at 36. While a detailed critique of Besson is beyond the scope of this paper, it is submitted that rights do not intermedicate between interests and obligations, but are conceptually prior to interests. An “interest” can *never* be a “sufficient reason” to impose obligations (that is, a duty enforceable by violence) upon others. Only a *right* can do that. Interests are *weighty* only if one has a right to their satisfaction, and that obtains only if it is necessary for autonomy. See ARTHUR RIPSTEIN, *PRIVATE WRONGS* 68-73 (2016) (draft manuscript on file with author) (criticizing “protected interest” theories of rights in private law).

171. RAZ, *supra* note 113, at 19. See also FOX-DECENT, *supra* note 106, at 90-91 (defining ‘*de facto* sovereignty’ as the “brute ability to govern through effective institutions” and ‘*de jure* sovereignty’ as “the state’s authority to do so”, the latter further separating into *legal* and *political* bases of sovereignty).

*vires* acts are nevertheless carried out “under color of law.” De facto authorities do not simply “exert naked power (e.g. through terrorizing a population or manipulating it) . . . [but] act. . . under the guise of legitimacy.”<sup>172</sup> The necessary and sufficient condition for human rights obligations is “authority over persons,” not “authority to perform actions.” Human rights law prevents political institutions from treating the human beings they assert de facto political authority over as de jure outsiders, thereby denying them the right to have rights. They may not be heard to disclaim their responsibility on municipal legal grounds. The “supply-side” of authority is irrelevant.

### B. *The Article 21(3) TEU Principle of Consistency/Coherence*

To recall Section I, the principle of consistency or coherence blurs the line between the European Union’s external and internal policies: the Lisbon Treaty “[singles] out consistency as the guiding principle for EU action abroad and at home,” and “consistency of EU action is as important internally as externally.”<sup>173</sup> Consistency is understood as the mere “absence of contradictions, whereas coherence refers to positive connections,”<sup>174</sup> such that “consistency” is about not tripping over each other’s toes, while “coherence” evokes the idea of “joined-up governance.” Leonhard den Hertog and Simon Stroß find the principle of consistency or coherence to be not “well substantiated [as a] constitutional principle of EU law,” and that the “case law of the [CJEU] explicitly dealing with the principle is scarce and lacks concretization.”<sup>175</sup> Ester Herlin-Karnell and Theodore Konstantinidis try to identify why this is the case with respect to “vertical” consistency between individual member state and the European Union policy. They conclude that the CJEU’s vertical consistency jurisprudence is neither “value-driven, nor does it forge a constitutional interpretative tool in the Dworkinian sense of consistency as integrity [but] is instead tilting towards a ‘constitutional diktat’ based on the methodical

172. Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1005 (2006) (citations omitted).

173. Ester Herlin-Karnell, *The EU as a Promoter of Values and the European Global Project*, in *THE EUROPEAN UNION’S SHAPING OF THE INTERNATIONAL LEGAL ORDER* 89, 97 (Dmitry Kochenov & Fabian Amtenbrink eds., 2014). See also Marise Cremona, *Coherence in European Union foreign relations law*, in *EUROPEAN FOREIGN POLICY: LEGAL AND POLITICAL PERSPECTIVES* 55, 77 (Panos Koutrakos ed., 2011). Note, ‘coherence’ does not appear in the English language version of the Treaty of Lisbon, which speaks only of ‘consistency.’ However, the same concept is rendered in German as *Kohärenz*, in French as *cohérence*, and in Spanish as *coherencia*. See Leonhard den Hertog & Simon Stroß, *Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term*, 18 EUR. FOREIGN AFF. REV. 373, 375 (2013). This Article cannot comment on these linguistic matters.

174. GEERT DE BAERE, *CONSTITUTIONAL PRINCIPLES OF EU EXTERNAL RELATIONS* 251 (2008); See also Cremona, *supra* note 173, at 77; Christian Tietje, *The Concept of Coherence in the TEU and the CFSP*, 2 EUR. FOREIGN AFF. REV. 211, 212 (1997); Pascal Gauttier, *Horizontal Coherence and the External Competences of the European Union*, 10 EUR. L.J. 23, 40-41 (2004).

175. Hertog & Stroß, *supra* note 173, at 378.

application of coercive constitutional principles to justify EU competence and ensure the maximum effectiveness of EU law. . .”<sup>176</sup> As a result, the CJEU’s jurisprudence on the principle of coherence displays little more than an “adherence to a line of judgment and a certain mode of conduct which is historically crafted by definition and which is not attached to a clear political goal.”<sup>177</sup>

A thin, pragmatic conception about efficiency maximization is indeed incapable of giving much legal guidance.<sup>178</sup> However, the fact that the European Union asserts *authority* in the wider world requires us to revisit the concepts of consistency and coherence. Given that it is founded upon political values<sup>179</sup> rather than an imagined community, whatever reasons justify the authority of the European Union’s acts within its territory should also regulate its exercise outside of that territory. One may object that Article 3(1) of the TEU specifies the European Union’s purpose as to “promote peace, its values and the well-being of its peoples,” thereby apparently committing it to European Union citizens in a way that cannot be extended to distant strangers. This objection is unsupportable. Everything turns upon the meaning of “its peoples.” If and to the extent that the European Union asserts authority over distant strangers, they become constructive members of the European Union’s political community.<sup>180</sup>

### C. *An Authority-based Theory of Human Rights Jurisdiction*

As described in Section II(A), states and IOs bear responsibility only for the protection of human rights within their “state jurisdiction.” This Article argues that this term cannot be understood as a function of power, such as “capability” or “control” over territory, but only in terms of a political institution’s claims of political authority over persons. For three reasons, this Article relies on the case-law of the Strasbourg Court, rather than that of other bodies. First, because Article 6(2) of the TEU requires the European Union to accede to the ECHR, and because Article 6(3) of the TEU provides that the ECHR will constitute general principles of EU

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176. Ester Herlin-Karnell & Theodore Konstadinides, *The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration*, 15 CAMBRIDGE Y.B. EUR. LEGAL STUD. 139, 152 (2013).

177. *Id.* at 153.

178. For a recent demonstration of this proposition see Case T-512/12, *Polisario* ¶¶ 149-58 (rejecting the Front Polisario’s argument that the EU-Morocco Association Agreement violated the principle of consistency).

179. See TEU art. 2.

180. Samantha Besson, *Human rights and democracy in a global context: decoupling and recoupling*, 4 ETHICS & GLOBAL POL. 19, 23 (2011)

Human rights protect those interests tied to equal political membership and whose disrespect would be tantamount to treating them as outsiders. . . human rights work as political irritants and mechanisms of gradual inclusion that lead to the extension of the political franchise and in some cases of citizenship itself to new subjects in the community.

law alongside the “constitutional traditions common to the Member States,” the ECHR jurisprudence will have significant bearing upon the delineation of the scope of the EU provisions.<sup>181</sup> There is, it is submitted, a distinctly *European* tradition of human rights legal practice. Second, the ECHR jurisprudence is far more developed than any of its counterparts. Finally, the ECHR jurisprudence is broadly right.

If human rights obligations arise from relations of political authority and obedience, it follows that the fundamental criterion for human rights jurisdiction—the threshold to be met before a state or IO can have human rights obligations with respect to an individual—is a relationship of authority and obedience. Seeing it this way explains both the difference between the concepts of general jurisdiction and human rights jurisdiction,<sup>182</sup> as well as why they are related.<sup>183</sup> Ideally, governments make law only for their own citizens and residents, for which “territory” serves as shorthand. Thus, their human rights jurisdiction normally covers only their territory. However, states and IOs exceed these bounds from time to time: sometimes properly, as when they assert authority extraterritorially pursuant to a recognized ground of jurisdiction, and sometimes improperly, such as when they illegally invade and occupy other countries. Such claims of *de facto* authority are illegal and therefore lacking authorization, but must nevertheless be justified in the same way because they too are made under the guise of legitimacy.<sup>184</sup> In these exceptional situations, a state or IO’s human rights jurisdiction expands accordingly. Thus, the true measure of human rights jurisdiction is not the state or IO’s scope of authority under the rules of general jurisdiction at international law, but that claimed by the municipal legal order, whether validly or not.<sup>185</sup>

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181. See Bartels, *supra* note 13, at 1077.

182. See MILANOVIC, *supra* note 30, at 21-34 (arguing that the Strasbourg Court failed to grasp these differences in *Banković*).

183. The Strasbourg Court’s continues to insist that Article 1 ECHR ‘jurisdiction’ is primarily territorial, with extraterritorial application obtaining in exceptional cases. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. Ct. H.R. 589, ¶ 131 (2011).

184. Besson, *supra* note 31, at 870-71

[W]hen domestic-law jurisdiction is exercised outside domestic boundaries, it may sometimes overlap with jurisdiction under international law, albeit not necessarily. Domestic- and international-law jurisdiction. . . necessarily overlap to the extent that domestic law’s state jurisdiction is the object of jurisdiction under international law. The former includes the latter, but also cases of unlawful exercise of state jurisdiction under international law.

185. *Id.* at 870 (arguing that “the state jurisdiction at stake in Article 1 ECHR is clearly a matter of law, but it is a matter of domestic law and not of international law. . .”). See also MICHAŁ GONDEK, *THE REACH OF HUMAN RIGHTS IN A GLOBALIZING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 56-57 (2009) (observing that “a person may in certain circumstances be within the jurisdiction of a state party to a human rights treaty when he or she is outside state territory and an act of state affecting such person would not pass a test of what is legal under the international law of jurisdiction”).



In the following sections, we criticize two prominent arguments linking human rights obligations to power rather than authority. The first, by Yuval Shany, holds that they arise where an institution has the *capability* to meet demands made under the title of human rights. The second, by Marko Milanovic, claims that human rights are owed to all but limited by considerations of feasibility, which depends on the type of *control* the institution has.

### 1. Capability

As is well known, Strasbourg jurisprudence on human rights jurisdiction took many turns after *Banković*, culminating in *Al-Skeini*, in which the Court discarded two holdings of the *Banković* decision: (1) that for Article 1 of the ECHR jurisdiction to arise, the state party had to be able to protect all the rights specified in the Convention, rather than a “divided and tailored”<sup>186</sup> version of it, and (2) the ECHR applied only within the *espace juridique* of the Council of Europe, because the Convention was intended by its drafters to benefit only Europeans.<sup>187</sup> Instead, the Court held that human rights jurisdiction arose where there was (1) state agent authority and control over persons,<sup>188</sup> or (2) effective control over territory.<sup>189</sup> It then went on to find that the application fell within category (1), because

[F]ollowing the removal from power of the Ba’ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.<sup>190</sup>

Yuval Shany, a member of the HRC, argues in favor of a “capability” approach to human rights jurisdiction, on the grounds that *Al-Skeini* apparently mirrors the HRC’s jurisprudence on the same.<sup>191</sup> In *Lopez Bur-*

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186. *Banković v. Belgium and others*, 2001-XII Eur. Ct. H.R. 335, ¶ 75; *overruled by Al-Skeini*, 53 Eur. Ct. H.R. ¶ 137.

187. *Id.* ¶ 80.

188. *Al-Skeini*, 53 Eur. Ct. H.R. ¶¶ 133-37.

189. *Id.* ¶¶ 138-40.

190. *Id.* ¶ 149.

191. Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 L. & ETHICS HUM. RTS. 47, 54-60 (2013). *See*

*gos v. Uruguay*, which involved the kidnapping, detention, and torture of an Uruguayan national in Argentina by Uruguayan paramilitaries, the HRC found that “it would be unconscionable to . . . interpret responsibility under [the ICCPR] as to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”<sup>192</sup> This formula was adopted by the Strasbourg Court in the *Issa, Pad*, and *Isaak* line of cases,<sup>193</sup> where it held (albeit *obiter* in *Issa*, where it was alleged but not proved that Turkish soldiers had crossed over the border into Iraq and shot a number of shepherds), that “Article I of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”<sup>194</sup> Finally, Shany invokes *General Comment No. 31*—the “most authoritative summary to date of the HRC’s position on the extraterritorial application”<sup>195</sup>—where the HRC held that

[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. . . . This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.<sup>196</sup>

According to Shany, the abovementioned passage in *Al-Skeini* incorporates this HRC principle into ECHR jurisprudence. In reading that passage, he observes that

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*also* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 *ISR. L. REV.* 17, 71-76 (Spring 2003-2004) (arguing from HRC jurisprudence that individuals fall within a state’s human rights jurisdiction if the projection of that state’s power has potential impacts that are direct, significant, and foreseeable); JAMES PATTISON, *HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE?* 36-38, 182 (2010) (assigning human rights duties on the basis of capacity to achieve good consequences).

192. U.N. Hum. Rts. Comm., Sergio Rubén López Burgos v. Uru., U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981). *See also* U.N. Hum. Rts. Comm., Samuel Lichtensztein v. Uru., ¶ 6(1), U.N. Doc. Supp. No. 40 (A/38/40) (1983); U.N. Hum. Rts. Comm., Lilian Celiberti de Casariego v. Uru., U.N. Doc. Supp. No. 40 (A/36/40) at 185 (1981).

193. *Pad and others v. Turkey*, App. No. 60167/00, Eur. Ct. H.R., ¶ 54 (June 28, 2007); *Isaak v. Turkey*, App. No. 44587/98, Eur. Ct. H.R., ¶ 19 (Sept. 28, 2006), <http://hudoc.echr.coe.int/eng?i=001-87146>; *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R., ¶ 71 (2004), <http://hudoc.echr.coe.int/eng?i=001-67460>.

194. *Issa*, App. No. 31821/96, ¶ 71.

195. Shany, *supra* note 191, at 53.

196. U.N. Hum. Rts. Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004).

[I]t is perhaps interesting to note that the Court did not explicitly base its decision in this dispositive paragraph on the belligerent occupation of Basra by the Coalition forces . . . or on the legal obligations that ensued from this particular state of affairs. It did, instead, emphasize that the UK substituted in a functional sense the authority of the local Iraqi government. Put differently, the Court found that the UK was *both capable and particularly well situated to assume government responsibilities* vis-à-vis the population of Basra, including its obligations to protect their human rights.<sup>197</sup>

This, however, was precisely the proposition described in the English Court of Appeal as “utterly unreal.”<sup>198</sup> Indeed, if British governance in Southern Iraq was capable or well-situated, one may wonder if it is ever possible to be incapable or poorly-situated. Tellingly, the *Al-Skeini* formula is not the HRC’s “power and effective control,”<sup>199</sup> but “*authority and control*.”<sup>200</sup> A better reading of that passage indicates that uppermost in the Court’s mind was not the fact the Coalition forces were “capable” or “well-situated” to exercise governmental powers, but that they had actually done so: they “assumed” public powers, and “exercised” authority and control over the victims.<sup>201</sup> It was irrelevant whether they had the wherewithal to do it well.

Regarding theory, Shany deflects the foreseeable criticism that the capability approach imposes human rights obligations just because they *can* be imposed, countering instead that feasibility is just the first criterion.<sup>202</sup> In addition to being in a position where they are able to do so, it must either be shown that (1) the impact of the obligation not being imposed must be “direct, significant and foreseeable,” or (2) there must be a “legitimate expectation” that the state in question will intervene, arising from “special legal relations” between the state and the individual involved.<sup>203</sup> Additional criterion (1) is a requirement of urgency, which does indeed address the concern that human rights obligations are imposed too lightly. Unfortunately, it accomplishes this rather too well; the requirements of directness and significance reduce human rights obligations to humanitarian obligations, precluding less spectacular violations from redress. Moreover, the “special legal relationship” in additional criterion (2) is not a normative relationship, but one where the state is “particularly well-situ-

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197. Shany, *supra* note 191, at 60.

198. *Al-Skeini and Ors, R (on the application of) v. Sec. of State for Def.*, [2005] EWCA (Civ) 1609, ¶ 124, (Eng.) (per Brooke LJ).

199. *General Comment No. 31*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10.

200. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. Ct. H.R. 589, ¶ 149 (2011).

201. *Id.*

202. Shany, *supra* note 191, at 70.

203. *Id.* at 69-70.

ated to protect that said individual.”<sup>204</sup> It is, in effect, a higher capability threshold; a state must not only be capable of bearing extraterritorial human rights obligations, but also be “particularly well-situated.” If not for Shany’s peculiar notion thereof, this might again raise the concern that the amendments to the “capability” theory were unduly restrictive of a state’s extraterritorial human rights obligations.

Moreover, Shany’s notion of “legitimate” consists only of results or “output” legitimacy. However, human rights are deeply linked to “inputs” such as political institutions and processes:

[A] key dimension of human rights and human rights duties that tends to be downplayed by overlooking their supply-side is the political dimension of human rights and the importance of egalitarian and hence democratic decision-making on those complex moral issues of allocation of human rights obligations and responsibilities for human rights.<sup>205</sup>

This then undermines output legitimacy, because measures imposed from on high are unlikely to be internalized and may be abandoned lightly. Intervening purely on the basis of capability, even in urgent cases, would ride roughshod over the self-determination of distant strangers. This does not mean such interventions are never permitted or even obligatory, but it does mean that something more than mere capability is necessary. Thus, “legitimacy” requires an account of normativity, that is, of authority.

In this regard, the choice-based theory provides a more robust and non-consequentialist justification of the importance of self-determination than interest-based theories. If, as per interest theories, the point of political authority is to help individuals comply better with their moral duties to one another, and thereby protect their rights qua important interests in security and subsistence, then self-determination can presumably be overridden or “balanced” away if the intervening institution really does provide better protection against standard threats to the urgent interests supposedly grounding rights. This, however, is contrary to conventional intuitions. Few would consider another to have the right to make decisions for them purely on the basis of their being more capable or well-suited to do so. This intuition is also to be found in various legal regimes. A central tenet of the law of occupation is that sovereignty can never be alienated by military force, no matter how competent the occupant or incompetent the ousted government.<sup>206</sup> Interest-theories may attempt to account for this by postulating that successful interferences are highly unlikely, and ought therefore to be prohibited on a rule-utilitarian basis.<sup>207</sup> However much

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204. *Id.* at 69.

205. Besson, *supra* note 151, at 430.

206. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 6 (2012).

207. An instrumentalist argument may be extrapolated from Raz’s ‘normal justification thesis,’ postulating that the “normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him. . . if he accepts the directives of the alleged authority as authoritatively binding

history might appear to confirm this speculation, it cannot explain why this general rule should not be departed from in exceptional situations. Some occupying forces might genuinely be better at maintaining law and order than the indigenous government.

The intuition that an occupying force can never be fully legitimate can be accounted for if rights are understood as guarantees of autonomy rather than of well-being. The law recognizes this by designating wrongs rather than harms as its basic currency. There are many ways you can be harmed without being legally wronged (as if a person operates a competing business that drives you into destitution), and wronged without being harmed (as if someone enters your house without your permission but does not damage anything). Indeed, you may even be wronged by someone who confers benefits upon you, such as if someone breaks into your house to wash your dishes for you. This is because that person has used you or your property for a purpose set by her rather than by you.<sup>208</sup> Similarly, an occupier who does not harm or perhaps even advances the material interests of the inhabitants, nonetheless wrongs them formally. “Alien control renders a people vulnerable to the will of another state or agency and undermines the ability of the dominated people’s institutions to govern and represent their members. . . . Ultimately, alien control of a nation dominates the nation’s members as well as the nation’s collective legal personality.”<sup>209</sup> Human rights jurisdiction is therefore properly limited to situations involving actual exercises of authority, and not mere factual capability to improve material well-being.

## 2. Control

In an exhaustive study of numerous human rights treaties, but with an emphasis on the ECHR, Marko Milanovic concludes that the term “jurisdiction” in human rights treaties is best understood as “state control over territory, and perhaps individuals.”<sup>210</sup> From this premise, Milanovic constructs a model mirroring Bartels: negative obligations to respect are territorially unlimited, while positive obligations to protect and fulfill are

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and tries to follow them, rather than by trying to follow the reasons which apply to him directly.” RAZ, *supra* note 172, at 53-57. See also ROUGHAN, *supra* note 112, at 107-14 (arguing that Raz’s service conception of authority is indeterminate in situations of conflicting claims to authority, because competing authorities may advance different kinds of reasons that an individual should comply with).

208. See RIPSTEIN, *supra* note 170, at 49 n.29.

209. Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEG. THEORY 301, 333 (2009). See also Mortimer N. Sellers, *Republican Principles in International Law*, 11 CONN. J. INT’L L. 403, 416 (1996)

Self-governing nations provide a locus for establishing individual human rights. But too much emphasis on universal human rights may obscure the primary value of the nation, which lies in the continuity and large common projects that nations make possible over generations in the lives of their citizens. Human rights could be protected in a world republic, but collective identity could not.

210. MILANOVIC, *supra* note 30, at 262.

“limited to those areas that are under the state’s effective control.”<sup>211</sup> The logic appears simple and elegant: human rights are “universal,” that is, “direct and enforceable. . . vis-à-vis all individuals in the world” and it does not take much *not* to violate them. Accordingly, *Banković* is wrongly decided.<sup>212</sup> However, their protections must also be “effective,” which precludes “positive” obligations if one does not have a physical presence in the territory, or control over relevant persons.<sup>213</sup> To be sure, Milanovic does “not advocat[e] a strict separation between negative and positive obligations . . . [but] a separation between those positive obligations which require control over territory in order to be effective . . . and those obligations whose effectiveness depends only on the State’s control over its own agents.”<sup>214</sup> He postulates a class of exceptional positive human rights obligations applying extraterritorially, on the basis that all that is needed to ensure them is control over agents.

Thus, Milanovic provides a pragmatic compromise between competing policies of universality and effectiveness,<sup>215</sup> where what matters is the factual ability to achieve particular states of material well-being. He anticipates the authority-based theory of human rights jurisdiction, and argues that limiting human rights jurisdiction only to those instances where states act pursuant to some legal authorization “would open the door to abuse” by allowing them to get away with clandestine violations committed solely through brute power.<sup>216</sup> While

an exercise of a legal power or authority by a state over an individual outside its territory would suffice to satisfy the jurisdictional threshold . . . [*l*]imiting the personal model to such purported exercises of legal power . . . would be entirely arbitrary, and would only serve to undermine the rule of law by creating a perverse incentive for states to act outside their own legal system if they wish to violate human rights.<sup>217</sup>

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211. *Id.* at 263.

212. One might say that Milanovic offered his monograph as a passionate refutation of *Banković*. See, e.g., *id.* at 264 (“Let me conclude by saying that I certainly do not suffer from the naïve belief that my proposed model of extraterritorial application will be adopted any time soon. At least when it comes to Strasbourg, it requires a major departure from existing jurisprudence, above all from *Bankovic*.”).

213. See *id.* at 56 (arguing that appeals to universality and human dignity cannot “overcome the threshold criterion of state jurisdiction that is found in most human rights treaties. . . these provisions have a purpose—they limit the obligations of contracting states to those situations where these obligations could realistically be met and human rights effectively protected”).

214. *Id.* at 215-16.

215. *Id.* at 263 (describing his rule as providing “the benefit of clarity and predictability, [and] the best balance among its competitors between the conflicting demands of universality and effectiveness”). See *id.* Ch. 3 on “Policy Behind the Rule”.

216. *Id.* at 206-07.

217. *Id.* at 207.

This is precisely the misunderstanding warned about earlier, of equating “authority” solely with “authority to perform actions.” To reiterate, human rights obligations arise from “authority over persons,” *not* “authority to perform actions.”

A bigger issue concerns Milanovic’s distinction between the treatment of negative and positive obligations, the former being universal and the latter mostly limited to territory under effective control. If this is right, the EU can have no human rights obligations towards the distant strangers in either of the hypothetical situations described in the introduction. Of the exceptional category of positive obligations Milanovic deems as applying extraterritorially, the prime example are “prophylactic and procedural obligations” to investigate killings. This is explained as (1) because such obligations are closely connected to universally applicable negative obligations, and (2) because all that is required of the duty-bearer is control and knowledge of the actions of its own agents.<sup>218</sup> A state is not required to investigate an extraterritorial human rights violation in which its own agents did not participate at all, unless the act was committed in a territory under its effective control.<sup>219</sup> The obligation to investigate a killing arises from the possibility that it may have been committed by a State agent. Attribution is therefore key. While Milanovic distinguishes between attribution and human rights jurisdiction, and criticizes early Strasbourg cases for conflating them, prophylactic and procedural obligations to investigate constitute an exception where attribution is a prerequisite for jurisdiction.<sup>220</sup>

Despite his prediction that his was “the only model of state jurisdiction and extraterritorial application that is stable in the long run,”<sup>221</sup> the Strasbourg Court does not appear to have followed Milanovic’s prescriptions. *Banković* would still be decided the same way today, albeit reasoned differently, and this is unlikely to change.<sup>222</sup> While there was some reason to believe otherwise in the wake of the *Issa, Pad*, and *Isaak* line of cases,

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218. *Id.* at 212-16.

219. *See id.* at 217 (arguing that the “positive procedural” obligation to investigate killings would not obtain “were they done by third parties, be they insurgents or indeed the soldiers of an allied country. . . since they took place in an area outside its jurisdiction, and it would in fact be exceedingly difficult, if not impossible, for the [state party] to conduct an effective investigation without having control over the territory.”).

220. *Id.* at 51-52. *See generally id.* at 41-52 (discussing difference between human rights jurisdiction and state responsibility).

221. *Id.* at 263.

222. Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 *EUR. J. INT’L L.* 121, 132 (2012) (“*Al-Skeini* leaves unchanged the outcome of *Bankovic*.”). *See also* LORD DYSON MR, ESSEX LECTURE 2014: THE EXTRATERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: NOW ON A FIRMER FOOTING, BUT IS IT A SOUND ONE? 19 (Jan. 30, 2014) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf>

It is likely that, if it were faced with the facts of *Bankovic* today, the Court would reach the same conclusion as it did in 2001, but its analysis would now depend on the degree of authority and control the respondent State exercised over the appli-

these precedents are no longer persuasive in the wake of *Al-Skeini*.<sup>223</sup> Specifically, his account of prophylactic and procedural obligations was rejected in *Jaloud v. Netherlands*, which involved a fatal shooting of an Iraqi by a Dutch soldier at a checkpoint manned by a Dutch battalion participating in the United States and United Kingdom-led military coalition, assisted by Iraqi troops under their command.<sup>224</sup> As in *Al-Skeini*, it was not the fact of the shooting that was at issue, but the failure to investigate it. It was acknowledged there were severe obstacles to carrying out such an investigation, with one concurring opinion criticizing the majority for not emphasizing that the problem was not the conduct of the Dutch soldiers, but that of the Dutch military courts.<sup>225</sup> The Court pointedly held “that the test for establishing the existence of ‘jurisdiction’ under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under general international law,”<sup>226</sup> a point driven home in Judge Spielmann’s concurring opinion, which castigated the majority for even mentioning the subject.<sup>227</sup> Instead, the Court held that the Netherlands’ human rights jurisdiction arose simply because the applicant “met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer.”<sup>228</sup>

Despite the Court’s unambiguity on the matter, Milanovic insists that “attribution is an issue in *every single case*, *Jaloud* included . . . [because

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cants, not where they were located or whether their cases could be squeezed into one of the exceptional categories to territorial jurisdiction.

223. See the re-interpretation of *Issa* by the Strasbourg Court in *Al-Skeini*, discussed at text to note 240.

224. *Jaloud v. Netherlands*, App. No. 47708/08, (Nov. 20, 2014), <http://hudoc.echr.coe.int/eng?i=001-148367>.

225. *Id.* ¶ 226. See also *id.* ¶ 4 (Joint Concurring Opinion of judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajó & Silvis).

226. *Id.* ¶ 154 (citing *Catan v. Moldova and Russia [GC]*, Eur. Ct. H.R., App. No. 43370/04, 8252/05 & 18454/06, ¶ 115 (Oct. 19, 2012)), <http://hudoc.echr.coe.int/eng?i=001-114082>).

227. *Id.* ¶¶ 5 & 7 (Spielmann, J., concurring) (criticizing the majority’s discussion of attribution as being “ambiguous, subsidiary, and incomprehensible,” as well as unnecessary and likely to cause confusion).

228. *Id.* ¶ 152. Jane Rooney remarks that the reasoning in this crucial paragraph

more closely resembles an attribution test rather than a control over the territory or authority and control over an individual test as the statement aims to establish *which* actor had the requisite control over the checkpoint rather than aiming to determine whether the *type* of control exercised over the individual was sufficient to establish jurisdiction over that individual.

Jane M. Rooney, *The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands*, 61 NETH. INT’L L. REV. 1, 8 (2014). To the contrary, the Court’s pronouncement actually does specify the “type” of “control” that gives rise to jurisdiction: the manning of a checkpoint under the actor’s supervision.



for] a state to be responsible for any violation of the Convention, some conduct of a living, breathing human being has to be *attributed* to that state.”<sup>229</sup> Milanovic rightly distinguishes between the concepts of attribution and human rights jurisdiction: “*Attribution of conduct* is a question of whether the acts or omissions of a living, breathing human being (or group of human beings) should *in law* be regarded as the conduct of a state. . . .” Human rights jurisdiction, on the other hand, “poses two different questions – does a state exercise effective control of an area or territory in which the victim of the alleged human rights violation is located (spatial model of jurisdiction), or does the state, through its agents, exercise authority and control over the individual victim of the alleged human rights violation (personal model of jurisdiction).” He also once again correctly distinguishes between “jurisdiction-establishing conduct” and “violation-establishing conduct.” The Court could not have decided as it did without attributing both forms of conduct to the Netherlands, but for Milanovic, this means *Jaloud* must have involved “not one, *but two*, attribution inquiries.”<sup>230</sup>

Milanovic sees “jurisdiction-establishing conduct” in terms of “acts or omissions by which a state, through its organs or agents, establishes control over an area or control over an individual.”<sup>231</sup> Because physical “control” or the factual ability to achieve levels of well-being is the touchstone of his theory, Milanovic places great importance upon factual and legal causal links between the putative rights-claimants and corresponding duty-bearers. Attribution is key. “When a state exercises jurisdiction, i.e. control over a foreign territory or individuals, it by definition needs to do so through its agents, i.e. persons whose acts are attributable to it.”<sup>232</sup> It must follow that there can be no Dutch human rights jurisdiction if (1) no involvement by Dutch soldiers in the killing was imaginable, or (2) any such acts of involvement were attributable to the United Kingdom, under whose orders its soldiers operated. If there was no imaginable Dutch involvement in the shooting, nothing the Netherlands did could have had any bearing upon the claimants’ well-being. Even if there was some bearing on the claimants’ well-being, the Netherlands would not have been accountable, since its soldiers were under the direction of the United Kingdom.

The flaw in this reasoning can be revealed by expressing the processes of attribution and jurisdiction more pithily. An attribution analysis essentially asks “Who did this?” In contrast, an analysis of human rights jurisdiction asks “Who’s in charge?” To wit, Milanovic understands being “in charge” with having physical control over land or persons. A moment’s

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229. Marko Milanovic, *Jurisdiction, Attribution, and Responsibility in Jaloud*, EJIL: TALK! (Dec. 11, 2014), <http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/> (last visited Aug. 1, 2016).

230. *Id.*

231. *Id.* One wonders how one may establish physical control over land or persons by omission.

232. MILANOVIC, *supra* note 30, at 51.

pause, however, reveals that this is overstated: it is possible to be “in charge” without going so far as deploying boots on the ground. As demonstrated by the discussion of territorial extension, it is possible to effect profound changes in a particular place purely by creating *legal* effects; that is, by claiming *authority* over persons there. Indeed, there is even a sense in which one can be in charge but unable to do anything.<sup>233</sup> In *Ilașcu*, the Court held that despite having lost control over a portion of its territory to the Russian-supported Transdniestrian puppet government, Moldova still retained positive obligations to use all of the diplomatic, economic, judicial, and other measures within its ability to secure the ECHR rights of individuals held in the breakaway region.<sup>234</sup> To be sure, it is unclear whether the Court would rule the same way today, in the light of the *Al-Skeini* formula of “effective control over territory” or “authority *and control* over persons.” Nevertheless, it may still meaningfully be said that a state or IO claiming to be or holding itself out as “in charge” of certain persons ought to act like it; its pretensions, however risible, give rise to obligations.<sup>235</sup>

If human rights jurisdiction is understood as rooted in claims of authority (normative power) over persons, rather than control or factual power over land, the link between attribution and jurisdiction is broken. It becomes possible to explain *Jaloud* without claiming that the Strasbourg judges were twice engaging in attribution analysis despite vociferously denying it. There is no need to trace—or manufacture—causation to acts of control over territory or persons, because “jurisdiction-establishing conduct” consists instead of a claim of authority over persons. As argued above, authority implies fiduciary obligations of loyalty, which include liability for omissions.<sup>236</sup> A parent has a positive obligation to rescue his child from drowning in a puddle, not because it is possible that he might have pushed the child into that puddle, but simply because he is that child’s fiduciary. Likewise, it could legitimately have been expected of the Netherlands, having held itself out as the authority over people passing

233. See DAVID L. ATTANASIO, *THE STATE OBLIGATION TO PROTECT*, 105-09 (2015) (unpublished Ph.D. dissertation, University of California, Los Angeles), <http://escholarship.org/uc/item/09f0w7h8#page-1>.

234. *Ilașcu v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. 2004-VII, ¶¶ 332-52. Milanovic’s commitment to a view of human rights jurisdiction as physical power over land or persons leads to him concluding that *Ilașcu* is wrongly decided. See MILANOVIC, *supra* note 30, at 106-07. This Article differs. Note, moreover, that the Strasbourg Court’s approach in *Ilașcu* was mirrored by the Inter-American Court of Human Rights in *Pueblo Bello Masacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 119-27 (Jan. 31, 2006) (holding Colombia responsible for human rights violations committed by paramilitaries in region where government had tenuous control).

235. Cf. Besson, *supra* note 31, at 873 (arguing that in order to give rise to human rights jurisdiction, the claim of authority by the putative duty-bearer must be accompanied by “effective power” and “overall control [which] should be effective and exercised, and not merely claimed”).

236. See generally ATTANASIO, *supra* note 233, chs. 3 & 6 (explaining why the state duty to protect results from its role as a public fiduciary, rather than from its having created or potential to create dangerous conditions).

through the checkpoint, that a shooting occurring under its nose not go uninvestigated, regardless of who did it. The responsibility involved here is not causal, but managerial.

Moreover, even if the Dutch soldiers had in fact been placed “at the disposal” of the United Kingdom or of any other power,<sup>237</sup> the Netherlands could not have disclaimed responsibility on the grounds that its soldiers were only following superior orders.<sup>238</sup> Once again, the criterion for human rights obligations is not authority to perform acts but authority over persons. The pedigree or chain of authorization is irrelevant. If the Dutch troops involved had indeed been at the disposal of the United Kingdom, the proper solution would have been to find that both the Netherlands’ and the United Kingdom’s human rights jurisdiction had arisen.<sup>239</sup> The finding of human rights jurisdiction has nothing to do with traceability of consequences to a particular actor’s agency or with its being the last link in a chain of command, but everything to do with its having claimed public authority over a particular individual.

Finally, note the *obiter* discussion of *Issa* in *Al-Skeini*, where the Court suggested that Turkish human rights jurisdiction would not have arisen on the alleged facts of the case, but it might have, if the Iraqi shepherds had been taken by Turkish forces to a nearby cave before they were shot.<sup>240</sup> This is absurd under the control model, because incomprehensible as a pragmatic compromise between universality and effectiveness. It is eminently within a state’s power *not* to shoot someone, no matter where they are. The authority-based theory provides an explanation: if the shepherds had been shot where they stood, they would merely have been *affected*, in the same way as the victims in *Banković*. However, for the brief duration the individuals are being transported to the cave, one can say they were being *governed*. This also explains why both negative obligations to respect and positive obligations to protect and fulfill are subject to exactly the same jurisdictional rules. Negative human rights obligations are not owed universally to everyone, but only to subjects.<sup>241</sup> By extension, the

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237. The Court found otherwise. See *Jaloud*, App. No. 47708/08, ¶ 151.

238. This was indeed the approach taken in *Behrami*, where France successfully denied jurisdiction because its actions in Kosovo were ultimately attributable to NATO. *Behrami v. France*, App. No. 71412/01, 78166/01, 45 Eur. H.R. Rep. 85, ¶¶ 132-43, 151 (2007). See Marko Milanović & Tatjana Papić, *As Bad as it Gets: The European Court of Human Rights’s Behrami and Saramati Decision and General International Law*, 58 INT’L & COMP. L.Q. 267 (2009) (criticizing *Behrami*).

239. Human rights duties may obtain if the state or IO procured or abetted another state’s or IO’s human rights violations. See Special Rapporteur on the Right to Food, Addendum—Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Hum. Rts. Comm’n, UN Doc A/HRC/19/59/Add.5, ¶ 2.6 (Dec. 19, 2011) (cited in Bartels, *supra* note 13, at 1081). However, Article 18 ARS and Article 16 ARIO require an element of knowledge on the part of the coercing state not met by a mere failure to carry out due diligence.

240. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. Ct. H.R. 589, ¶ 136 (2011).

241. Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT’L L. 247, 268-69 (2014) (explaining this legal fact by observing that duties to respect

limitation of the positive duty to protect to territory under effective control would be improper, if that would result in a public authority evading its obligations to the governed. As Lord Dyson notes extrajudicially, “[i]f a Contracting State has taken over control of the civil administration of the foreign territory then its inability to control the situation is not a ticket out of the Convention.”<sup>242</sup> At the jurisdictional stage, “cannot” implies “ought not”: to the extent the putative duty-bearer cannot fulfill its human rights obligations, it ought not to have pretended to authority, and is precluded from complaining about the onerousness of its obligations. Thus, positive obligations cannot be knocked out as a rule at the admissibility stage. The duty-bearer may be excused if it really cannot fulfill its obligations, but it bears the burden of proving it has tried.<sup>243</sup> The specification of human rights obligations can be done only in the concrete circumstances of each case, that is, at the merits.

### 3. Arendt's Loophole

If authority is the touchstone of human rights obligations, this implies, as suggested in the previous section, that a state or IO has no human rights obligations if it controls a foreign territory without any pretense thereof. As Besson observes, “military occupation with effective control over a territory need not imply jurisdiction, because it may lack the normative element of reason-giving and appeal for compliance. Another example may be effective personal control by troops without, however, any normative appeal besides the use of coercion.”<sup>244</sup> Such situations may be less likely to occur in the wake of *Hassan*, where the Strasbourg Court held that an Iraqi individual taken into British custody fell within the U.K.’s human rights jurisdiction, notwithstanding that this took place during the active hostilities phase of an international conflict.<sup>245</sup> Despite the fact that the events in *Hassan* and *Jaloud* occurred during active conflicts, the requirement of “authority over persons” was fulfilled because the state party concerned figuratively claimed an entitlement to tell the victims what to do, and to force them to do as told. In addition, the reformulation of *Issa* in *Al-Skeini* should address the problem of “black sites” and the treatment of civilians during armed conflicts. Lastly, consider that controlling an area through brute power alone is impossibly exhausting, and a political institution greatly lightens its burden by evoking a moral obligation of compli-

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“balance the interest in protecting people from state intrusions against countervailing interests that justify such intrusion. The duty not to kill permits killings to protect innocents . . .”).

242. See DYSON, *supra* note 222, at 20.

243. *Al-Skeini*, 53 Eur. Ct. H.R. ¶ 166 (holding that compliance with positive duties is an obligation of means rather than result, meaning the duty-bearer must demonstrate due diligence).

244. Besson, *supra* note 31, at 876.

245. *Hassan v. United Kingdom*, App. No. 29750/09, Eur. Ct. H.R., ¶ 77 (2014) (citing *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8)), <http://hudoc.echr.coe.int/eng?i=001-146501>.

ance. It is not effective control that is needed for authority, but authority that needed for effective control.<sup>246</sup>

Nevertheless, the problem remains. The authority-based theory would not cover situations where it is impossible to locate even a scintilla of *de facto* authority, for instance in a pure *Issa* or *Lopez Burgos* situation of drone strikes in faraway lands, or the poisoning of an exiled ex-secret agent. As unsettling as this is, it is in perfect accordance with the result in *Banković*, which, as stated earlier, would be decided no differently today. As Arendt presciently noted, the “paradox” of human rights is that one loses all protections the moment one becomes “a human being in general . . . representing nothing but [one’s] own absolutely unique individuality.”<sup>247</sup>

Perhaps one might ask what would be gained by proceeding under human rights in such situations. A state engaging in *Lopez Burgos*-like conduct is unlikely to be dissuaded by a stern letter from a Special Rapporteur: “[i]nternational reporting and monitoring mechanisms have to rely on the good will, self-criticism and cooperation of the states they scrutinise and the committees lack the capacity to sanction state parties for failing their reporting obligations; hence, the procedures function poorly as an accountability mechanism.”<sup>248</sup> “Pragmatic jurisdiction” over such cases might serve the useful purpose of publicizing and shaming the perpetrator, but then, a regime that poisons its ex-agents might welcome the sobering effects of such publicity upon others contemplating defection.

These are of course empirical speculations, which may be disproved. There is, however, the *formal* objection that one need not bend the concept of human rights when the law possesses other resources for stigmatizing those types of conduct. In fact, such atrocities might be something much, much worse: crimes. The difference between crimes and ordinary wrongs lies in the fact that the former imply the *making of a choice* to exempt oneself unilaterally from the law.<sup>249</sup> Because authority is necessary for freedom, the criminal thereby selects herself for punishment by choosing to subvert it.<sup>250</sup> Likewise, a state that acts without any pretense at legitimacy manifests a will to exempt itself from the law. Thus, the “ef-

246. For a similar argument, see RAZ, *supra* note 172, at 26 (“Acquiescence seems relevant to the explanation of *de facto* authority rather than to legitimate authority. To have effective political control requires, in the circumstances of our world, a high degree of acquiescence.”).

247. ARENDT, *supra* note 166, at 302.

248. Schaffer, *supra* note 153, at 15.

249. ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 134 (“The criminal law serves primarily to protect and vindicate fair terms of interaction. Tort liability is appropriate when someone *takes* a risk with the security of others; criminal liability is reserved for the narrower class of cases in which someone *chooses* a risk (or result).”). See *generally* ch. 5 on “Punishment and the Tort/Crime Distinction.” Strict liability crimes are problematic under this theory.

250. See RIPSTEIN, *supra* note 126, at 308-14; IMMANUEL KANT, THE METAPHYSICS OF MORALS 97 (§6:321) (Mary Gregor ed., Cambridge Univ. Press 1996) (1797) (the criminal makes “such a crime his rule”).

fective control of territory” grounds of jurisdiction should be understood as setting up a presumption that the putative duty-bearer exercises not just power but also authority over individuals there, which the state cannot be heard to deny.<sup>251</sup> This “normative pull”<sup>252</sup> is not for reasons of a policy of multiplying obligations to advance well-being, but because a state which openly uses violence to dominate persons is degenerating into a system of organized barbarism. Such a situation is unsalvageable and must be abolished immediately.<sup>253</sup> It must therefore be dealt with under the laws of war and international criminal law.

### C. Territorial Extension and Human Rights Jurisdiction

This Section demonstrates that the strategy of territorial extension described in Section III(A) gives rise to the entire spectrum of human rights obligations, both negative and positive, and argues that this is already recognized in Strasbourg jurisprudence. To reiterate, the crucial factor for human rights jurisdiction and therefore obligations is *de facto* authority, a condition met simply by creating legal effects. The misconception that human rights obligations depend instead upon factual effects might be a result of the fact that the prominent extraterritoriality cases before the Strasbourg Court have tended to involve military occupation of foreign countries, or boots on the ground.<sup>254</sup> That this is a misconception may be demonstrated by comparing the two cases that have so far come before the Court where a human rights violation was alleged purely on the basis of

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251. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. Ct. H.R. 589, ¶¶ 138-39 (2011) (“Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration.”). See Vassilis P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 MICH. J. INT’L L. 129, 150 (2014) (“Although the factual element of effectiveness recedes, the question of control remains intact. The sole difference is that it now depends on a presumption that does not need to be tested . . .”).

252. MILANOVIC, *supra* note 30, at 171, 263.

253. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. Rep. 141, 206 ¶ 205 (July 22) (separate opinion of Judge Cançado Trindade) (observing that a “State which systematically perpetrates [certain] grave breaches acts criminally, loses its legitimacy, and ceases to be a State for the victimized population . . .”).

254. The Court arguably committed this solecism in *Al-Skeini* when, in discussing *Öcalan v. Turkey*, *Issa, Al-Saadoon and Mufdhi v. United Kingdom* and *Medvedyev*, it observed that it did “not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive is the exercise of physical power and control over the person in question.” See *Al-Skeini*, 53 Eur. Ct. H.R. ¶ 136 (citing *Öcalan v. Turkey*, 41 Eur. Ct. H.R. 45 (2005); *Issa*, App. No. 31821/96; *Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08, 51 Eur. H.R. Rep. 9 (2010); *Medvedyev* 2010-III Eur. Ct. H.R.). The fighter pilot in *Banković* also wielded physical power and control over the people he was bombing, in that he held absolute power over whether they would live or die. Rather, the decisive factor in *Öcalan* and the other cases was not physical power, but authority.

intangible extraterritorial effects: *Ben El Mahi*<sup>255</sup> and *Kovačić*.<sup>256</sup> Several authors have remarked upon their apparent irreconcilability.<sup>257</sup> It is submitted that the confusion disappears, if one bears in mind the distinctions between (1) affecting and governing, and (2) factual effects and legal effects.<sup>258</sup>

*Ben El Mahi* was brought by Moroccan applicants challenging the publication in Denmark of a newspaper caricaturing the prophet Muhammad. *Kovačić* was brought by Croatian foreign currency depositors at a Zagreb branch of a Slovenian bank—the Ljubljana Bank—who had been prevented by Slovenian legislation from withdrawing funds from certain foreign currency accounts. The accounts had been opened with the Ljubljana Bank prior to the breakup of Yugoslavia, and had begun to be frozen from 1998 onwards due to increasing hyperinflation. Following the breakup, the newly-independent Slovenia legislated to require the Ljubljana Bank to retain its liability with respect to such accounts held in branches on Slovenian territory, as well as in branches in the other former Yugoslav republics. In *Ben El Mahi*, the Court declared the application inadmissible by repeating the *Banković* formula, that is, jurisdiction arising under Article 1 of the ECHR is the same as jurisdiction at international law, and that it obtained outside of state territory only in exceptional circumstances. In *Kovačić*, however, the Court held unanimously that the matter fell within Slovenia's human rights jurisdiction, notwithstanding the then-recent *Banković* decision. Slovenia had introduced measures “addressing the issue of foreign-currency savings deposited with branches of Slovenian banks outside Slovenian territory . . . ,”<sup>259</sup> leading to the “applicants’ position as regards their foreign-currency savings deposited with the Zagreb Main Branch [*being and continuing*] to be affected by that legislative measure.”<sup>260</sup> Ultimately, the matter fell within

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255. *Ben El Mahi v. Denmark*, App. No. 5853/06, 2006-XV Eur. Ct. H.R. (2006).

256. *Kovačić v. Slovenia* (Admissibility Decision), App. Nos. 44574/98, 45133/98 and 48316/99, Eur. Ct. H.R. (Apr. 1, 2004), <http://hudoc.echr.coe.int/eng?i=001-23835> (last visited Aug. 1, 2016). This paper ignores *White v. Sweden*, Eur. Ct. H.R., App. No. 42435/02 (Sept. 19, 2006) and *Von Hannover v. Germany*, Eur. Ct. H.R., App. No. 42435/02 (June 24, 2006) because these were defamation cases where the libel arguably took place in the territory of the ECHR contracting party, even if the claimant was located in Mozambique or Monaco and Paris respectively. Moreover, the court did not consider the issue of jurisdiction in either of these cases.

257. See, e.g., Bartels, *supra* note 13, at 1077-78; Maarten den Heijer, *Procedural Aspects of Shared Responsibility in the European Court of Human Rights*, 4. J. INT'L DISP. SETTLEMENT 361, 366 n.26 (2013) (citing *Kovačić* as a ‘problematic’ post-*Banković* case where the Court “appeared to adopt a lower threshold”).

258. See Maarten den Heijer and Rick Lawson, *Extraterritorial Human Rights and the Concept of ‘Jurisdiction’*, in GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 153, 179 (Malcolm Langford et al. eds., 2013) (examining a group of post-*Banković* cases including *Kovačić*, concluding that “the factual exercise of authority appeared decisive in enlivening the State’s human rights obligations”).

259. *Kovačić*, App. No. 44574/98, 45133/98 and 48316/99, ¶ 4(c).

260. *Id.* ¶ 5(c).

Slovenia's human rights jurisdiction because "the acts of the Slovenian authorities [*continued*] to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged."<sup>261</sup>

Note that despite some confusion in the language between responsibility and jurisdiction, neither the Court nor the applicants invoked the principles of state responsibility and attribution. It was never claimed by the applicants or by the Court that the Ljubljana Bank was either controlled by or acting upon the instruction of Slovenia, such that the freezing of the funds was somehow an act of the Slovenian state. Instead, the crucial factor was that Slovenian legislation had "addressed" the operation of bank accounts in Croatia, thus creating *legal* effects there, even if those effects merely prolonged a pre-existing set of factual circumstances.<sup>262</sup> In fact, the applicants' complaint was that by enacting such legislation, "Slovenia had chosen to interfere in [the Ljubljana Bank's] private-law relationship to the detriment of non-Slovenian savers."<sup>263</sup>

This distinguishes *Kovačić* from *Ben El Mahi*, where the Moroccan applicants could not have claimed that Denmark had altered their legal situation. Thus, the Slovenian legislation did not merely affect the Croatian depositors—it also governed them. Indeed, given that the freezing of the accounts had begun *before* the breakup of Yugoslavia, one may argue that the Slovenian legislation created no factual effects, but only legal effects upon the claimants. It is immaterial that the measures were addressed solely to Slovenian banks. One cannot presume to determine the legal position of one party to a private relationship without also claiming authority over the other.<sup>264</sup> As a result of the Slovenian measures, the Croatian depositors were legally barred from reclaiming their deposits exactly as if those measures had been enacted by Croatia. They were in fact

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261. *Id.*

262. Cf. Daniel Augenstein and David Kinley, *When human rights responsibilities become duties: the extra-territorial obligations of states that bind corporations*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 271, 287-88 (Surya Deva & David Bilchitz eds., 2013). Augenstein and Kinley understand *Kovačić* to mean that

what is decisive for the determination of extra-territorial human rights obligations to protect against corporate violations is not the state's exercise of de jure authority, but its assertion of de facto power over the individual rights-holder. More specifically, it is an act or omission of the state in relation to a corporate actor that brings the individual under the power of the state and triggers corresponding obligations to protect his or her human rights against corporate violations.

Such an interpretation is irreconcilable with *Al-Skeini*, *Ben El Mahi* or the *Bankovic* rejection of a human rights effects doctrine, as well as with the facts of the case—the Slovenian legislation had absolutely no effect upon the factual circumstances of the applicants. They had been barred from accessing their accounts by the old Yugoslav government itself.

263. *Id.* ¶ 5(b).

264. See Besson, *supra* note 31, at 873 (arguing that in order to give rise to human rights jurisdiction, authority should be "exercised over a large number of interdependent stakes, and not one time only and over a single matter only").



examples of territorial extension *par excellence*, in that they presumed to determine the legal rights and duties of persons in Croatia in a way that could only have been accomplished by a geographically unbounded claim of prescriptive jurisdiction. Slovenia therefore had human rights obligations towards the Croatian applicants, including by necessary implication positive obligations to prevent their rights from violation by the Ljubljana Bank.<sup>265</sup>

By extension, where the European Union presumes authority over the rest of the world—even if only by nonphysical methods, and even if enforcement is postponed perhaps indefinitely until entry on EU territory—it acquires human rights obligations to distant strangers who become the subjects of its authority, and therefore “its people.” As demonstrated in Section III, a state or IO may exercise authority by causing legal effects overseas, without needing its (or its member states’) agents to ever set foot there.<sup>266</sup> Distinctions between the various instrumentalities of authority are irrelevant. All that matters is that authority is asserted, and that there is some means eventually of enforcing it.<sup>267</sup> The rule in *Commune de Champagne* should be overruled for the same reasons as the *espace juridique* doctrine in *Banković*. The European Union’s human rights obligations cover the entire complement of positive and negative obligations, their specific scope being determined at the merits by the particular facts of each case. The provisions anchor this in EU law.

#### CONCLUSION: THE STING OF EMPIRE

This paper has argued that the European Union has perfect, legally enforceable human rights obligations towards distant strangers, including

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265. *Kovačić*, App. No. 44574/98, 45133/98 and 48316/99, ¶ 5(c). The applicants were eventually unsuccessful due to new information coming before the Court. *Id.* ¶¶ 257-69.

266. *See* MANN, *supra* note 80, at 14 (suggesting that while “the mere exercise of prescriptive jurisdiction, without any attempt at enforcement, will not normally have to pass the test of international law. . . it is not difficult to visualize circumstances in which the exercise of legislative jurisdiction plainly implies the likelihood of enforcement that foreign States are entitled to challenge its presence on the statute book”).

267. This is not to say that EU territorial extension is always successful. Following the *ATAA* judgment, in February 2012, twenty-three countries threatened retaliation including litigation under the Chicago Convention, reviewing or cancellation of air transport service agreements, *etc.* President Obama also signed into law the European Union Emissions Trading Scheme Prohibition Act of 2011, 49 U.S.C. §40101 (2012), prohibiting U.S. airlines from complying with the EU emissions trading scheme. These resulted in the Commission deferring enforcement of the Emissions Trading Scheme in November 2012 until after the conclusion of the U.N. International Civil Aviation Authority (ICAO) in the fall of 2013. Following the negotiations, the Commission issued a proposal to amend the Emissions Trading Directive to require emissions-offsetting only for that part of the flight taking place over EU territory. *See Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC*, COM (2013) 722 final (Nov. 16, 2013), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0722&from=EN> (last visited Aug. 1, 2016). In March 2014, the EU agreed to a further watering-down of its emissions trading scheme for aviation by scrapping the offsetting requirement for long-haul flights even within EU territory until 2016, approved a month later by the European Parliament.

obligations to protect. These obligations arise when the European Union claims authority over distant strangers, that is, when it changes their legal position. An examination of the EU law obligation of compliance with international law demonstrates that it presupposes a notion of international law that allows for geographically unbounded prescriptive authority. The paper then turned to international human rights law to argue that such authority to prescribe rules for distant strangers gives rise to human rights obligations, from which positive obligations to protect cannot be excluded at the outset. The provisions thus contain not just a compliance principle, but also a “missionary principle”<sup>268</sup> requiring the European Union to advance its values, and indeed live them out in its doings in the wider world.

The “compliance” reading is reminiscent of Robert Kagan’s portrayal of the European Union as particularly committed to consensus and multilateralism, while the United States remained “mired in history, exercising power in the anarchic Hobbesian world where international laws and rules are unreliable, and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might.”<sup>269</sup> International law, according to Kagan’s caricature, is something invented by Europeans to make up for their lack of an army.<sup>270</sup> As Section III demonstrated, this is pure fantasy. The European Union has a long tradition of unilateralism that can be reconciled with international law only with great difficulty. In another sense, however, Kagan was prescient in speculating that the “transmission of the European miracle to the rest of the world has become Europe’s new *mission civilisatrice*,”<sup>271</sup> and that “what many Europeans believe they have to offer the world [is] not power, but the transcendence of power.”<sup>272</sup> Indeed, it offers not power, but authority. This raises the issue of imperialism, a charge often deflected even by those who take seriously the European Union’s unilateral promo-

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268. This felicitous phrase appears to have been coined by Morten Broberg. See Morten Broberg, *What is the Direction for the EU's Development Cooperation After Lisbon?—A Legal Examination*, 16 EUR. FOREIGN AFF. REV. 539, 548-54 (2011); Morten Broberg, *Don't Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union's Development Policy*, in EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA 181-98 (Paul James Cardwell ed., 2012).

269. ROBERT KAGAN, POWER AND PARADISE: AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (2003).

270. See JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW 8 (2015)

International law is under attack in the United States. Although most lawyers—and certainly most law school professors—consider international law to be a central and profoundly important element of our legal system, many conservative lawyers are deeply suspicious of international law and the infringement of American sovereignty that it represents. They want U.S. affairs to be dictated by the American political system and the laws that it produces, not the international legal norms that flow from faraway European cities like Brussels, Geneva, and The Hague.

271. *Id.* at 61.

272. *Id.* at 59-60.

tion of its values in the world.<sup>273</sup> There remains, however, the question of whether “the EU [should] assume the role of legislator, fee collector, and lastly exclusive beneficiary of the revenues [of the emissions trading scheme], for the sake of the entire world.”<sup>274</sup>

Bearing this in mind, consider the opinion in *Salemink*, issued mere months before the *ATAA* decision, remarkable in that Advocate General Cruz Villalón went out of his way to present an unnecessary argument about sovereignty. *Salemink* involved a Dutch worker on an oilrig in the continental shelf adjacent to the Netherlands, who had moved his primary address to Spain. Upon returning to dry land, he discovered his lack of residence in the Netherlands rendered him no longer eligible for Dutch invalidity benefits, and brought suit alleging a violation of his freedom of establishment. The issue was whether EU fundamental freedoms applied on an oilrig located on the Dutch continental shelf.<sup>275</sup> The Advocate General presented the Court with two options: (1) an “easy” option, holding under established EU precedent that EU fundamental freedoms apply to work carried out outside of member state territory, if it had a sufficiently close connection to the member state; and (2) an “innovative” option, offering the Court an opportunity to explain whether the continental shelf counted as member state territory, and the scope of the member state’s obligations there under EU law.<sup>276</sup> He proceeded to make the following arguments, which merit close reading:

44. As a physical space under the sovereignty of a State, the concept of territory covers territorial space as such and also airspace and maritime space. . . . [However,] these areas do not represent the full extent of the domain in which States can exercise their sovereign powers, since international law also recognises the existence of extraterritorial State powers.

45. Just as the area in which State sovereignty can be exercised does not necessarily coincide exactly with the extent of its territory, neither do the competences of a State which derive from sov-

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273. See Manners, *supra* note 120, at 253 (“[D]ismiss(ing) the accusation that the EU’s ‘norms’ are really cultural imperialism in disguise [because] the EU often finds itself at odds with other developed OECD states, such as the US and Japan, as in the case of the abolition of the death penalty.”); Bradford, *supra* note 119, at 6 (the “EU’s external regulatory agenda has . . . emerged largely as an inadvertent by-product of [an] internal goal rather than as a result of some conscious effort to engage in ‘regulatory imperialism’”).

274. Andrea Gattini, *Between Splendid Isolation and Tentative Imperialism: The EU’s Extension of its Emission Trading Scheme to International Aviation and the ECJ’s Judgment in the ATA Case*, 61 INT’L & COMP. L.Q. 977, 982-83 (2012) (the EU emissions trading scheme “can be understood only if one posits himself (sic) on a universal plane, in a supposed *civitas mundi*”).

275. Case C-347/10, *Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, ECLI:EU:C:2012:17, ¶¶ 13-27 (Jan. 17, 2012) (Judgment).

276. Case C-347/10, *Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, ECLI:EU:C:2011:562, ¶¶ 38-39, 41 (Sept. 8, 2011) (Opinion of Advocate General Cruz Villalón).

ereignty always exhibit the exclusivity and absolute nature which are characteristic of sovereign power. On the contrary, precisely as a result of the progressive legal regulation of the international community, the exercise of sovereignty is subject to variations in intensity, becoming less pronounced as the connection between the area of exercise and the territorial base of the State becomes weaker.

. . . .

47. If State sovereignty over territorial sea is already restricted in the way I have indicated, the characteristic powers of a sovereign State diminish progressively the further one travels, so to speak, from 'dry land', such powers becoming reduced in the case of the continental shelf, as we shall go on to see in more detail, to a collection of 'sovereign rights' intended to be used for particular purposes, and diluted to the mere exercise of certain freedoms upon reaching the high seas, where any claim to sovereignty is quite simply invalid.<sup>277</sup>

The Advocate General then deduced that since EU competences are conferred by the member states, "EU law will apply to whatever extent the Member States exercise official authority in the areas of competence conferred on the Union," subject to limitations specified in the Treaties.<sup>278</sup>

In the subsequent judgment, the CJEU silently but definitively chose the "innovative" route, ruling that the applicant's work carried out on the Dutch continental shelf was to be regarded as carried out in the territory of the Netherlands for the purposes of applying EU law, because the Netherlands had "sovereignty over the continental shelf adjacent to it—albeit functional and limited sovereignty."<sup>279</sup> This makes sense of the *ATAA* judgment, which, as argued above, claims a right to prescribe rules in a territorially unbounded fashion. In this regard, *Salemink* builds upon existing case law in *Kramer*,<sup>280</sup> *Commission v. Spain*,<sup>281</sup>

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277. *Id.* ¶¶ 44-45, 47.

278. *Id.* ¶¶ 54-55.

279. Case C-347/10, *Salemink*, ¶ 35 (Judgment).

280. Joined Cases 3,4, and 6/76, *Officier van Justitie v. Kramer*, 1976 E.C.R. 1279, ¶¶ 30-33 (stating EU rules on the conservation of marine biological resources extend not just to the territorial waters of the Member States, but to the high seas "in so far as the Member States have similar authority under public international law").

281. Case C-258/89, *Comm'n v. Spain*, 1991 E.C.R. I-3977, ¶ 18 (stating EU measures regulating fishing activities of EU vessels applies on high seas "outside the Community fishing zone").

*Armand Mondiet SA v. Armement Islais SARL*,<sup>282</sup> and *Commission v. UK*.<sup>283</sup>

As a description of the concept of sovereignty in international law, the *Salemink* opinion might strike readers as being very peculiar. Instead of borders, the world of *Salemink* has frontiers, that is, lines on the other side of which one claims authority that one cannot enforce (yet). Compare the *Salemink* opinion, say, to Justice Story's classic formulation in *The Apollon*:

The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.<sup>284</sup>

As a description of an empire, however, the *Salemink* opinion is almost pitch-perfect. Herfried Münkler enumerates the differences between states and empires as follows:

In states, power is exercised at all times and places in the same manner and according to consistent principles, and this is increasingly true the more strongly a State has developed as a Rechtsstaat or Constitutional State. In contrast, the imperial exercise of power is ordered according to a system of circles and ellipses that radiate outwards from the centre to the periphery. With these circles and ellipses, the type and intensity of the self-obligation of imperial power also changes. It is at its strongest in the centre, in the heartland of the empire, and here it is comparable to the self-obligation of power in states. Towards the periphery, however, it tails off the further away [one goes], without thereby offending the functional principles of imperial order.<sup>285</sup>

282. Case C-405/92, *Armand Mondiet SA v. Armement Islais SARL*, 1993 E.C.R. I-6133, ¶ 12 (“[W]ith regard to the high seas, the Community has the same rule-making authority in matters within its jurisdiction as that conferred under international law on the state whose flag the vessel is flying or in which it is registered.”). See also Case C-25/94, *Comm’n v. Council (FAO)*, 1996 E.C.R. I-469, ¶ 44.

283. Case C-6/04, *Comm’n v. U.K.*, 2005 E.C.R. I-1111, ¶ 117 (rejecting UK’s argument that Directive 92/43/EEC, [1992] OJ (L 206/7) (Habitats Directive) applied only to UK national territory and territorial waters and not to the exclusive economic zone, holding instead that where “the United Kingdom exercises sovereign rights in its exclusive economic zone. . . [i]t follows that the directive must be implemented in that exclusive economic zone”).

284. *The Apollon*, 22 U.S. 362, 370 (1824).

285. Herfried Münkler, *Das Prinzip Empire*, in *EMPIRE AMERIKA: PERSPEKTIVEN EINER NEUEN WELTORDNUNG* 112-13 (Ulrich Speck & Nathan Sznajder eds., 2003) [In Staaten hat die Machtausübung überall und jederzeit auf die Gleiche Weise und nach denselben Prinzipien zu erfolgen, und das um so mehr, je stärker sich der Staat zum Rechts- und Verfassungsstaat entwickelt hat. Imperiale Machtausübung ist dagegen nach einem System von Kreisen und Ellipsen geordnet, die vom Zentrum zur Peripherie auseinanderlaufen. Mit

Although Münkler uses the term “power” [*Macht*], he must be taken as meaning normative power or authority: his interest is not in economic or military might, but “political order.”<sup>286</sup> In their depiction of the European Union as a “Cosmopolitan Empire,” Ulrich Beck and Edgar Grande develop Münkler’s insight, defining a state as “a permanent political association based directly on the formal power of command over those subject to it,” while an empire is a mode of exercising power that “permanently strives for control over non-subjects.”<sup>287</sup> Thus, while a state “seeks to solve its security and welfare problems by establishing fixed borders,” an empire “solves them through variable borders and external expansion.”<sup>288</sup> In this light, “territorial extension” takes on new shades of meaning.

These peculiar features may have something to do with the European Union’s unique history and structure. Since the seminal *Van Gend en Loos*<sup>289</sup> decision, where the CJEU held that the member states had created a new legal order by constituting the European Union, the running theme behind the evolution of EU law has been the breaking down of borders and the pooling of sovereignty in favor of transnational legal solutions.<sup>290</sup> Laurens Ankersmit, Jessica Lawrence and Gareth Davies surmise that the “EU’s purposive, explicitly evangelical, and law-based identity . . . gives it an institutional bias towards substantive policy goals, and away from respect for constitutional boundaries, which more traditionally constituted states, and their representatives in the WTO adjudicatory bodies, may not entirely welcome or entirely comprehend.”<sup>291</sup>

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diesen Kreisen und Ellipsen verändert sich auch die Art und das Maß der Selbstbindung imperialer Macht. Im Zentrum, im eigentlichen Kernland des Imperiums, ist sie am stärksten, und hier gleicht sie dem, was für die Selbstbindung der Macht im Staaten gilt. Zur Peripherie hingegen nimmt sie immer weiter ab, ohne daß damit gegen die Funktionsprinzipien der imperialen Ordnung verstoßen würde]. See also MICHAEL DOYLE, *EMPIRES* 24 (1986) (describing ‘dispositional’ theories of imperialism as “seeing the roots of empire in imperialism, a force emanating from the metropole like radio waves from a transmitter”).

286. MÜNKLER, *supra* note 285, at 112 (“Empires and States differ not only in their attitudes towards borders, but also with regard to the political ordering of each and every space.” [Imperien und Staaten unterschieden sich nicht nur im Umgang mit Grenzen, sondern auch hinsichtlich der einheitlichen politischen Gestaltung des je eigenen Raumes.]).

287. ULRICH BECK AND EDGAR GRANDE, *COSMOPOLITAN EUROPE* 56 (2007). See also JAN ZIELONKA, *EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION* 2-3 (2006) (“[T]he Union is anything but a state. It has no effective monopoly over the legitimate means of coercion. It has no clearly defined centre of authority. Its territory is not fixed. Its geographical, administrative, economic, and cultural borders diverge.”); MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 167 (2000) (“[The] fundamental characteristic of imperial sovereignty is that *its space is always open*. . .”).

288. BECK & GRANDE, *supra* note 287, at 57. See also Jan Zielonka, *America and Europe: two contrasting or parallel empires?* 4 J. POL. POWER 337, 345 (2011).

289. Case 26/62, *N.V. Algemene Trans.—en Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1, 2.

290. See Case C-270/13, *Haralambidis v. Calogero Casili*, 2014 ECLI:EU:C:2014:1358, ¶ 49 (“[T]he Communities were founded with the very aim of overcoming the times of ‘Blut und Boden’.”) (Opinion of Advocate General Wahl).

291. Ankersmit *et al.*, *supra* note 123, at 94. Speaking of the EU as a bearer of human rights obligations given that it is the only political institution known to assert jurisdiction

As discussed above, territorial extension obtains only in certain policy areas, outside of which the European Union acts in the ordinary “sovereign” style.<sup>292</sup> This distinction then provides a principled basis for elaborating the law governing the European Union’s role as a global human rights actor. In situations where only power is asserted extraterritorially, the European Union’s legal obligations will be tortious and contractual.<sup>293</sup> Such duties of care may be ensured internally through EU administrative law.<sup>294</sup> Where the European Union asserts authority, however, it acquires fiduciary, or human rights obligations towards the distant strangers subjected to it.

So, here at last are the answers to the two hypothetical situations. In the first scenario, concerning agricultural subsidies, there are no human rights obligations toward affected distant farmers, only duties to other political actors in tort—by analogy to the *Trail Smelter/Corfu Channel* principle—or contract, if there are any applicable trade agreements. In the supermarket merger scenario, however, there may well be enforceable human rights obligations towards the distant farmers, because EU competition regulation creates extraterritorial legal effects.

This raises the following question: is there a necessary and unavoidable connection between human rights and (particularly European) imperialism?<sup>295</sup> On one hand, the imposition of human rights obligations, and

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internationally, Besson remarks that “[u]nless we are ready to start a revolution in the way we think of and protect individual equality and, hence, not only human rights but democracy itself, it may be better not to transpose the EU experiment too quickly to other international institutions of a universal scope.” Samantha Besson, *The Bearers of Human Rights’ Duties and Responsibilities for Human Rights: A Quiet (R)evolution?* 32 *SOC. PHIL. & POL’Y* 244, 267 (2015).

292. Scott, *supra* note 89, at 95-96 (noting that in a rare instance, Commission Regulation 648/2012, 2012 O.J. (L 201)1) or the European Market Infrastructure Regulation (EMIR) relies upon the effects doctrine theory of objective territorial jurisdiction). See EMIR art. 4(1)(a)(iv), 11(4) (imposing obligations upon parties to a derivatives contract that has direct, substantial, and foreseeable effects within the EU). See also Joanne Scott, *The New EU “Extraterritoriality”*, 51 *COMM. MKT. L. REV.* 1343 (2014) (exploring assertions of effects-based jurisdiction in recent EU financial legislation).

293. See RAZ, *supra* note 172, at 5 (“In its relations to those not subject to its authority, a government is in the same position as you or I or any corporation: that is, its actions must respect moral bounds which impose on us all certain responsibilities to others. But its duties to its subjects are more extensive.”).

294. See European Commission, *Towards a reinforced Culture of Consultation and Dialogue: General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, COM (2002) 704 final (Dec. 11, 2002), <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF> (last visited Aug. 1, 2016) (stating the Minimum Standards of Consultation adopted by the Commission, requiring consultations to be open to all interested parties, including third countries and individual stakeholders within such countries). These guidelines are currently being revised. European Commission, *Stakeholder Consultation Guidelines 2014 – Public Consultation Document*, 1 (2014), [http://ec.europa.eu/smart-regulation/impact/docs/scgl\\_pc\\_questionnaire\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/docs/scgl_pc_questionnaire_en.pdf).

295. See ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500-C. 1800* 200 (1995) (“We all internalize our own histories. The history of European empires in America is one of the reformulation of a constitu-

socioeconomic rights obligations in particular, might serve as a deterrent against imperial misadventures. The Netherlands might have been more circumspect, had it known it would be accountable for events arising out of its manning a checkpoint in Iraq. On the other hand, human rights may obviously advance imperial agendas. In the example of the hypothetical merger, the imposition of human rights obligations upon the European Union towards Ruritania farmers does not cure, but only exacerbates the apparent infringement of Ruritania's sovereignty. Then again, unilateral assertions of authority might be the only way to solve the problems plaguing the provision of global public goods.<sup>296</sup> Are such assertions of authority legitimate? If not, might there nevertheless be legal obligations, however limited, to obey them anyway?<sup>297</sup>

This Article avoided these questions, because they arise mainly when dealing with the European Union's competences to promote and advance human rights. Instead, our limited brief was to describe the European Union's human rights obligations towards distant strangers. In this regard, the objections from sovereignty and self-determination are inappropriate because interposed too late. While it would indeed reduce Ruritania's freedom of action for the Commission to block a supermarket merger on the basis of violations of the human rights of Ruritania coffee farmers, that objection should have been made *before* the European Union assumed the role of competition regulator for the world. Of course, it may

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tive element in European cultural and political thinking: the belief in the possibility of a universal human code of conduct.”).

296. See Krisch, *supra* note 88, at 3-5 (arguing that collective failures to provide global public goods has resulted in the weakening of state consent in international law); Daniel Bodansky, *What's So Bad about Unilateral Action to Protect the Environment?* 11 EUR. J. INT'L L. 339, 345 (2000) (arguing that “unilateral action, though questionable from a process standpoint, may nevertheless be justified by its substantive objectives and results”). Consider Benvenisti's argument that sovereigns have other-regarding duties to distant strangers affected by their policies partly on the basis that the right to exclude such strangers from their land, resources and government is justifiable only if those individuals have “enough and as good left in common.” Eyal Benvenisti, *supra* note 169, at 311 n.87 (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §33 (C. B. Macpherson ed., 1980) (1690)). See also Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269 (2015) (arguing, from a Grotian conception of sovereigns as fiduciaries of humanity, that states have standing as ‘fiduciaries of necessity’ to take action to protect human rights from violations abroad, such competence being constrained and regulated by fiduciary principles).

297. Consider the duties owed by the population of an occupied territory to an occupying force, which is legally obliged to establish authority to keep public order. See Eyal Benvenisti, *Occupation and Territorial Administration*, (GlobalTrust Working Paper Series No. 11/2015), <http://globaltrust.tau.ac.il/wp-content/uploads/2015/08/Occupation-and-territorial-administration-WPS-11-20151.pdf> (last visited Aug. 1, 2016); BENVENISTI, *supra* note 206, at 72-76, 245. For an interesting analogy from the private law, consider the Roman *negotiorum gestio*, governing situation where a person, completely unbidden, takes charge of and administers certain property or even mere affairs of another. While she is accountable to the principal for any losses (*actio negotiorum gestorum directa*), she is entitled to reasonable payment if her administration of the property results in a windfall (*actio negotiorum gestorum contraria*). REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 440-45 (1996).



be difficult to imagine the Commission would ever block, or even place conditions upon, a merger for the sake of distant strangers. The most obvious hurdles are the European Union's restrictive requirements for standing to bring judicial review, and the Commission and the General Court's reliance upon the effects doctrine rather than the CJEU's implementation test. However, it would be hypocritical for the European Union to *govern* distant strangers in effect, but then deny any accountability towards them. The burden is squarely upon the European Union to demonstrate by what right it presumes to prescribe law for the entire world.