

Extraterritoriality - Universal Human Rights without Universal Obligations?

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In international human rights discourse, the concept of universalism has been key since the adoption of the UN Charter in 1945, and the labelling of the 1948 Declaration as the *Universal Declaration of Human Rights* (UDHR) signifies the importance of this concept. Added to this, the strong position of the non-discrimination provisions in the Charter, the UDHR and all subsequent human rights treaties and declarations, is further evidence of the primacy of universal and non-discriminatory enjoyment of human rights. This was also confirmed by the International Court of Justice (ICJ) in its determination that the practice of *apartheid* was a flagrant violation of the purposes and principles of the UN Charter.² Yet, in the development of human rights law and its implementation through national and international bodies, the concept of universalism has been rather one-sided: it concerns human rights enjoyment, but not human rights obligations. While all individuals everywhere are considered to have the same rights based on international law, the obligation-holders (normally states) do not have the same obligations with regard to individuals everywhere. According to common perceptions of human rights obligations, whether a state can in any way be held responsible for human rights violations depends not only on the state's actions, but indeed where those actions took place, and/or the nationality of the victims of violations.

However, this way of looking at obligations has in recent times been questioned by a number of actors in the international human rights community. Academics,³ policy makers,⁴ non-governmental organisations (NGOs),⁵ and

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<http://www.lancs.ac.uk/fss/organisations/humanrights/inthron/index.htm>

² *Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion of 21 June 1971 (Hereinafter 'the Namibia opinion'), para. 131.

³ Coomans, F and M. T. Kamminga, *Extraterritorial Application of Human Rights Treaties*, Antwerp, Intersentia, 2004; Donnelly, J. and R. E. Howard, *Human Rights Self-Monitoring: A Proposal for the Northern European Democracies*, Chr. Michelsen's Institute, 1996; Gibney, M. "Genocide and State Responsibility", 7, *Human Rights Law Review*, 2007, 760-773; Gibney, M. *International Human Rights Law: Returning to Universal Principles*, Lanham, Rowman & Littlefield Publishers, Inc., 2008; Gibney, M; E., Roxstrom and T. Einarsen "The NATO Bombing Case [Bankovic c. Belgium et al.]: One Step Forward or Two Steps Back?", *Boston University Journal of International Law*, 2005, p. 55-136; Gibney, Mark, Genocide and State Responsibility, 7, *Human Rights Law Review*, 2007, 760-773; , Gibney, Mark, *International Human Rights Law: Returning to Universal Principles*, Lanham, Rowman & Littlefield Publishers, Inc., 2008, Gibney, Mark; Katarine Thomasevski, Jens Vedsted-Hansen, Transnational State Responsibility for Violations of Human Rights, 12, *Harvard International Law Journal*, 1999, 267-295; , Kamminga, Fons Coomans and M. T., *Extraterritorial Application of Human Rights Treaties*, Antwerp, Intersentia, 2004, Kamminga, Menno T., *Inter-state Accountability for Violations of Human Rights*, Philadelphia, University of Pennsylvania Press, 1992.; Lawson, R. "The Concept of Jurisdiction and Extraterritorial Acts of State," in G.

international institutions (as discussed below) have begun to question the logic of this approach, and indeed the legal justifications for it. A significant number of international court cases have also in recent years debated the reach of international human rights obligations.⁶ Thus, the altered approach is to address whether states have obligations in regard to the human rights effects on individuals in other states as a result of actions and omissions in their international cooperation or foreign policy.

There are different reasons for this shift in attention concerning these obligations. One of the more obvious reasons is the phenomenon of 'globalisation', understood in a broad sense. The increased international interaction among states; between states and international institutions; and between states and private entities, such as multinational corporations (MNCs), may have positive or negative effects on the human rights situation outside the control of the territorial state. The more far-reaching international regulation of financial matters and trade, combined with an emphasis on certain economic

Kreijen, *State. Sovereignty, and International Governance*, Oxford, Oxford University Press, 2002; Narula, S. "The Right to Food: Holding Global Actors Accountable Under International Law", 44, *Columbia Journal of Transnational Law*, 2006, 691-800; Sepulveda, M. "Obligations of 'International Assistance and Cooperation' in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," 24, *Netherlands Quarterly of Human Rights*, 2006, 271-303; Gibney, Mark, Terminology, University of Tilburg, 11, 2008, Rice, Xan, *The Water Margin*, London, 2007, Andersson, Annelie, Mixed Messages? On EU Policy Coherence and the Right to Food in Latin America, FIAN and UBV Latinamerika, 2007, Skogly, Sigrun I., *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Antwerp, Intersentia, 2006, Wilde, Ralph, Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights, 26, *Michigan Journal of International Law*, 2005, 739-806; , Sepulveda, Magdalena, Obligations of 'International Assistance and Cooperation' in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 24, *Netherlands Quarterly of Human Rights*, 2006, 271-303; , Wilde, Ralph, Casting light on the 'Legal Black Hole': Some Political Issues at Stake, *European Human Rights Law Review*, 2006, 552-557; , Narula, Smita, The Right to Food: Holding Global Actors Accountable Under International Law, 44, *Columbia Journal of Transnational Law*, 2006, 691-800; , Mesquita, Judith Bueno de, *International Covenant on Economic, Social and Cultural Rights: Obligations of International Assistance and Cooperation*, Human Rights Centre, University of Essex, 2002, Howard, Jack Donnelly and Rhoda E., *Human Rights Self-Monitoring: A Proposal for the Northern European Democracies*, Chr. Michelsen's Institute, 1996, Kamminga, Fons Coomans and Menno T., Comparative Introductory Comments on the Extraterritorial application of Human Rights Treaties, F. C. a. M. T. Kamminga, *Extraterritorial Application of Human Rights Treaties*, Antwerp, Intersentia, 2004, Hunt, Paul, Report of the Special Rapportuer on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, UN Human Rights Council, A/HRC/4/28, 2007, Harding, Andrew, *Kenyan Women in Rape Protest*, London, 2, 2003, Lawson, Rick, *The Concept of Jurisdiction and Extraterritorial Acts of State*, G. Kreijen, *State. Sovereignty, and International Governance*, Oxford, Oxford University Press, 2002, Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006,.

⁴ This is, *inter alia*, the position taken by the Norwegian government in its white paper from 1999 "Human dignity in focus" (*menneskeverd i sentrum*) where it states that "[t]he government will clearly give priority to work towards improved compliance with human rights obligations at home as well as abroad"; and "Norwegian development assistance shall contribute to enhance the ability of recipient countries to meet their human rights obligations." The Norwegian Government, Foreign Office, White Paper to the Norwegian Parliament, no. 21 (1999/2000), Section 2: The International Human Rights Efforts, pages 12 and 48 of 93 (url version). Translated by author.

⁵ See, eg, FIAN, Compliance of Belgium with its Obligations under the International Covenant On Economic, Social and Cultural Rights, FIAN Belgium et al, 2007; 3D, US and EU Cotton Production and Export Policies and Their Impact on West and Central Africa: Coming to Grips with International Human Rights Obligations, 3D, No date

⁶ Several of these cases will be referred to in some details in the following sections of this chapter.

models, the compliance with which are imperative for international assistance, have resulted in nation states being less able to control events within their own borders and direct development in ways that they themselves choose.

This increased interaction and interdependence of states in the international community has resulted in a debate that questions whether states have obligations that go beyond their national borders, and include human rights problems caused by the actions or omissions of one state in the territory of another state. The question raised is whether the foreign state fails to comply with legal obligations if its actions or omissions result in human rights violations abroad. This debate concerns questions that have been addressed through the use of different terms: extraterritorial obligations, transnational obligations, international obligations, or global obligations, to mention the most common. While these terms do not necessarily signify the exact same phenomenon,⁷ the main aim of this discussion is to address the problem that may occur if one state acts in a manner whereby its actions undermine human rights for individuals in another country. For the purpose of this chapter, I will use the term “extraterritorial obligations”.⁸

The Content of Extraterritorial Obligations

Before discussing the legal foundation for, and current obstacles to the implementation of, extraterritorial obligations, it is necessary to dwell briefly on what the content of such obligations are. It was alluded to in the introduction that the understanding of what human rights obligations are has become more sophisticated and nuanced in the past two decades. While human rights obligations were initially thought to be mainly negative (to refrain from interfering with individuals’ human rights enjoyment), both the language in the various human rights treaties and the jurisprudence from human rights courts and committees have confirmed that such an approach is too limited. Indeed, it is now generally accepted that human rights obligations are of both negative and positive nature, in that states are obliged not only to refrain from violating rights, but also to take steps to ensure human rights enjoyment. This is the case for economic, social and cultural rights as well as civil and political rights.⁹ Furthermore, based on works by Henry Shue¹⁰ and Asbjørn Eide,¹¹ a common understanding of three levels of obligations has emerged: the obligation to

⁷ For a discussion on the various terms used in these discussions see Gibney, Mark, Terminology, University of Tilburg, 11, 2008, 24-26 January 2008. On file with author

⁸ For a discussion as to why I have chosen to use this term in my work on the issue, see Skogly, Sigrun I., *Beyond National Borders: States’ Human Rights Obligations in International Cooperation*, Antwerp, Intersentia, 2006, p. 5

⁹ Maastricht Guidelines, Guideline no. 6. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were adopted by a group of experts that met in Maastricht in January 1997. The Guidelines are reprinted at (1998) 20 *Human Rights Quarterly* 691 and can be accessed at: http://www1.umn.edu/humanrts/instreet/Maastrichtguidelines_.html

¹⁰ Shue, H *Basic Rights: Subsistence, Affluence , and U.S. Foreign Policy*, Princeton, Princeton University Press, 1996, (sec. ed.), p. 52

¹¹ Eide, A. *The Right to Adequate Food as a Human Right*, (UN/Commission on Human Rights, *Report on the Right to Adequate Food by A. Eide, Special Rapporteur*, UN.Doc. E/CN.4/Sub.2/1987/23, 7 July 1987)

*respect, to protect, and to fulfil.*¹² These levels of obligations have been explained in the Maastricht Guidelines:

The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.¹³

According to the UN Committee on Economic, Social and Cultural Rights, the same levels apply to extraterritorial (international) obligations¹⁴. The obligation to respect implies that a state has to respect the human rights for individuals in another country when entering into cooperation with, or carrying out foreign policy (including military activity) that impacts on these individuals. The obligation to protect refers to the activities of private parties, and therefore entails that states have an obligation to ensure that private parties (including private businesses) over which they assert (jurisdictional or other) control do not violate the rights of individuals in other states.¹⁵ Finally, the obligation to fulfil requires states to take such measures that are necessary for the full realisation of rights in other states.

This final point is by far the most controversial element of extraterritorial obligations. Without going into the details of the debates concerning this level of extraterritorial obligation,¹⁶ and the problems that it may raise in terms of sovereignty of the home state of individuals facing human rights problems, as well as the practical problems of resources available for full realisation of all

¹² In a follow-up study on the right to adequate food, Eide proposes two separate elements of the fulfil part of obligations: to promote and to facilitate. See Eide, Eide, Asbjórn, *The Right to Adequate Food and to be Free From Hunger*. Updated study on the right to food, UN Subcommission on human rights, E/CN.4/Sub.2/1999/12, 1999

¹³ Maastricht Guidelines, Guideline no. 6. Please note that the focus here is on violations of economic, social and cultural rights. However, the sentence preceding the quoted part above states: "Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights."

¹⁴ The UN Committee on Economic, Social and Cultural Rights refers to extraterritorial obligations as 'international obligations'.

¹⁵ In General Comment no. 15 on the Right to Water, the UN Committee on Economic, Social and Cultural Rights confirms that 'international obligations' includes that "Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries." (para. 33) Likewise, in General Comment no. 14 on the right to the highest attainable standard of health, the same Committee confirms that "To comply with their international obligations in relation to article 12, 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." (para. 39).

¹⁶ For a more in-depth discussion of these issues, see Skogly 2006, Chapter 3.

human rights in foreign states, it should be noted that the special rapporteur on the Right to Food, Mr. Jean Ziegler, introduced the concept of ‘support fulfilment’ of rights in other states. He explained this terminology in the following manner:

It underlines that the principal obligation to guarantee the right to food is incumbent on the national Government, but other States, if they have available resources, have a complementary obligation to help the national State, when it does not have the resources to realize the right to food of its population.¹⁷

Legal Foundation for Extraterritorial Human Rights Obligations

While states’ extraterritorial human rights obligations often have been ignored, this does not imply that they are non-existent, nor that there are no legal foundations for such obligations. Indeed, extraterritorial human rights obligations have their grounding in international human rights law, and this has been confirmed by international courts and committees. It should be noted that the jurisprudence in this area is not conclusive, and that different approaches have been taken by different international institutions, and that even the same institution may not appear to be consistent in its application of extraterritorial obligations.¹⁸

a) The UN Charter

Little attention has been given to the possibility that the UN Charter provides for more than domestic human rights obligations. Commonly, the Charter is criticized for not being specific enough in terms of human rights and the corresponding obligations. However, there may be more in the Charter than has been recognized.

Article 1 of the Charter establishes the purposes of the organisation, and as members of the UN each individual state is bound by the Charter, and has obligations to assist in fulfilling these obligations. The fundamental principle of universal and international protection of human rights is provided in article 1(3). It is the

“Purposes of the United Nations [to] achieve *international co-operation* in solving international problems of an economic, social, cultural or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms for all ...*” (emphasis added).

The inclusion of the passage that the organisation’s purpose is, *inter alia*, to ‘achieve international co-operation’ in relationship to the substantive content of the rest of the paragraph, is not insignificant in relation to the question of extraterritorial human rights obligations. If international cooperation is to be achieved, the members of the UN will have an obligation to contribute to this cooperation which is aimed at addressing problems of economic, social,

¹⁷ UN/Commission on Human Rights, Report of the Special Rapporteur on the Right to Food, Mr. Jean Ziegler, (5th Report), UN. Doc. E/CN.4/2005/47 para. 47.

¹⁸ This thesis will be further discussed in the section on ‘Obstacles’ below.

humanitarian and human rights character. If member states of the United Nations claim that human rights obligations are uniquely territorial, this would disregard the principle of international cooperation in Article 1.

Further, articles 55 and 56 provide that the United Nations shall promote ‘*universal* respect for, and observance of human rights and fundamental freedoms for all ...’,¹⁹ and that this shall be done through “joint and separate action in co-operation with the Organization...”.²⁰ These articles are commonly referred to in UN documents when the international promotion of human rights is discussed. However, until recently, there has been little interpretation of the obligations that stem from these two articles.²¹

In an elaboration of the legislative history and interpretation of Article 56, it is explained that the text is a compromise between a wording suggested by Australia, and the views of the United States in the drafting process.²² Australia had proposed that “all members of the UN should pledge to take action, on both national and international levels, for the purpose of securing for all peoples, including their own, such goals as improved labour standards”²³ and thus suggested a formulation in which the pledge would mean that the “members would both co-operate internationally and act within their own countries to pursue the economic and social objectives of the Organization, in their own way and without interference in their domestic affairs by the Organization”.²⁴ This was opposed by the US, as it claimed that all that could be included in the Charter was to provide for “collective action and thus it could not oblige a nation to take separate action because that would constitute an infringement upon the internal affairs of the member states”.²⁵ Thus, the interpretation of the article has tended to accept a compromise of the two positions, whereby the:

rather limited obligatory function of Article 56 is [...] the result of the wording of Article 55, to which it refers. The latter only describes purposes (and not substantive obligations) to be achieved by means of co-operation. To this extent, Article 56 can thus only create substantive obligations (as opposed to procedural obligations) in so far as Article 55 contains a corresponding basis in that respect.²⁶

¹⁹ UN Charter, Article 55 (c) (emphasis added)

²⁰ UN Charter, Article 56

²¹ A recent book carries interesting interpretation of these articles: Salomon, Margot E *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford, Oxford University Press, 2007, pp. 67-71.

²² Simma, Bruno (ed.) *The Charter of the United Nations – A Commentary*, Oxford, Oxford University Press, 1994, p. 793.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Discussion UNCIO X, Doc. 699, II/3/30 and Doc. 747, II/3/46, pp. 139-40. As cited in Simma, *Ibid.*

²⁶ *Ibid.*, p. 794.

However, Simma holds that Article 55 (c) contains substantive obligations in respect to human rights,²⁷ and it can thus be held that in terms of human rights, articles 55 and 56 in conjunction establish obligations to take action to promote the respect for human rights. According to this interpretation, there is a firm obligation for states to act individually as well as collectively to promote respect for human rights.

It is, however, interesting to note that the opposition by the United States was did not concern the international obligations, but rather that the UN Charter could not prescribe what states should do domestically. As domestic human rights obligations have now gained virtually universal acceptance, it is rather paradoxical that the international (or extraterritorial) obligations have become the controversial ones.

The meaning of 'jointly' as used in article 56 is not quite clear though. In Simma's commentary on the UN Charter, the meaning of the term 'joint' is not substantially discussed.²⁸ However, "jointly" could imply action through the United Nations, as a way to practically carry out the organisation's mandate, in recognition that the organisation may not be able to fulfil its purposes without joint commitment from the membership. However, the interpretation that this would be the entire meaning of 'joint action' in article 56 seems too narrow. The article provides that this joint action shall take place 'in cooperation with the organisation.' If it was intended to imply a narrow obligation to promote respect for human rights through the work of the United Nations, one would have expected the wording to reflect this, for instance by saying 'joint and separate action through the United Nations'. But this wording was not chosen. Rather, a wider formulation is used, and the understanding of 'joint' therefore implies an obligation to act jointly to promote respect for human rights, and also that this implies an obligation to cooperate with the United Nations in this regard.²⁹ This joint action has a clear extra-territorial element to it: only one of the states acting 'jointly' may at any given time address the promotion of the respect for human rights domestically – all the other states involved in the joint action will logically be addressing respect for human rights in another state.

Furthermore, article 56 does not only call for joint action, but indeed also 'separate' action in cooperation with the United Nations. These words, seen in conjunction with the provision in Article 55 (c), which calls for '*universal*' respect for human rights, further strengthens arguments for human rights obligations beyond national borders for individual states. As the article uses the term 'universal' rather than 'domestic', it is submitted that this wording has extraterritorial implications, and that it adds to the Charter's non-discrimination

²⁷ *Ibid.*

²⁸ The seminal work by Simma covers 1400 pages. However, only three pages are devoted to Article 56. Very little scholarly work on this article is found elsewhere.

²⁹ Simma, p. 948

principle, in that states shall promote respect for human rights not only of their own populations, but indeed universally as well.

In addition to the UN Charter, the various specific human rights treaties are the main sources of human rights obligations. Some of these treaties have provisions which give a specific content to extraterritorial obligations, while others have been interpreted to contain such obligations without specific mention in the treaty text.³⁰

There are three international human rights treaties that are specifically important based on their own provisions for the discussions on extraterritorial obligations. These are the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),³¹ the Convention on the Rights of the Child ('CRC'),³² and the newly adopted and entered into force) Convention on the Rights of Persons with Disabilities ('CRPD').³³

b) International Covenant on Economic, Social and Cultural Rights

The ICESCR is particularly interesting in any discussion on extraterritorial human rights obligations.³⁴ Not only does Article 2(1) of the Covenant refer specifically to the States Parties' obligations to take steps 'individually and through international assistance and co-operation'³⁵ for the realisation of the rights guaranteed, but it also omits the reference to 'jurisdiction' or 'territory' which is common in other human rights instruments.³⁶ This being so, the understanding of the content of the extraterritorial obligations stemming from this provision in article 2(1) has not been significantly developed.³⁷ The Committee

³⁰ The scope of this chapter does not permit a full and in-depth discussion of the legal sources for extraterritorial obligations. For a deeper analysis, see Skogly, 2006; and Kamminga, Fons Coomans and M. T., *Extraterritorial Application of Human Rights Treaties*, Antwerp, Intersentia, 2004.

³¹ Adopted by the United Nations General Assembly 1966, entered into force 1976. As of January 2008, 157 States have ratified the Covenant. (Hereinafter: ICESCR)

³² Adopted by the United Nations General Assembly in 1989, entered into force in 1990. As of January 2008, 193 states have ratified this Convention. (Hereinafter CRC)

³³ Adopted by the United Nations General Assembly in December 2006. On April 3, 2008 the CRPD received its 20th ratification, which, according to Article 45 of the Convention, triggers its entry into force 30 days later. The CRPD consequently entered into force on May 3, 2008, less than 18 months after its adoption (13 December 2006). As of January 2008, 14 States have ratified this Convention. According to Article 45, the Convention will enter into force thirty days after the twentieth instrument of ratification has been received.

³⁴ In this chapter, I will only address Article 2(1) of the Covenant. I have addressed the significance of other articles in the Covenant in other publications: see generally Skogly, Sigrun I. "The obligation of international assistance and co-operation in the International Covenant on Economic, Social and Cultural Rights", in Bergsmo Morten (ed.) *Human Rights and Criminal Justice for the Downtrodden*, Kluwer Law International, 2003; and Skogly, 2006, p. 83-98.

³⁵ Article 2(1) of the ICCPR reads: " Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

³⁶ For the text of these instruments, see footnotes 94-96 below and accompanying text.

³⁷ In General Comment no. 3 (1990), the Committee referred to this passage as indicating that 'available resources' included those available through international assistance' (para. 13), and that read in conjunction

on Economic, Social and Cultural Rights has in later years, however, begun to include explicit and implicit references to this provision in its General Comments and in questioning of and concluding observations to states' reports.³⁸

A review of some of the drafting history of article 2(1) sheds light on the debates that took place in the 1950s and 60s. As has been documented elsewhere,³⁹ there was some discussion over the inclusion of the passage 'international assistance and co-operation' in the article. The discussions in the Commission on Human Rights and in the General Assembly's Third Committee were, however, not conclusive as to the drafting parties' intentions. What did seem rather clear though, was that international co-operation and assistance was seen as necessary if the Covenant's rights were to be realised. What was more discussed was the nature of this cooperation, and whether the added provision of 'especially economic and technical' was too limited.⁴⁰ International assistance and cooperation was included as one of the means of realisation of the right in the original (and subsequent) general obligation provision of the Covenant. However, more than 50 years later, it has proven to be one of the more controversial aspects of the document.

c) The Convention on the Rights of the Child

As is the case for the ICESCR, the CRC also incorporates specific obligations of international assistance and cooperation in regard to economic, social and cultural rights. Article 4 states that:

“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the

with Articles 55 and 56 of the UN Charter, that "... international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard." (para. 14); The Limburg Principles, paragraphs 29 – 34, deal with this passage in article 2(1), but use rather general terms, such as 'international co-operation and assistance shall' give priority to 'the realization of all human rights ...'; and that it should contribute to the establishment of a social and international order conducive to human rights. There is no clear indication as to the content of obligations for states. The Limburg Principles on the Implementation of Economic, Social and Cultural Rights were adopted by a group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht on 2-6 June 1986. These principles can *inter alia* be accessed through the International Human Rights Obligations Network (IntHRON) at: <http://www.lancs.ac.uk/fss/organisations/humanrights/inthron/index.php> Additionally a briefing paper on the content of 'international assistance and cooperation' in Article 2 was given to the Committee in 2002. See "International Covenant On Economic, Social And Cultural Rights: Obligations Of International Assistance And Cooperation" A Briefing Paper by Judith Bueno de Mesquita, Senior Research Officer, Human Rights Centre, University of Essex. On file with author.

³⁸ For a detailed analysis of the way in which the Committee on Economic, Social and Cultural Rights has approached this issue, see Sepulveda, Magdalena, Obligations of 'International Assistance and Cooperation' in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 24, *Netherlands Quarterly of Human Rights*, 2006, 271-303;

³⁹ Skogly, S, 2003, p. 403 – 420.

⁴⁰ General Assembly, Seventeenth Session, Third Committee 1204th meeting, Official Records, para. 49. For further discussions on this, see Skogly, *Ibid*, pp. 407-412

present Convention. *With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.*"⁴¹

During the drafting of this article, there were a number of issues debated, including the reference to 'available resources'.⁴² However, what is noticeable in this context is that the inclusion of 'international co-operation' was already included in the first draft of the convention text presented by Poland in January 1980, and it was readily accepted, and not considered controversial, as evidenced by the lack of debate about it.⁴³

Contrary to the position of the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child has not dealt with the concept of international co-operation as part of the treaty obligations in any detail. The only aspect of international co-operation that is included in the Committee's General Comments⁴⁴ relates to the seeking of international assistance, and does not include recognition of extraterritorial obligations.⁴⁵

d) The Convention on the Rights of Persons with Disabilities

A recent addition to international human rights law was made with the adoption and entry into force of the CRPD. There are two articles that specifically address international cooperation: Article 4 'General Obligations' and Article 32 'International Cooperation'. Article 4 (2) provides that:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

In contrast to Article 2(1) of ICESCR, the article only refers to 'international cooperation' rather than 'international assistance and cooperation'. As international assistance (technical, financial, humanitarian) is now commonly seen to be part of international cooperation,⁴⁶ this difference is unlikely to imply a more narrow sphere for the extraterritorial obligations.

⁴¹ Emphasis added.

⁴² Skogly, 2006, p. 103

⁴³ Skogly, 2006, p. 104

⁴⁴ Committee on the Rights of the Child, General Comment no. 5 "General Measures of Implementation of the Convention on the Rights of the Child", October 2003.

⁴⁵ Skogly, 2006, p. 159-160.

⁴⁶ For further discussions on this, see Salomon, 2007, pp. 98-109;

The second article that deals with international cooperation, Article 32, emphasises 'the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, ...'. This refers to the same concept as Ziegler labelled 'obligation to support fulfilment'.⁴⁷ It then continues to call for international development programmes that are inclusive and accessible to persons with disabilities;⁴⁸ to facilitate and support capacity building;⁴⁹ research cooperation;⁵⁰ and to provide technical assistance and technology transfer.⁵¹ Finally, the Article ends with:

The Provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.⁵²

This final passage is of particular interest, as it addresses some of the concerns opponents to extraterritorial obligations have voiced, namely that states (and particularly poorer states) will feel relieved of their treaty obligations, as they can advocate that they need external funding to implement the rights in the treaties. This provision emphasises the primary obligation for the territorial state to comply with its obligations and carry out its implementation.

e) Other human rights treaties

It is noticeable that the specific treaties discussed so far all address economic, social and cultural rights in relation to extraterritorial obligations. One could then easily conclude that any extraterritorial human rights obligations are confined to that part of international human rights law. However, such an interpretation would not reflect the current understanding of international human rights treaties. Indeed, the ICJ, the UN Human Rights Committee (which monitors the implementation of the International Covenant on Civil and Political Rights), the European Court of Human Rights, and the Inter-American Commission on Human Rights have all confirmed that international human rights treaties protecting civil and political rights contain obligations for the states parties that go beyond the national territory. This is in spite of the clauses in some of these treaties providing that the states parties are to protect and ensure the rights within their territory and/or their jurisdiction.⁵³ In the Namibia (South West Africa) Opinion, the ICJ found that South Africa, having established a system of *apartheid* in the neighbouring state, was in breach of its international obligations under the UN Charter. Therefore, the fact that South Africa acted outside of its own territory was of no consequence; the Court still found that South Africa was

⁴⁷ See footnote 20 above and accompanying text.

⁴⁸ Article 32 (1) (a)

⁴⁹ Article 32 (1) (b)

⁵⁰ Article 32 (1) (c)

⁵¹ Article 32 (1) (d)

⁵² Article 32 (2)

⁵³ For text, see footnote 94-96 Below.

in breach of its obligations.⁵⁴ Furthermore, in the advisory opinion on the ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’, the ICJ considered the relevance of obligations stemming from human rights treaties that Israel has ratified. In regard to the ICCPR, the Court held that it was applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’.⁵⁵ Likewise, in respect of the ICESCR, the Court held that

The territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the Occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the ICESCR.⁵⁶

Likewise, in *Lopez Burgos v Uruguay*, the Human Rights Committee held that

“it would be unconscionable to so interpret the responsibility under article 2 of 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.”⁵⁷

Adding his individual opinion to this case, Committee Member Mr. Tomuschat held that

Never was it envisaged ... to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.⁵⁸

While this case concerned the abduction and arrest of a Uruguayan citizen living abroad by members of the Uruguayan security forces, and the question before the Committee became whether a state had the same obligations towards its citizens abroad as at home,⁵⁹ it is probably reasonable to suggest that Tomuschat’s opinion could also be applied to foreigners abroad and that states should not have ‘unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity’ of individuals in other states. This understanding is supported by another passage in his statement, where he

⁵⁴ See footnote 2 above.

⁵⁵ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, General List No. 131, para. 111.

⁵⁶ *Ibid.* para. 112.

⁵⁷ *Lopez Burgos v Uruguay* (52/79), Human Rights Committee (find full reference), as quoted in Joseph, S et.al ed. *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford, Oxford University Press, 2001, p.60.

⁵⁸ *Ibid.*, p. 184

⁵⁹ In this respect, the case is similar to that heard by the European Court of Human Rights in *Öcalan v. Turkey*, where Mr. Öcalan, a Turkish citizen, was arrested by Turkish authorities at the international airport in Nairobi, Kenya, and brought back to Turkey. The Court considered that ‘directly after being handed over to the Turkish officials, the applicant was effectively under Turkish authority and therefore within the “jurisdiction” of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.’ Eur.Crt.HR, *Öcalan v. Turkey*, Application no. 46221/99, Judgment, 12 May 2005, para. 91).

holds that the “words ‘within its territory’ ... was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations.”⁶⁰

This view is confirmed both by the Committee against Torture (CAT), and the Human Rights Committee in their deliberations and conclusions regarding the United States’ reports concerning *inter alia* the conditions at Guantanamo Bay. In its concluding observations from 2006 CAT “reiterates its previously expressed view that “territory under [the State party’s] jurisdiction” includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers that the State party’s view that those provisions are geographically limited to its own de jure territory to be regrettable.”⁶¹ Likewise, the Human Rights Committee has noted “with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice; ... The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory ...”⁶²

The European Court of Human Rights has also found that actions by a High Contracting Party beyond its territory may be in breach of that State’s obligations. In *Loizidou v Turkey*,⁶³ which concerned the ability of a Greek-Cypriot to access her property in Northern Cyprus after the Turkish occupation of that part of the island, the Turkish government argued that the case could not be admissible as it concerned an area outside the territory of Turkey. However, the European Court clearly stated that a state’s responsibility for its own acts can reach outside the territorial jurisdiction of that state. The Court held that the

responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.⁶⁴

The Inter-American Commission on Human Rights (IACHR) has taken a similar view in cases involving transnational human rights obligations. In *Armando Alejandro Jr. and Others v Cuba*⁶⁵ the petitioners complained to the

⁶⁰ *Ibid.*

⁶¹ UN Committee Against Torture, Conclusions and recommendations, United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 15.

⁶² UN Human Rights Committee, Concluding Observations, United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10.

⁶³ The European Court of Human Rights, *Loizidou* judgment (*Loizidou v Turkey*) of 23 March 1995, Series A. no. 310

⁶⁴ *Ibid.* p. 24, para. 62

⁶⁵ *Armando Alejandro Jr and Others v Cuba* (“*Brothers to the Rescue*”), Inter-American Commission of Human Rights, report No. 86/99, case no. 11.589, 29 September 1999

IACHR about the death of four individuals caused by the shooting down of two civilian aircrafts by a Cuban military MIG-29. The civilian aircrafts were in international territory when they were shot down. The IACHR held Cuba responsible for violating the right to life and to a fair trial of the victims, and stated the following with regard to the extraterritorial nature of the acts:

"The fact that the events took place outside Cuban jurisdiction, does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues - in this case the rights enshrined in the American Declaration. The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority. Consequently, the Commission is competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace on February 24, 1996."⁶⁶

In this case, the IACHR recognised that Cuba was acting outside its territorial jurisdiction, but that in certain circumstances it is not only consistent with, but also required by, the applicable rules to hold a state accountable for acts outside its territory.⁶⁷

This recital of cases by international courts and opinions by monitoring Committees should not be taken as an indication that extraterritorial obligations in relations to human rights are necessarily always accepted, and that they are not seen as controversial by many institutions and human rights lawyers. Indeed, the European Court on Human Rights has stated that only 'in exceptional circumstances' can obligations go beyond the territory of the state.⁶⁸ Furthermore, the ICJ has gone to great lengths to avoid apportioning responsibility to states whose conduct contributes to human rights violations in third countries.⁶⁹ This reality calls for an assessment of the obstacles to full recognition of extraterritorial obligations.

⁶⁶ *Ibid.* para. 25.

⁶⁷ *Ibid.*, para. 23.

⁶⁸ Vlastimir and Borka BANKOVIĆ, Živana STOJANOVIĆ, Mirjana STOIMENOVSKI, Dragana JOKSIMOVIĆ and Dragan SUKOVIĆ; against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. European Court of Human Rights, Application no. 52207/99, para. 80 (Hereinafter: *Bankovic case*), para. 71.

⁶⁹ This thesis is evident both in the *Nicaragua case* (*Nicaragua vs. United States of America*, Judgment 17 June, 1986, ICJ Reports, 1986, p. 14-150;) and the *Genocide case* (*Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), Judgment 27 February 2007, ICJ Reports 2007) For a critical appraisal of these cases and the implication for state responsibility for breaches of extraterritorial obligations, see Gibney, Mark, *Genocide and State Responsibility*, 7, *Human Rights Law Review*, 2007, 760-773;

Obstacles to the recognition of extraterritorial obligations

There are a number of obstacles to the development of a consensus regarding the content of states' obligations for their involvement in human rights violations in other states. Some are obstacles in (the interpretation of) the law and others are of a more political nature.

a) State responsibility

According to the International Law Commission's Articles on Responsibility for Internationally Wrongful Acts ('ILC Articles'),⁷⁰ if a state commits an act or omits to carry out prescribed conduct and this act or omission represents a breach of an international obligation, the state has committed an internationally wrongful act for which it is responsible.⁷¹ The ILC Articles also set out the legal consequences for such unlawful acts.⁷² This is a reflection of the reciprocal character of international law as between states. However, state responsibility is not commonly invoked in situations where the actions of one state breach or threaten the human rights of individuals in another state.

Inter-state complaint procedures existing in some of the regional human rights systems,⁷³ and in some of the international conventions adopted through the United Nations system.⁷⁴ These procedures, while sparingly used, are somewhat different from the regular application of state responsibility, as they are procedures specifically provided for in certain treaties, and are not reactions to breaches of normal reciprocal international law obligations independent of specific treaty-based procedures. Yet, the inter-state complaint procedures underscore the argument that international human rights treaties operate according to the general principles contained in the Law of Treaties. It is the reciprocal obligations undertaken by ratifying the treaty that is essential, not the nationality of the individual whose rights have been violated. In order to complain about the treatment of its own citizen abroad, a state need not rely on human rights treaties to seek redress, as customary international law principles regarding diplomatic protection cover that issue.⁷⁵

⁷⁰ Adopted by the International Law Commission in 2001, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (Hereinafter 'ILC Articles')

⁷¹ ILC Articles, Articles 1 and 2.

⁷² ILC Articles, Part II.

⁷³ See Article 33 of the European Convention on Human Rights and Fundamental Freedoms (1950) as amended by Protocol 11; American Convention on Human Rights provides for a similar procedure in Article 44; African Charter on Human and Peoples' Rights, Article 47. None of these procedures has been significantly used.

⁷⁴ Interstate complaints procedures are available under the ICCPR, the Convention against Torture; the Convention on the Elimination of Racial Discrimination; and the Convention on the Protection of All Rights of Migrant Workers and their Families, all contain such procedures. As of November 2007, no such complaints have been filed in the UN system.

⁷⁵ This issue relates to the discussion about minimum standards of treatment of citizens of another state, an issue that goes beyond the scope of this essay. For a discussion on this, see Cassese, Antonio, *International Law*, 2nd edition, Oxford, Oxford University Press, 2005, p. 120.

Therefore, when entering into international human rights treaties, states not only guarantee that they will treat their inhabitants according to the standards provided in the treaties, but also that they are obligated to do so in their relationship to the other states that have ratified the same treaties. In essence, there is no relinquishment of the reciprocal nature of international treaties. To illustrate, states A and B are in a human rights treaty relationship with each other and the treaty prohibits torture. State A tortures its prisoners. The acts of torture violate the rights of the prisoners, but they also breach its treaty obligation in relationship to state B. This conception concerns the traditional international obligations, breaches of which give rise to state responsibility as defined in Articles 1 and 2 of the ILC Articles.

The scenario used in this example reflects the domestic operation of human rights law, as the violations are committed by State A in regard to its own citizens or residents. However, the lack of application of state responsibility becomes increasingly more relevant in extraterritorial human rights relations. What if State A acts in a manner that violates the rights of State B's residents, while they are within the territory of State B? This example illustrates a lack of 'reverse diplomatic protection'. According to principles of customary international law, diplomatic protection may be afforded by one state if another state infringes upon the first state's citizens while they are in the territory of the second state.⁷⁶ The principle works on the basis that a violation of the rights of a citizen of one state by another state is considered a wrongful act against the citizen's home state.⁷⁷ However, if one state violates the rights of a citizen of another state, while that citizen is in his/her home state, the principle of diplomatic protection does not seem to apply, or at least is not being used.⁷⁸

The problem faced in these situations is that while we have a definition as to what triggers state responsibility, namely a wrongful act on the part of a state, we have very little guidance as to *what* constitutes a wrongful act by states in extraterritorial relations, and in particular in human rights cases. There is little international jurisprudence in this field, and what is available is not necessarily consistent. As has been mentioned above, the ICJ has heard some relevant cases, in particular the *Nicaragua case* and the *Genocide case*, and so have regional courts and commissions (in particular the European Court on Human Rights and the Inter-American Commission on Human Rights) and international criminal tribunals (in particular the International Criminal Tribunal for the Former Yugoslavia (ICTY)). What is common for these cases is that the courts, commissions and tribunals go to great lengths to determine, on the basis of the evidence available, the exact detail of control that one state may have had over the events in another state, events that have led to (often highly significant) human rights violations.

⁷⁶ Lowe, Vaughan *International Law*, Oxford University Press, 2007, p. 132

⁷⁷ *Ibid.*

⁷⁸ We have, however, seen that if a person has his/her human rights violated by their home state while residing in another state, extraterritorial application of human rights treaties have been accepted. See for instance, *Burgos Lopez v. Uruguay*, for reference, see footnote 61 above.

In the *Nicaragua case* the ICJ considered, *inter alia*, whether the significant support by the United States to the *contras* in Honduras triggered responsibility for the actions taken by them when operating in Nicaragua. The Court held that

... the evidence available to the Court indicates that various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but it is insufficient to demonstrate their *complete dependence* on the United States aid.⁷⁹ [...] The Court has taken the view ... that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations.⁸⁰ [...] For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had *effective control* of the military and paramilitary operations in the course of which the alleged violations were committed.⁸¹

Furthermore, in the more recent *Genocide case*, the Court builds on the concept of 'effective control' from the *Nicaragua case*, and uses article 8 of the ILC Articles, when determining whether Serbia and Montenegro (FRY) could be considered to have responsibility for the genocide that had taken place in Bosnia and Herzegovina.⁸² Article 8 holds that

The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The question in this case was whether the Bosnian Serbs during the genocide had been under the "direction or control of" the government of the FRY. According to the applicants, up to 90 per cent of the material needs of the self-proclaimed "Republic Srpska" (the Bosnian Serbs) had been provided by Serbia; a substantial portion of the Bosnian Serb paramilitary forces were being salaried by Serbia; and the economies of the Republic of Srpska and Serbia were almost completely integrated.⁸³ This claim was not challenged by the Court,⁸⁴ as it confirmed that

the Respondent was thus making its considerable military and financial support available to the Republic Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republic Srpska authorities.⁸⁵

⁷⁹ *Nicaragua case*, para. 110. Emphasis added.

⁸⁰ *Ibid.*; para. 115.

⁸¹ *Ibid.* Emphasis added.

⁸² *Genocide case*, para. 399

⁸³ *Ibid.*, paras. 239 and 240.

⁸⁴ Gibney, 2007; p. 764

⁸⁵ *Genocide case*, para. 240.

Yet, the Court did not find that the FRY was legally responsible, because it

is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied – and continued to supply – the [Bosnian Serb forces] who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way⁸⁶

What these two cases decided by the ICJ illustrate is that the Court applies an extremely high threshold for responsibility. In applying the concept of ‘effective control’ over, or on whether a non-territorial state ‘directed or controlled’, the impugned actions, the ICJ seems to conclude that unless the foreign state has complete control over actions in a given situation, no legal responsibility can be attributed.

The ICJ’s decisions demonstrate that, contrary to domestic legal systems, the international legal system does not utilise the concept of complicity by states in actions that lead to human rights violations in another state.⁸⁷ This is at least the way in which the ICJ approaches serious human rights violations. The ILC articles contain the possibility of complicity through the notion of ‘aid or assistance’ to another state for its commission of an internationally wrongful act.⁸⁸ However, the ICJ has interpreted this ‘aid and assistance’ to be so significant that it represents ‘effective control’ over the situation, which more or less deprives the concept of complicity without any real meaning.

As with domestic criminal cases, violations of international human rights law are often complex occurrences where more than one actor may be involved. In such circumstances, a concept of complicity (“aiding and abetting”) ought to be developed, to ensure that states may be held internationally responsible for their own actions or omissions.⁸⁹

b) Jurisdictional obstacles

As was mentioned above, some human rights treaties contain provisions that provide that the rights guaranteed by the treaty shall be respected, protected and/or ensured within the jurisdiction and/or territory of the ratifying state. This has resulted in a perceived geographical limitation which may be interpreted as

⁸⁶ *Ibid.*, Para. 422.

⁸⁷ It should be noted that complicity is provided for in international criminal law, but that concept refers to acts committed by individuals rather than states. The complicity by individuals as a foundation for criminal responsibility is provided for in the Rome Statute of the International Criminal Court (1998), Article 25.

⁸⁸ ILC Articles, Article 16 – 18.

⁸⁹ The concept of complicity of non-state actors (such as multinational corporations) in human rights violations is addressed in Clapham, CAndrew, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006, Clapham, Scott Jerbi and Andrew, *Categories of Corporate Complicity*, 24, *Hastings International and Comparative Law Review*, 2001, 339 - 349;

granting these states impunity in terms of human rights conduct outside their own territory, or the territory covered by the relevant treaty.

Article 2(1) of the ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁰

The European Convention on Human Rights and Fundamental Freedoms, Article 1, states

The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.⁹¹

Finally, Article 1 of the American Convention on Human Rights states:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.⁹²

The African Charter on Human and Peoples Rights does not contain any specific jurisdictional or territorial limitation.⁹³

The European Court of Human Rights has found that article 1 contains a concept of 'European legal space' ('espace juridique') in the *Bankovic* case.⁹⁴ This case, which concerned the responsibility of 17 NATO states parties under the European Convention on Human Rights for the death and injury caused by the bombing of the television tower in Belgrade in 1999, was found by the Court to be inadmissible, mainly because the alleged human rights violations were not found to fall within the jurisdiction of the Court, as the events took place outside the geographical area of the Convention, and the states in question did not have

⁹⁰ Emphasis added.

⁹¹ Emphasis added.

⁹² Emphasis added.

⁹³ Article 1 reads: "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."

⁹⁴ European Court of Human Rights *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, EDHR 2001-XII (12 December 2001) For a critique of this case and the concept of a 'legal space' for human rights enjoyment, see Wilde, Ralph, Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights, 26, *Michigan Journal of International Law*, 2005, 739-806; , Gibney, Erik Roxstrom and Mark, The NATO Bombing Case [Bankovic c. Belgium et al.]: One Step Forward or Two Steps Back? *Boston University Journal of International Law*, 2005, 55 -136; , Wilde, Ralph, The "Legal Space" or "*Espace Juridique*" of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action? *European Human Rights Law Review*, 2005, 115-124;

'effective control' over the victims of the bombings.⁹⁵ The Court dismissed the applicants' arguments by holding that it was

tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, 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.

The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction". Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question ...⁹⁶

This position by the European Court of Human Rights raises a number of questions, including the issue as to whether states have impunity to commit human rights violations as long as they take place geographically outside the territorial reach of a regional human rights instrument. This understanding of jurisdiction is very limited.

Article 2(1) of the ICCPR has a slightly different wording from that of Article 1 of the European Convention on Human Rights, in that it uses the terms "within its territory and subject to its jurisdiction", while the ECHR only uses the provision "within their jurisdiction". On the face of it, the ICCPR's obligation article seems more limited than that of the ECHR. However, in the *travaux préparatoires* of the ICCPR, it is explained that the UN Human Rights Commission chose to include the words "within its territory" because it might not be possible for a State to protect the right of persons subject to its jurisdiction when they are outside its territory.⁹⁷ On the other hand, the Commission decided that a State should not be relieved of its obligations under the ICCPR to persons who remained within its jurisdiction merely because they were not within its territory.⁹⁸ Thus, this understanding represents a more practical than legal distinction, in that the drafters recognised that it would be difficult for a state to ensure the enjoyment of human rights in another state, but when such human rights enjoyment is threatened or influenced by acts from another state, that other state was not relieved of its obligations.

⁹⁵ *Bankovic case*, para. 76

⁹⁶ *Ibid.*, para. 75

⁹⁷ Bossuyt, M. J. *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff Publishers, 1989, p. 54 – referring to UN Doc. E/CN.4/SR. 138 and E/CN.4/SR. 329.

⁹⁸ *Ibid.*, p. 53 – referring to E/CN.4/SR 194.

Therefore, it seems that there is confusion as to what this 'jurisdictional' limitation actually refers to in the ICCPR and the ECHR. On one level one might question whether there is confusion between the concept of 'jurisdiction' and 'state responsibility'. As Higgins clarifies, "the law of jurisdiction is about *entitlements to act*, the law of state responsibility is about *obligations incurred when a state does act*."⁹⁹ Therefore, the violation of the human rights of individuals by a State outside its jurisdiction would imply that the State has committed an internationally wrongful act, and should not be able to do so with impunity. This possibility of state action outside its jurisdiction becomes more sinister when assessed in light of recent developments where, for instance, the United States (with the assistance of other states) has deliberately chosen to remove individuals from its territory (and therefore arguably from its jurisdiction) in order to deprive these individuals of their rights.¹⁰⁰ The distinction between jurisdiction as related to a geographic area (territory),¹⁰¹ and jurisdiction as related to the effect and control a state has over the individual becomes essential. If the protection from human rights treaties is dependent upon states acting within jurisdiction, the danger is that extra-jurisdictional acts can be carried out without responsibility being triggered.

c) States' concern about human rights developments

The two obstacles discussed above concern the perceived legal hindrances in this debate. There are also political obstacles to be overcome. States' approaches to international human rights differ, and the international human rights climate changes over time. Currently, developments within international human rights law seem to be under stress, in that states are increasingly resentful towards this legal regime which they see as limiting their freedom of manoeuvre.¹⁰² Indeed, the approach by the 17 NATO member states in the *Bankovic* case, which indicated that they did not consider themselves bound by international human rights law outside Europe, underscores the change

⁹⁹ Higgins, R *Problems and Process: International Law and How we Use it*, Oxford, Clarendon Press, 1994, p. 146. Emphasis in original.

¹⁰⁰ This is arguably the position for individuals brought to Guantanamo Bay, and those subjected to extraordinary rendition in recent years. For comments on these practices see Rapporteurs, UN - Economic and Social Council - Special, Situation of detainees at Guantanamo Bay, United Nations, E/CN.4/2006/120, 2006; Bergquist, David Weissbrodt and Amy, Extraordinary Rendition: A Human Rights Analysis, 19, *Harvard Human Rights Journal*, 2006, 123 - 160; , Marty, Dick, Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States, Council of Europe - Parliamentary Assembly, AS/Jur(2006) 16 Part II, 2006, Assembly, Parliamentary, Resolution 1507 (2006) Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, Council of Europe, 2006. While the United States has argued that persons it detains outside its territory do not enjoy the protection of US or international human rights law, this has been refuted by the UN Human Rights Committee. See Concluding Observations, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, paras. 10-21.

¹⁰¹ *Bankovic* case, para. 76

¹⁰² See, eg, (now former) Prime Minister of the UK, Tony Blair, when he in 2005 "served notice that he was ready to renounce parts of the European Convention on Human Rights if British and European judges continued to block deportation of Islamic extremists in the wake of the London bombings." Jones, George "Blair to curb human rights in war on terror", *The Telegraph*, 7 August 2005

from a universal focus in human rights protection. It should be recognised that the Court, even if finding the case inadmissible, did not say that these countries could carry out human rights violations with impunity outside their territory. But by holding that the Court itself did not have jurisdiction to hear the case, the *de facto* result was that there were no Court procedures available for the individuals in that case, where they had been adversely affected by the actions of foreign states. The decision in *Bankovic* can be interpreted as being based on a procedural limitation of the European Convention on Human Rights, but the result is impunity from legal redress for states.¹⁰³ This demonstrates how far reality is from the ideals of universalism of human rights. If states are able to carry out with impunity acts against individuals in another state that they are not able to carry out against their own population because of a narrow understanding of jurisdiction, the notion of universalism (and non-discrimination) does not carry much weight.

It should be added to this discussion that the jurisprudence of the various Courts and UN Committees is not necessarily coherent in these cases, as has been shown above. The ICJ, the regional courts and the UN Committees have decided cases in which extraterritorial obligations of states have been recognised. While states may be more hesitant in affording human rights respect and protection to individuals in other states, this is clearly an area where the law is developing, and the views of international accountability structures may differ.

Current approach in the international human rights community

States are wary about further extending the human rights protection that they are obliged to respect and protect. Particularly in a world where there is greater interaction among states, international organisations and multinational private actors, many states will see further human rights protection as limiting their options, and will resent it. The events of 11 September 2001 and the following 'war on terror' have not helped the international human rights project. In this climate, extraterritorial obligations have not received much support from states. Indeed, the portrayal of these obligations as extensions of obligations, or new obligations, indicates the reluctance of states to take these obligations seriously. However, it has been demonstrated above that these obligations are not new; they are contained in the various human rights instruments starting with the UN Charter, and confirmed in international treaties as recently as 2006, with the adoption of the Convention on the Rights of People with Disabilities.

This recognition, and the recognition that the way in which individuals are now often more dependent upon actions of foreign actors (including states) than their own government for their human rights enjoyment, has led actors in the

¹⁰³ McGregor, Lorna "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty", 18, *European Journal of International Law*, no. 5, 2007, p. 906. Writing on torture, McGregor holds that "Procedural rules cannot be used to evade substantive obligations, as this would defeat the core basis for *jus cogens* norms such as the prohibition of torture, by facilitating unlawful derogation.

international human rights community to take these questions far more seriously. The UN Committee on Economic, Social and Cultural Rights has emphasised the need for states to take the effect of their development assistance, and actions through international financial institutions (such as the World Bank and the IMF) into account.¹⁰⁴ Furthermore, they have also emphasised the need for poorer states to seek international assistance in situations where their domestic resources are insufficient to comply with their legal obligations in relationship to economic, social and cultural rights.¹⁰⁵ Likewise, the Human Rights Committee has confirmed that the obligations under the ICCPR also extend beyond the territory of the state, for instance in situations where individuals are “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.”¹⁰⁶ The similar approach to extraterritorial obligations taken by the Inter-American Commission on Human Rights was discussed above.¹⁰⁷

In addition to UN and regional human rights bodies, the attention to extraterritorial human rights obligations is also increasing in academic circles. There is now a growing body of literature on extraterritorial obligations. This attention has also been matched by interest from the non-governmental human rights organisations, and several of these are now actively involved in documenting negative human rights effects as a result of foreign states’ activities,¹⁰⁸ as well as taking part in conceptual and analytical developments in this field.

Concluding remarks

There is a *de facto* difference between the proposed universal enjoyment of human rights from the accepted universal obligations of human rights. The proposition here is obviously that if we are advocating universal enjoyment of human rights, it does not make sense to limit the protection of human rights to national borders. This essay has demonstrated that there are significant legal foundations for extraterritorial obligations in current international human rights law. The drafters of human rights treaties from the 1940s onwards have been aware of the need for international cooperation in the implementation and the promotion of human rights, and this logically extends to the responsibility of

¹⁰⁴ See Sepulveda, 2006, footnote 35 and accompanying text.

¹⁰⁵ UN Committee on Economic, Social and Cultural Rights, General Comment on the Nature of State Parties’ Obligations, General Comment no. 3, (1990), paras. 13 and 14.

¹⁰⁶ UN Human Rights Committee, General Comment no. 31 (2004) “The nature of the general legal obligation imposed on States parties”, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

¹⁰⁷ See footnote 59 and accompanying text.

¹⁰⁸ A project on ‘Universal Human Rights in Practice’, aimed at documenting the human rights effect of extraterritorial activities undertaken by states, and to develop further principles on the extraterritorial obligations for violations of economic, social and cultural rights, is currently being undertaken by a group of approximately 30 NGOs and academics. For further information, please visit: <http://www.lancs.ac.uk/fss/organisations/humanrights/inthron/projects.htm>

states for their own behaviour that has adverse effects on individuals' human rights enjoyment in foreign states.

There remain, however, obstacles to overcome to attain general recognition for these obligations. These obstacles are both of a legal and political nature. States are reluctant to accept what they conceive of as an extension of their human rights obligations. This political obstacle is probably the most important one to address, as with an improved political climate, the (perceived) legal obstacles would be easier to address. It is also necessary to develop an understanding of what extraterritorial obligations imply. Some confusion about their extent exists, and further work on the content of the obligations and their limitations still need to be carried out. For instance, the obligation to provide assistance and how much, remains controversial. Furthermore, the relationship between the national and the foreign states' obligations may still need further clarification. Nevertheless, if states take responsibility for the effect of their actions, whether committed at home or abroad, rather than trying to escape responsibility, this would be a big step forward. Too much effort has been put into trying to evade responsibility, or to develop legal loopholes to do so, rather than to respond to the underlying philosophy of human rights: that we are born free and equal in dignity and rights.¹⁰⁹

¹⁰⁹ Universal Declaration of Human Rights, Article 1.