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# Human rights beyond borders at the World Court

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## Introduction

It was an immense privilege, pleasure and honour to work as a research assistant for, and then be supervised as a doctoral student by, James Crawford. Whereas the opportunity to contribute to a volume in tribute to him by some of his former doctoral students follows from that, it has its own special significance. The passage of time since those days has deepened the sense of great fortune one feels at having had the opportunity of sustained and deep contact, at a particularly formative period in one's life, with someone capable of having such a tremendously positive personal impact. One is reminded by the inevitable ups and downs of life that things could easily have been very different, and so how precious, in the light of that, the experience then was. James was frank, honest, unsparing in criticism, unwaveringly supportive, fair and sensible. He always gave one the impression of considerable faith in and commitment to one's ability and merit and, when I felt that this was unwarranted, it made me raise my game.

More personally, for me as a British person from a family where no one had previously stayed at school beyond the age of sixteen, James's lack of pretention and absence of grandness, and his exclusive focus on aspirations to merit and excellence, were of immense significance. To have a Cambridge experience that enabled me to move further away from, not

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closer to, the horrors of the British class system is a mark of the positive significance of James's personal character and the especially beneficial impact of that on the university in general and his students and colleagues in particular. The atmosphere at the Lauterpacht Centre for International Law under his tenure was, I now see, a model of collegiality, with people working in very different roles in an atmosphere marked by a remarkably unhierarchical, friendly and mutually supportive tone. My memories of that time combine stimulating work challenges and inspiring lectures and discussions with the warmth, fun and friendship of the regular morning coffee meetings, lunches, dinners, barbecues and parties.

In paying tribute to James, I offer a critical evaluation of the significance of the International Court of Justice's (ICJ) express pronouncements on the extraterritorial application of human rights treaties in the context of determinations on this area of law by other courts and tribunals. These pronouncements were made in three decisions: the *Wall* Advisory Opinion of 2004; the 2005 Judgment in the *DRC* v. *Uganda* case; and the 2008 Provisional Measures Order in the *Georgia* v. *Russia* case.[1] As will be discussed, the significance of these pronouncements to the law on the extraterritorial application of human rights law built on a statement in the Court's *Namibia* Advisory Opinion from decades earlier, 1971.[2] Although not about this area of law as such, that statement can nonetheless be regarded as foundational to how the law is now understood. This piece forms part of a body of scholarship on the broader issue of the ICJ and international human rights law.[3]

[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 9 July 2004, ICJ Reports (2004), 136 (*Wall* Advisory Opinion); *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) (*DRC* v. *Uganda*); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, Order Indicating Provisional Measures, 15 October 2008 (*Georgia* v. *Russia* Provisional Measures).

[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, ICJ Reports (1971), 16 (*Namibia* Advisory Opinion).

[3] See the following, and the sources cited therein: Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution in Interpreting and Developing International Human Rights and Humanitarian Law and Rules* (Antwerp: Intersentia, 2008); Sandesh Sivakumaran, 'The International Court of Justice and Human Rights' in Sarah Joseph and Adam McBeth (eds.), *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar, 2010), 299–325; Bruno Simma, 'Mainstream Human Rights: The Contribution of the International Court of Justice', *Journal of International Dispute Settlement*, 3 (2012), 7–29. For the human rights instruments whose provisions will be

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There are certain direct connections between some of these cases and James Crawford. He was counsel for Palestine in the *Wall* advisory proceedings and for Georgia in *Georgia* v. *Russia*. The position of these two States on the topic at issue in the present chapter – whether or not certain human rights treaties apply extraterritorially – prevailed and was endorsed by the Court in the decisions under evaluation. The *Namibia* Advisory Opinion dates of course from a different era, but even here there are significant links. The year it was issued, 1971, was the same one that James was awarded his joint honours LLB-BA degrees from Adelaide University. The *Namibia* Opinion constitutes a landmark not only, as will be argued, on the present topic of the extraterritorial application of human rights law, but also more generally on the law of self-determination (not unconnected), a subject on which that graduate of the same year went on to become one of the leading, if not *the* leading, academic authorities.

More broadly, the topic of this chapter, and James's intellectual career, challenge the banal generalist/specialist distinction that has arisen in the context of the massive increase in the range and depth of international law that, indeed, one might also say has occurred since 1971 – a further trend that links the topic to the person. Just as James, the quintessential 'generalist', has made seminal contributions in every 'specialist' area of law he has engaged with (of course one cannot hope to appreciate the specific without a complete, authoritative understanding of the general)

addressed in the present piece, see American Declaration of the Rights and Duties of Man, 1948, OAS Res. XXX (1948) (American Declaration) [not a treaty]; European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 221 (ECHR); International Covenant on Economic, Social and Cultural Rights (New York, adopted 16 December 1966, entered into force 23 March 1976), 993 UNTS 3 (ICESCR); International Covenant on Civil and Political Rights (New York, adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR); American Convention on Human Rights, 1969, 1144 UNTS 123 (ACHR); International Convention on the Elimination of All Forms of Racial Discrimination (New York, adopted 7 March 1966, entered into force 4 January 1969), 660 UNTS 195 (ICERD or CERD); International Convention on the Elimination of All Forms of Discrimination Against Women (New York, adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13 (CEDAW); African Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, Nairobi, adopted 27 June 1981, entered into force 21 October 1986) (ACHPR); Convention on the Rights of the Child (New York, adopted 20 November 1989, 2 September 1990), 1577 UNTS 3 (CRC); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000 (CRC Optional Protocol) (New York, adopted 25 May 2000, entered into force 12 February 2002), 2173 UNTS 222; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85 (CAT).

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it will be suggested that the ICJ's pronouncements on this area of law are just as, and in some cases more, significant than what has been said by specialist human rights bodies. There is a further, more basic but still significant, stylistic link in the importance of brief, pithy remarks that convey a depth of authority, significance and, ultimately, merit.

## The contested issue and treaty law framework on extraterritoriality

The Court's determinations on the question of the extraterritorial application of human rights treaty law obligations were made at the time when this question was highly contested.[4] The entry-level matter of the very applicability of the obligations themselves – as distinct from consequential questions, such as what they would mean were they to apply, or how this meaning would be mediated by the interplay with other applicable law – was disputed.[5] Such a situation was possible in part because the relevant provisions of the treaties contain terminology on applicability that lack a clear indication of spatial scope.

Some of the main treaties addressing civil and political rights, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR) and their Protocols, the Convention Against Torture (CAT), as well as the Convention on the Rights of the Child (CRC), which also covers economic, social and cultural rights, conceive obligations as operating in the State's 'jurisdiction'. Under the ECHR (and

[4] See the following, and the sources cited therein: Fons Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp and Oxford: Intersentia, 2004); Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law*, 99 (2005), 119; Ralph Wilde, 'Legal "Black Hole"?: Extraterritorial State Action and International Treaty Law on Civil and Political Rights', *Melbourne Journal of International Law*, 26 (2005), 739; Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2009); Ralph Wilde, 'Compliance with Human Rights Norms Extraterritorially: "Human Rights Imperialism"?' in Laurence Boisson de Chazournes and Marcelo Kohen (eds.), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowlland-Debbas* (The Netherlands: Brill/Martinus Nijhoff, 2010); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011); Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (The Netherlands: Brill, 2012). Sandesh Sivakumaran highlights this significance in the Court's intervention on the topic. See Sivakumaran, 'The International Court of Justice and Human Rights', 307.

[5] See the sources cited *ibid.*

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some of its Protocols) and the ACHR, the State is obliged to 'secure' the rights contained in the treaty within its 'jurisdiction'.[6] Under the CAT, the State is obliged to take measures to prevent acts of torture 'in any territory under its jurisdiction'.[7] Under the CRC, States parties are obliged to 'respect and ensure' the rights in the treaty to 'each child within their jurisdiction'.[8] The ICCPR formulation is slightly different from the others in that applicability operates in relation to those 'within [the State's] territory and subject to its jurisdiction'.[9]

Thus a nexus to the State – termed 'jurisdiction' – has to be established before the State's obligations are in play (the significance of the separate reference to 'territory' in the ICCPR will be addressed below).

Certain other international human rights instruments do not contain a general provision, whether using the term 'jurisdiction' or some other equivalent expression, stipulating the scope of applicability of the obligations they contain: the 1948 (Inter-)American Declaration of the Rights and Duties of Man (not a treaty), the 1981 African Charter on Human and Peoples' Rights, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1979 International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000.[10] That said, as far as the Inter-American Declaration is concerned, the Inter-American Commission on Human Rights has treated the instrument as if it does contain the 'jurisdiction' trigger, without any explanation for this assumption.[11]

The obligation to secure the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not include a dedicated stipulation concerning spatial applicability. The relevant provision simply obliges parties 'to take steps, individually and through international assistance and co-operation . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant'.[12]

The vagueness of the provisions in the instruments reviewed enables the scope of their spatial applicability to be easily disputed. 'Jurisdiction'

[6] See ECHR, Art. 1; ACHR, Art. 1. [7] CAT, Art. 2.
[8] CRC, Art. 2.1. [9] ICCPR, Art. 2.
[10] American Declaration; ACHPR; CEDAW; CERD; CRC Optional Protocol.
[11] *Coard* v. *U.S.*, Case 10.951, Report No. 109/99, OEA/Ser.L./V/II.85, doc. 9 rev. (1999) (*Coard*), para. 37.
[12] ICESCR, above n. 3, Art. 2.

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could be regarded as a synonym for presence in sovereign territory only, thereby ruling out extraterritorial applicability. Alternatively, it could be defined in some way that includes, but is not limited to, a State's presence in its sovereign territory, but is defined in a manner that only covers a subset of extraterritorial activities (for instance, requiring a certain level of control), thereby creating the possibility for disagreements over which activities are covered. 'Free-standing' obligations could be regarded as operating in any spatial zone in which the State is present, or, alternatively, a claim could be made that a limitation to sovereign territory should be read into them.

## Decisions by other bodies and the Court

By the time the ICJ came to pronounce upon the extraterritorial applicability of certain of the aforementioned human rights treaties, there were already other decisions (judicial, quasi-judicial, advisory) on the topic, and the process of overlapping deliberations continued during the period in which the Court became seized of the topic. Prominent were decisions of the United Nations Human Rights Committee (expressed through its Views and General Comments),[13] the Inter-American Commission of Human Rights,[14] the European Commission and Court of Human Rights,[15] the United Nations Committee Against Torture,[16] the

[13] General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004) (HRC General Comment No. 31); para. 10; HRC, *Lilian Celiberti de Casariego* v. *Uruguay*, Communication No. 56/1979, UN Doc. CCPR/C/13/D/56/1979 (29 July 1981) (*Celiberti de Casariego*), para. 10.3; HRC, *Sergio Euben Lopez Burgos* v. *Uruguay*, Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40) (6 June 1979) (*Lopez Burgos*).

[14] *Coard*, paras. 37, 39, 41.

[15] *WM* v. *Denmark*, Application No. 17392/90, 73 Eur Comm'n HR Dec. and Rep. 193 (1992), 196, Section 'The Law', para. 1 (*WM*); *Loizidou* v. *Turkey*, Application No. 40/1993/435/514, Judgment, 23 February 1995, 1996-VI ECtHR, Ser. A, 2216 (GC) (Merits), paras. 52–6; *Cyprus* v. *Turkey*, Application No. 25781/94, Judgment, 10 May 2001, 2001-IV, ECtHR, 1 (GC), para. 77; *Banković and others* v. *Belgium and others*, Application No. 52207/99, Judgment, 12 December 2001, 2001–XII ECtHR (GC), 333, paras. 70–1; *Öcalan* v. *Turkey*, Application No. 46221/99, ECtHR (GC), 12 May 2005 (*Öcalan*), para. 91; *Isaak v Turkey*, Application No. 44587/98, ECtHR, Judgment, 28 September 2006 (Admissibility) (*Isaak*), p. 21; *Issa and others* v. *Turkey*, ECtHR, Admissibility Decision, 30 May 2000 (*Issa* (Admissibility)) and 41 ECtHR 27 (2004) (Merits) (*Issa* (Merits)), para. 71; *Al-Saadoon and Mufdhi* v. *United Kingdom*, Application No. 61498/08, ECtHR, Chamber decision, 2 March 2010 (*Al-Saadoon*); *Al Skeini and others* v. *United Kingdom*, Application No. 55721/07, ECtHR, Judgment, 7 July 2011.

[16] Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America, UN Doc.

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United Nations Committee on the Rights of the Child[17] and judgments of domestic courts such as in the United Kingdom.[18]

The question of the extraterritorial applicability of human rights law treaties raised in the ICJ cases concerned the applicability of the treaties to Israel in the Palestinian Territories in the context of the occupation in general and the construction of the separation barrier in particular, to Uganda in the DRC in the context of the military action by the latter in the territory of the former and to Russia in Georgia in the context of Russia's support for the breakaway Republics of Abkhazia and South Ossetia, including through military action in 2008. The treaties at issue were the ICCPR (*Wall* and *DRC* v. *Uganda*), the CRC (*DRC* v. *Uganda*), the CRC Optional Protocol (*DRC* v. *Uganda*), the African Charter (*DRC* v. *Uganda*), the ICESCR (*Wall* Advisory Opinion) and the CERD (*Georgia* v. *Russia*).

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

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

CAT/C/USA/CO/2 (25 July 2006), para. 15; General Comment No. 2: Implementation of Article 2 by States Parties, 23 November 2007, UN Doc. CAT/C/GC/2 (24 January 2008), para. 16.

[17] Concluding Observations of the Committee on the Rights of the Child: Israel, UN Doc. CRC/C/15/Add.195, 4 October 2002, paras. 2, 5, 57–8.

[18] *R* v. *Immigration Officer at Prague Airport and another (Respondents), ex p. European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, 9 December 2004; *R (on the application of Al-Skeini and others)* v. *Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33; *R (on the application of Al-Skeini and others)* v. *Secretary of State for Defence* [2005] EWCA Civ 1609, 21 December 2005; *R (on the application of Al-Skeini and others)* v. *Secretary of State for Defence* [2004] EWHC 2911 (Admin), 14 December 2004.

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

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

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

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

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

## The Court's contribution (1): *Namibia* – control not sovereignty; effective control a trigger

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

> accountable for any violations . . . of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.[19]

[19] *Namibia* case, 54, para. 118.

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

Whatever the intended meaning in the case of South Africa and the people of Namibia, and the significance for rules concerning applicable law in general and human rights law in particular, as a general proposition the echo of this statement can be traced through later decisions on the applicability of human rights treaty law in two related but distinct respects. First, the fundamental point that State responsibility should not be limited to situations where a State enjoys title is the basic underpinning of extraterritorial applicability. Secondly, the particular concept of 'physical control over territory' as a basis for determining where obligations should subsist has been adopted in later human rights decisions, notably those made in interpreting the meaning of 'jurisdiction' in the European Convention on Human Rights, as one of the two main triggers for extraterritorial applicability, the second being a concept of control exercised over individuals.[20] The extraterritorial applicability of human rights treaties based on the exercise of control over territory – the 'spatial' or 'territorial' trigger – finds its origin in this more general concept from the ICJ.[21]

It would be no exaggeration to say, then, that the ideas first judicially affirmed by the ICJ are both the underpinning of the notion of the extraterritorial application of human rights law itself, and also one of the two main ways in which the trigger for such application has been defined. They foreground subsequent approaches taken on these issues by human rights bodies and the Court itself.[22] In retrospect, it can be said that the

[20] The two triggers are discussed below, nn. 29 and 30 and accompanying text.

[21] *Ibid.*

[22] Sandesh Sivakumaran observes that the Court's later decisions on the extraterritorial application of the ICCPR, ICESCR and CRC (addressed below) are 'timely and important'

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ground-breaking decision on the extraterritorial application of human rights law came from the ICJ, not from a human rights tribunal, and well before the canonical decisions were issued on the topic by such tribunals.

Just as the Court paved the way for later approaches taken on extraterritorial applicability that were directly concerned with human rights treaty law, so too the Court later became involved in offering approaches of its own to the topic. Its contribution here can be split into different elements, beginning with the question of the extraterritorial meaning of the term 'jurisdiction' as used in human rights treaties.

## The Court's contribution (2): affirming the extraterritorial meaning of 'jurisdiction'

The general refutation of the extraterritorial application of human rights law made by many of the States which would be subject to the obligations were they to apply – including Israel, Uganda and Russia with respect to the three ICJ decisions in this field – has been primarily concerned with the term 'jurisdiction' in some of the main human rights treaties. This term, it is argued, means the State's presence in its sovereign territory only, and so in circumstances where it serves as the trigger for applicability, the relevant obligations do not apply extraterritorially.[23] In the particular case of the ICCPR provision on applicability, which as mentioned earlier addresses those 'within [the State's] territory and subject to its jurisdiction', the argument is made that the inclusion of the word 'territory' in addition to 'jurisdiction' should be read to suggest that jurisdiction is limited to territory, thereby ruling out extraterritorial applicability.[24] Arguments have also been made against the extraterritorial application of the ICESCR, for example by Israel in the context of the situation in the Palestinian territories.[25]

Even before the *Wall* Advisory Opinion and the *DRC* v. *Uganda* and *Russia* v. *Georgia* decisions were issued by the ICJ, the consistent

but also 'no more than the specific application to human rights treaties of' this earlier idea. Sivakumaran, 'The International Court of Justice and Human Rights', 309.

[23] See e.g. the discussion in Wilde 'Legal "Black Hole"?', 776–8, and sources cited therein.

[24] See the discussions in the literature cited above, n. 4; for one example of a commentator who advocates this position, see Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation'. For Israel's position with respect to the ICCPR, see e.g. *Wall* Advisory Opinion, para. 110, and sources cited therein.

[25] See the *Wall* Advisory Opinion, para. 112.

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position adopted in relation to international human rights instruments by international review bodies was the opposite of the rejectionist position. The term 'jurisdiction' in the ECHR, ACHR, CAT and CRC has been interpreted to operate extraterritorially in certain circumstances.[26] The aforementioned treatment of the applicability of the (Inter-)American Declaration by the Inter-American Commission on Human Rights in terms of the exercise of 'jurisdiction' was in the context of extraterritorial activity, which it regarded as capable of constituting the exercise of jurisdiction and thereby falling under the scope of the obligations in the Declaration.[27] Similarly, the ICCPR was interpreted as applying extraterritorially by the UN Human Rights Committee in Views issued in 1981 and a General Comment of 2004.[28] In general, the term 'jurisdiction' has been defined extraterritorially as the exercise of control over either territory – the concept, indicated earlier, which has its origins in the *Namibia* Advisory Opinion, sometimes referred to as the 'spatial' or 'territorial' definition[29] – or individuals, sometimes referred to as the 'individual', 'personal' or, because of the identity of the foreign State actor involved, 'State agent authority' definition.[30]

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

In the *Wall* Advisory Opinion and the *DRC* v. *Uganda* Judgment the Court affirmed that the ICCPR is capable of extraterritorial application.[31] This bolsters the credibility of the Human Rights Committee's position on this question, and, by the same token, the credibility of the rejectionist view is weakened. It is also significant more broadly within the Court's jurisprudence because the Human Rights Committee's position is expressly cited by the Court in its reasoning on the issue in the *Wall* Advisory Opinion, both as a general matter and as far as the position of Israel in the Palestinian territories in particular is concerned (the reasoning in *DRC* v. *Uganda* merely invokes the Court's earlier reasoning in

[26] See decisions cited above nn. 14–17. [27] *Coard*, above n. 11, para. 37.

[28] General Comment No. 31, *Celiberti de Casariego, Lopez Burgos,* above n. 13.

[29] See e.g. *Cyprus* v. *Turkey*; *Loizidou* v. *Turkey* (Preliminary Objections), Merits; *Banković*; *Al-Skeini* (DC), (CA), (HL), (ECtHR); *Issa*.

[30] *Celiberti de Casariego*, para. 10.3; *Lopez Burgos*, para. 12.3; *Öcalan*; *Isaak*, p. 21; *Coard*, paras. 1–4, 37, 39, 41; *Al-Skeini* (DC), (CA), (HL), (ECtHR), passim; *Al-Saadoon*, passim; *WM*, p. 196, section 'The Law', para. 1.

[31] *Wall* Advisory Opinion, para. 113.

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the *Wall* Advisory Opinion in summary form).[32] Just as its decisions on extraterritorial applicability constitute some of the main decisions by the Court on human rights law generally, so here a decision in this category is a landmark in the broader theme of the Court's express use of the decisions of other courts and tribunals.

In a similar fashion, in the same two decisions, the Court provided authority for the extraterritorial application of the CRC, as with the Human Rights Committee and the ICCPR earlier, bolstering the position of the Committee on the Rights of the Child on this issue (although, by contrast, without referring to the latter Committee's position on the issue).[33]

Before the ICJ made its pronouncements on the topic, the position on the extraterritorial applicability of the term 'jurisdiction' when used in human rights treaties was limited to affirmation by the UN Human Rights Committee and the Committee on the Rights of the Child – whose decisions, although important and influential, are formally non-judicial and non-binding – and the European Commission and Court of Human Rights – whose decisions are necessarily specific to the ECHR and its Protocols even if often containing logic that is clearly transferable to equivalent provisions in other treaties. The extraterritorial applicability of the ICCPR and the CRC could be rejected by dissenting States on the grounds that it had not been affirmed by a body other than the Committees associated with the two instruments, that the position of those Committees were non-binding and that decisions made with respect to the European Convention on Human Rights were irrelevant.[34]

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

[32] *Ibid.*, para. 109 (on the Committee's general position on extraterritorial applicability) and para. 110 (on the Committee's position on Israel in the Palestinian territories in particular); *DRC* v. *Uganda*, para. 216.

[33] *Wall* Advisory Opinion, para. 113; *DRC* v. *Uganda* Judgment, paras. 216–7. On the decision of the Committee on the Rights of the Child, see above, n. 17.

[34] See the discussions in the literature cited above n. 4; for one example of a commentator who advocates this position, see Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation'. For Israel's position with respect to the ICCPR, see e.g. *Wall* Advisory Opinion, para. 110, and sources cited therein.

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

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

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

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

As indicated above, the Inter-American Commission on Human Rights had read a concept of 'jurisdiction' into the American Declaration on Human Rights (not a treaty), which did not contain an express reference to this word, as a way of affirming its extraterritorial applicability. This approach was taken up (without acknowledgement of its origins, as an idea, in the Commission's decision about the Declaration) and applied by the ICJ in relation to the ICESCR in the *Wall* Advisory Opinion, the African Charter and the CRC Optional Protocol in *DRC* v. *Uganda*. All of these instruments were treated as if they contained the 'jurisdiction' trigger, as a way of affirming that they were capable of extraterritorial application on the basis of the performance of activity by the State which fell within the scope of this concept.[35] In the *Wall* Advisory Opinion, the Court mentions the positions of Israel and the Committee on Economic, Social and Cultural Rights on the question of the applicability of the

[35] On the ICESCR, see *Wall* Advisory Opinion, paras. 111–12; on the ACHPR and the CRC Optional Protocol, see *DRC* v. *Uganda* Judgment, paras. 216–7.

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ICESCR to Israel in the Palestinian territories.[36] Whereas it rejects Israel's advocacy of inapplicability, in contrast to its discussion of the position of the Human Rights Committee in relation to the ICCPR, it does not expressly associate the position of the Committee on Economic, Social and Cultural Rights advocating applicability (either generally or in relation to Israel in the Palestinian territories in particular) with its own affirmation of this view.[37]

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

A second approach to the extraterritorial scope of treaties with a free-standing conception of applicability provisions is simpler. It was adopted by the UK House of Lords (as it was called then) in the *Roma Rights* case of 2004 concerning the posting of UK immigration officials at Prague airport.[38] Lady Hale and Lord Steyn both assumed that the prohibition of discrimination on grounds of race in CERD applied extraterritorially, without recourse to a particular factual doctrine such as the exercise of 'jurisdiction', which had to be met in order for the obligations to be in play. [39]

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

> observes that there is no restriction of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which [by Russia in Georgia] are invoked by Georgia, contain a specific territorial limitation . . . the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory;[40]

[36] *Wall* Advisory Opinion, para. 112. [37] *Ibid.*

[38] See Opinion of Lord Bingham, *Roma Rights* case, para. 4.

[39] See Opinion of Lady Hale, *Roma Rights* case, paras. 97–102 and Opinion of Lord Steyn, paras. 44 and 46.

[40] *Georgia* v. *Russia* (Provisional Measures), para. 109.

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The Court's order called upon '[b]oth Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia' to take certain acts to comply with the Convention, a determination that assumed the extraterritorial application of CERD to Russian forces in Georgia.[41]

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

## The Court's contribution (4): on the 'exceptional' nature of extraterritorial activity and its regulation by human rights law

However controversial and important extraterritorial State actions are, and however fundamental they may be in certain cases to the interests of the relevant States and those in the territories affected, taken as a whole they are exceptional when compared with the presence and activities of State authorities within their sovereign territories. Thus in the *Wall* Advisory Opinion the ICJ stated in relation to the ICCPR that 'while the exercise of jurisdiction is primarily territorial, it may sometimes be exercised outside the State territory'.[42] The Court went on to say that:

> Considering the object and purpose of the . . . Covenant . . . it would seem natural that, even when such is the case, States parties to the Covenant should be bound by its provisions.[43]

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

> this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies *both* to territories over which a State

[41] *Ibid.*, para. 149.
[42] *Wall* Advisory Opinion, para. 109. [43] *Ibid.*

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> party has sovereignty *and* to those over which that State exercises territorial jurisdiction.[44]

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

In the *Banković* decision concerning the NATO bombing of Serbia in 1999, the European Court of Human Rights stated that jurisdiction is 'essentially' territorial, with extraterritorial jurisdiction subsisting only in 'exceptional' circumstances.[45] However, in this observation the Court seemed to suggest that somehow the 'exceptional' character of extraterritorial jurisdiction should be understood not only in a factual sense; it should also have purchase in attenuating the scope of the meaning of 'jurisdiction' in international human rights law, and should perform this function in an autonomous manner from the factual exceptionalism. The autonomous nature of this exceptionalism creates the possibility that even if a State *is* acting 'exceptionally' as a *matter of fact* outside its territory, such a situation might not fall within its 'jurisdiction' for the purposes of human rights law. In other words, only a subset of extraterritorial activity will be regulated by human rights law.

The dictum from *Banković* was affirmed at certain stages in the English courts of the *Al-Skeini* case concerning the UK's military presence in Iraq, although by way of simple recitation only.[46] In the Strasbourg judgment in that case, the European Court of Human Rights stated:

> A State's jurisdictional competence under Article 1 is primarily territorial . . . Jurisdiction is presumed to be exercised normally throughout the State's territory . . . Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases . . .
>
> To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a

[44] *Ibid.*, para. 112. [45] *Banković*, para. 67.
[46] See *Al-Skeini* (HC), paras. 245 and 269; *Al-Skeini* (CA), paras. 75–6.

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> Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.[47]

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

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

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

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

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

[47] *Al Skeini* (ECtHR), paras. 131–2.

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

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

The significance of this idea is illustrated by the following two examples of exclusions that would be effected by this limitation. First, no European State acting in Afghanistan, or taking action in the territorial waters of States and/or the high seas off the Horn of Africa with respect to so-called 'piracy', or taking migration-related action in the territorial waters of North African States and/or the high seas in the Mediterranean, would be bound by the ECHR. Secondly, no action by any State on the high seas, or off the coast of the Western Sahara (a non-State territory), whether piracy- or migration-related, is covered by any human rights treaty obligations whatsoever.

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

Whether or not such an exclusion actually operates with respect to the ECHR and its Protocols has been addressed in both case law and academic commentary.[48] Such discussion has included coverage of broader normative issues concerning whether the absence of such a limitation, and the consequent application of human rights standards that were not previously applicable in the territory, would constitute 'human rights imperialism' and also potentially risk, where it is co-applicable, adherence to certain norms of occupation law.

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

In the *Wall* Advisory Opinion, however, the Court was considering the applicability of human rights treaties that were not already in operation in the particular sense that the territory – Palestine – did not itself constitute a State party to human rights treaties (a position that has since changed), nor was it regarded as forming part of the territory of another State party to such treaties. The situation was therefore, in this sense, outside the 'legal space' of these instruments. It might have been said, then, that to apply the

[48] See *Banković*; *Al-Skeini* (DC), (CA), (HL), (ECtHR), 63; Wilde, 'Compliance with Human Rights Norms Extraterritorially'.

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treaty obligations to Israel in the Occupied Palestinian Territories would fall foul of a limitation on applicability to the 'legal space' of the treaties at issue. However, such a view was not expressed by the Court and the treaties were regarded as applicable to Israel, thereby necessarily rejecting the 'legal space' limitation idea in its entirety.

## Conclusion

When the ICJ issued the *Namibia* Advisory Opinion in 1971, the development of international human rights treaty law, and its expert-body interpretation, was at a very early stage – the two global human rights Covenants, for example, had been adopted (in 1966) but were not yet in force (that happened in 1976).[49] The question of the extraterritorial application of this law had not been subject to any general expert determination. When that happened later, the ideas expressed by the Court can be clearly identified. Although, then, the Court did not itself pronounce upon international human rights treaty law for some time after *Namibia*, that opinion nonetheless deserves a central place in the canon of international human rights law jurisprudence, not only for the commonly acknowledged significance it has for UN law and the law of self-determination, but also because of this link with later expert-body determinations on the extraterritorial application of human rights law. Moreover, when the Court offered its own contribution on the latter subject to sit alongside the expert-body determinations, this had an important role in consolidating and supplementing a critical mass of authoritative interpretation on what was and remains the highly contested and fundamentally important question of whether human rights treaty obligations apply extraterritorially. In a few brief statements in three decisions, the Court bolstered the case for an affirmative answer to this question. It has done this in a manner that has widened the scope of the judicial and quasi-judicial conversation from an isolated, treaty-specific treatment by dedicated interpretation bodies on what is a common matter across the human rights treaty framework.

[49] See ICCPR and ICESCR.

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