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SYMPOSIUM ARTICLE

Extraterritorial, Universal, or Transnational Human Rights Law?

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Abstract

Traditionally, international human rights adjudication relied on the paradigm of extraterritoriality on the rare occasions when it was confronted with cross-border cases. This paradigm recognises only limited circumstances in which states bear extraterritorial human rights obligations. However, with globalisation, transboundary human rights cases have multiplied. This emerging litigation increasingly reveals that the paradigm of extraterritoriality is no longer fit to address global crises. Extraterritoriality demands effective control over a territory, or authority and control over a person, for a state to exercise jurisdiction outside its territory. Thus, several cases of cross-border human rights abuses are inevitably barred on jurisdictional grounds. This is particularly true for obligations of a global character, which are, by their very nature, completely unrelated to the control that states exercise over territories or people. It is therefore necessary to look beyond extraterritoriality. This article analyses the competing paradigms of universality and transnationality as they have been adopted by domestic courts. It argues that international human rights adjudication should reconceptualise extraterritoriality against the background of universality and transnationality to address global crises.

Keywords: extraterritorial; universal; transnational; human rights litigation; human rights adjudication; global crises; jurisdiction; obligations of a global character

1. The extraterritorial dilemma

Public international law conceives human rights as a system of international obligations binding states to guarantee basic rights for individuals within their territory. These rights include a vertical dimension (states shall respect

individuals' rights) and a so-called 'indirect' horizontal dimension (states shall ensure individuals' rights against other private parties). In this latter case, international human rights law (IHRL) applies only to the relationship between individuals and states. It mandates states to enact domestic laws to implement human rights between non-state actors. States may choose how to enforce human rights in their domestic system; they may, for example, adopt domestic human rights legislation or use existing private or public laws to implement international human rights obligations in their territory. In essence, international law establishes the obligations of states towards individuals, while domestic law regulates the bilateral relations between private parties. If domestic law fails to implement IHRL between private parties, individuals may file complaints with international human rights courts against states for their alleged breach of such law.[1]

This system may work well if human rights abuses are perpetrated in the territory of one state. In this case the state is presumed to have sufficient control over its territory to prevent potential human rights abuses. However, this international human rights system is not designed to capture cross-border human rights abuses. Both state and non-state actors commit these abuses in several different scenarios: from military strikes on foreign land to climate change. In a globalised world, domestic courts have to deal with an increasing number of cases concerning cross-border human rights abuses. For example, the United Kingdom (UK) Court of Appeal ruled that the UK government irrationally and unlawfully sold arms to Saudi Arabia without adequately investigating the possibility that such weapons could be used against civilians in the Yemeni conflict in breach of international humanitarian law;[2] the Canadian Supreme Court allowed Eritrean claimants to proceed against the holding company Nevsun Resources Ltd for alleged cross-border human rights abuses committed by its foreign subsidiary in Eritrea;[3] a Dutch district court held that Royal Dutch Shell must reduce at least net 45 per cent of its emissions by 2030 to meet the Paris Agreement targets and limit its contribution to climate change resulting in human rights abuses;[4] Mexico filed a complaint against Smith & Wesson and several other gun manufacturers for facilitating the unlawful traffic of weapons from the United States (US) into Mexico, resulting

[1] Thomas Raphael, 'The Problem of Horizontal Effect' (2000) 5 *European Human Rights Law Review* 493; John H Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1; Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012); Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013); Riccardo Pisillo Mazzeschi, 'Responsabilité de l'Etat pour Violation des Obligations Positives Relatives aux Droits de l'Homme', 333 *Collected Courses of the Academy of International Law* (Martinus Nijhoff 2008).

[2] *The Queen (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade and Others* [2019] EWCA Civ 1020; Marina Aksenova, 'Arms Trade and Weapons Export Control' in Mark Gibney and others, *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021).

[3] Supreme Court of Canada, *Nevsun Resources Ltd v Araya* [2020] 37919.

[4] *Vereniging Milieudefensie v Royal Dutch Shell* [2021] Rechtbank Den Haag [District Court of The Hague], C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339.

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in criminal activities and human rights abuses.[5] In all of these cases, the private international law jurisdictional question is pivotal because the justiciability of these human rights abuses depends on whether domestic courts assert jurisdiction over these cross-border cases. Domestic cases with a cross-border human rights dimension raised a related IHRL question: whether public international law mandates that states address cross-border human rights abuses.

To answer such a critical question, international human rights courts and treaty bodies have increasingly developed a jurisprudential trend known as the extraterritorial application of human rights. They have treated cross-border cases as exceptions to the rule of territoriality. Thus, they have maintained that states are to address human rights abuses within their territory except for a limited number of situations. However, in an increasingly globalised world, the number and complexity of cross-border human rights abuses have risen. In the past 20 years, those cases when a victim would be outside a state's territory but might still be considered within its jurisdiction have multiplied. As a result, courts have found themselves in a dilemma: to stretch the jurisdictional rules mandated by public international law even further or to decline jurisdiction of complex cases involving cross-border abuses?[6] This extraterritorial dilemma is not trivial: if courts stretch the boundaries of extraterritoriality not on an exceptional but on a regular basis, they risk establishing a patchwork of case law that is hard to reconcile with logic, let alone establish legal certainty; this, in the long term, undermines the rule of law. Conversely, if they avoid asserting jurisdiction on an increasing number of cross-border cases, their jurisprudence will lose relevance because it will not address the real-life problems of victims of human rights abuses worldwide. Almost a decade ago, Yuval Shany had already identified this problem and described it as follows:[7]

> [L]ike their Human Rights Committee counterparts, many European Court of Human Rights judges appear to resent the idea that states should have a free hand to engage in atrocious conduct outside their borders; still, the same judges are also reluctant to impose on member states extremely onerous international human rights law obligations. This being the

[5] *Estados Unidos Mexicanos v Smith & Wesson Brands, Inc and Others* (2022) US District Court of Massachusetts, Case 1:21-cv-11269-FDS; William S Dodge and Ingrid Wuerth, 'Mexico v. Smith & Wesson: Does US Immunity for Gun Manufacturers Apply Extraterritorially?', *Just Security*, 19 August 2021, https://www.justsecurity.org/77815/mexico-v-smith-wesson-does-us-immunity-for-gun-manufacturers-apply-extraterritorially; León Castellanos-Jankiewicz, 'Mexico v. Smith & Wesson: U.S. Court Duel over Extraterritorial Legal Issues Looms with Motion to Dismiss', *Just Security*, 14 December 2021, https://www.justsecurity.org/79542/mexico-v-smith-wesson-u-s-court-duel-over-extraterritorial-legal-issues-looms-with-motion-to-dismiss; Scott Graber, 'Mexico v. Smith & Wesson: High-Stakes Gun Suit May Turn on Choice-of-Law Analysis', *Just Security*, 4 February 2022, https://www.justsecurity.org/80041/mexico-v-smith-wesson-high-stakes-gun-suit-may-turn-on-choice-of-law-analysis.

[6] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 *The Law & Ethics of Human Rights* 47.

[7] ibid 57.

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case, the Court tries to find a not too hot and not too cold 'goldilocks' formula to delineate state obligations in a manner that would encompass some, but not too many, extraterritorial manifestations of state power. As is often the case with compromise formulations, however, they leave all stakeholders and interests at stake partly unsatisfied.

Several scholars have addressed the extraterritorial dilemma by criticising international human rights courts for either incrementally enlarging their jurisdiction or, vice versa, avoiding asserting jurisdiction in complex cross-border cases.[8] However, scholars who question the paradigm of extraterritoriality, as a procedural construction that limits the application of human rights, remain rare.[9]

This article fills this gap by comparing the paradigm of extraterritoriality with those of universality and transnationality. It questions whether extraterritoriality is the right approach to adopt for human rights cases and argues that a shift in perspective is necessary to implement human rights law in global crises. It reconceptualises the extraterritorial scholarly debate in the light of two alternative paradigms that could capture the cross-border nature of human rights abuses: the universal and transnational application of human rights law. The paradigm of universality has been embedded in the human rights language since its inception. However, international human rights courts have largely ignored its relevance by dismissing it as not legal or binding on states.[10] The paradigm of transnationality is a more recent trend, which attempts to adopt the transnational use of commercial or contract law in transnational public law litigation, directed at protecting public goods via the use of a combination of private, public, international and national law transnationally.[11] The article is not normative and does not aim to propose a solution for the extraterritorial dilemma faced by international human rights courts. Rather, it encourages scholars and judges to look beyond the

[8] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011); Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 857; Gérard Gonzalez, 'La responsabilité des états parties à la Convention Européenne des Droits de l'Homme du fait de leurs actions extraterritoriales' [2007] *Annuaire de Droit Européen* 755; Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009).

[9] Sara L Seck, 'Moving Beyond the E-Word in the Anthropocene' in Daniel Margolies and others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019) 49; John H Knox, 'A Presumption against Extrajurisdictionality' (2010) 104 *American Journal of International Law* 351; Mark Gibney, 'On Terminology Extraterritorial Obligations' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013) 32.

[10] Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 *European Journal of International Law* 427.

[11] Harold Hongju Koh, 'Transnational Public Law Litigation' (1991) 100 *The Yale Law Journal* 2347; Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (Hart 2001); Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Bloomsbury 2018).

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extraterritoriality paradigm established by public international law and consider the relevance of alternative frameworks. It suggests reconceptualising the debate on extraterritoriality by increasing transjudicial dialogue between international human rights and national adjudication.

The following sections first analyse the meaning, limitations and problems of a discourse constructed around the concept of extraterritoriality; second, consider the implications of the use of the languages of universality and transnationality; and, third, investigate whether cross-fertilisation between international and domestic courts can help to address global threats, using the paradigms of universality and transnationality.

2. Extraterritorial human rights

Most international human rights treaties include a jurisdictional clause requiring signatory states to apply human rights law to persons within or subject to their jurisdiction. This concept is enshrined in Articles 1 of the European and American Conventions on Human Rights and Article 2 of the International Covenant on Civil and Political Rights.[12] There are four exceptions to this rule. The American Declaration of the Rights and Duties of Man, the African Charter on Human and People's Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of all Forms of Discrimination against Women do not include jurisdictional clauses. Nevertheless, this has not determined a significant dichotomy between the interpretation of these four instruments and the other human rights treaties.[13]

The interpretation of these jurisdictional clauses is as follows. Human rights law applies to a signatory state in so far as the victim is within the jurisdiction of the state; traditionally, victims are considered within the jurisdiction of a

[12] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 221, art 1 ('The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'); American Convention on Human Rights, Pact of San José, Costa Rica (entered into force 18 July 1978) 1144 UNTS 123, art 1(1) ('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'); International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171, art 2(1) ('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').

[13] Nadia Bernaz, 'State Obligations with regard to the Extraterritorial Activities of Companies Domiciled on Their Territories' in Carla M Buckley, Alice Donald and Philip Leach, *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff 2017); Dalia Palombo, *Business and Human Rights: The Obligations of the European Home States* (Hart 2020) 186–212; Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000).

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state when they are in its territory. Are there cases, however, when a victim is outside the state's territory and can still be considered within its jurisdiction? This question frames the whole paradigm of extraterritoriality. Extraterritoriality covers those situations when a victim is outside the territory of a state but is still within its jurisdiction.

This paradigm of extraterritoriality is embedded in the concept of human rights as part of public international law. Public international law, a state-centric legal system constructed around sovereignty, conceives jurisdiction as primarily territorial. As states are equal, they are to respect each other's sovereignty and avoid interferences with the territories of other states. According to this paradigm, a state may only exceptionally exercise jurisdiction outside its territory. These exceptions are limited and legally justified under international law.[14]

This section analyses various approaches that scholars and courts take within the paradigm of extraterritoriality.

2.1. The traditional approach

According to the traditional approach, the enjoyment of human rights depends on the procedural question of jurisdiction. If a state has no jurisdiction over a victim, it also has no obligation towards that victim.[15]

The main extraterritorial scenarios in which a victim is outside the state's territory but still within its jurisdiction are cases of military occupation and the like. In sum, they are situations when a state effectively controls another state's territory as if it were its own. The International Court of Justice (ICJ), together with human rights courts and commissions,[16] adopted this interpretation in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[17] The case of military occupation is now commonly accepted as an extraterritorial case where a state has jurisdiction over victims who are not within its territory.

Moreover, this traditional approach has been extended to situations in which a state exercises jurisdiction over a foreign person (and not a territory). For example, a state captures a person during military operations abroad; in such a case the state does not control a foreign territory but exercises authority and control over a foreign person. Given that the jurisdictional clauses of international human rights treaties mention that victims (and not territories) must be within the jurisdiction of signatory states for human rights law to apply, then once a state takes a prisoner into custody, it exercises jurisdiction

[14] Rick Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 83; Besson (n 8).

[15] Besson (n 8).

[16] Noam Lubell, 'Human Rights Obligations in Military Occupation' (2012) 94 *International Review of the Red Cross* 317.

[17] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.

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over that prisoner even if outside its territory.[18] Another example is the control exercised in Iraq by European military forces invited by the Iraqi government. European states did not have effective control over Iraq, but they still exercised public power in place of the Iraqi government. Thus, the authority and control exercised over the Iraqi people was sufficient to trigger the jurisdiction of European states.[19]

This interpretation left several critical situations outside the jurisdiction of states. For example, dropping a bomb in a foreign country would not meet the jurisdictional test: victims of bombings are not under the authority and control of the state and, therefore, are outside its jurisdiction. Under the traditional extraterritorial approach, there are no human rights obligations without jurisdiction. Thus, states that drop bombs in foreign countries have no human rights obligations towards the civilians who suffer from the attack because those civilians are not under their jurisdiction. The European Court of Human Rights (ECtHR) embraced this approach in the seminal case of *Bankovic v Belgium*, which concerned a NATO military attack in Belgrade that caused several civilian casualties.[20]

2.2. The procedural approach

The traditional approach – focused solely on the jurisdictional question (does the state have jurisdiction over the victim?) while avoiding the substantive human rights or humanitarian law questions at stake in these cases (does the state violate human rights or humanitarian law?) – resulted in a widespread sense of dissatisfaction and injustice among victims, human rights advocates, and even some judges. For example, Judge Bonello, in his concurring opinion in *Al-Skeini v United Kingdom*, wrote:[21]

> If two civilian Iraqis are together in a street in Basra, and a United Kingdom soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of United Kingdom jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same United Kingdom soldier, same gun, same ammunition, same patch of street – same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human rights justice.

The dissatisfaction with the traditional approach stimulated new and creative interpretations of extraterritorial scenarios. Thus, several litigators

[18] ECtHR, *Ocalan v Turkey*, App no 46221/99, 12 May 2005; ECtHR, *Issa and Others v Turkey*, App no 31821/96, 16 November 2004; Shanta Bhavnani, 'ECtHR Extends Application of Convention beyond Council of Europe Borders' (2011) 16 *EHRAC Bulletin* 1.

[19] ECtHR, *Al-Skeini and Others v United Kingdom*, App no 55721/07, 7 July 2011; ECtHR, *Jaloud v The Netherlands*, App no 47708/08, 20 November 2014; Barbara Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons' (2012) 33 *Michigan Journal of International Law* 693.

[20] ECtHR, *Bankovic and Others v Belgium*, App no 52207/99, 19 December 2001; Lawson (n 14).

[21] *Al-Skeini and Others v United Kingdom* (n 19) concurring opinion of Judge Bonello, 15.

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and scholars have focused on procedural rights to enlarge the scope of extraterritoriality.

A complex case is that of a victim filing a civil law complaint against a signatory state for bombing a foreign country. Indeed, the civil proceedings would be within the territory and jurisdiction of the signatory state, but would human rights treaties require the state to investigate its human rights violations perpetrated abroad?

The answer to these questions has been increasingly positive: states are to provide effective remedies for victims within their territory even if the human rights abuses occurred elsewhere. The case that better exemplifies this approach is *Markovic v Italy*, in which the ECtHR recognised that Italy had jurisdiction over a claim on the same facts as *Bankovic v Belgium*. The only significant difference between *Bankovic* and *Markovic* was that the former concerned the substantive question of bombing Belgrade, while the latter included a procedural question on whether victims of the Belgrade bombing could file a civil complaint against Italy, in Italian courts, for providing the military bases for the NATO attack.[22] The ECtHR confirmed this procedural exception in subsequent cases.[23]

This opening in jurisprudence, establishing an exception for procedural obligations, raised a related question concerning cases of non-state actors, particularly multinational corporations, abusing human rights outside the jurisdiction of a signatory state. Does IHRL apply when a victim of abuses committed abroad by a corporation headquartered in a signatory state files a complaint in the signatory state? Indeed, in such a case the victim files the complaint against a corporation within the state's territory, but the human rights abuse occurred abroad. An additional complication in cases of multinational enterprises is that often the company incorporated in the signatory state is not the same entity that committed the abuse of human rights but it is its parent or holding company.

While these complexities are of interest to tort and corporate lawyers,[24] to determine the responsibility of parent companies for abuses committed by their groups, from the IHRL perspective, the question is whether the procedural exception to extraterritoriality applies both to negative and positive obligations. To recap, there is the following *procedural rights exception*: when a victim files a civil suit against a state for human rights abuses committed abroad, that state has jurisdiction over the matter, and human rights law applies to that lawsuit. This means that the state shall provide effective remedies for the extra-jurisdictional violations it committed. Thus, the state has jurisdiction when the allegation is that it violated human rights itself, a case of negative obligation (an obligation requiring states to refrain from acting). However, the case of corporations is different because the

[22] *Bankovic and Others v Belgium* (n 20); ECtHR, *Markovic and Others v Italy*, App no 1398/03, 14 December 2006; Gonzalez (n 8).

[23] ECtHR, *Hanan v Germany*, App no 4871/16, 16 February 2021; ECtHR, *Guzelyurtlu and Others v Cyprus and Turkey*, App no 36925/07, 29 January 2019.

[24] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 *Washington and Lee Law Review* 1769.

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alleged extra-jurisdictional abuse is not committed by the state but by a non-state actor. Therefore, by providing victims with access to remedies against a corporation, the state fulfils a positive obligation (requiring the state to prevent or redress abuses committed by a third party).[25] The application of the *procedural rights exception* to positive obligations divided scholars between those in favour and those against such an extended interpretation of extraterritoriality.[26]

The Inter-American Court of Human Rights (IACtHR) has developed a robust jurisprudence connecting procedural rights and positive obligations regarding private enterprises in several cases related to corporate human rights abuses affecting indigenous communities.[27] Initially applied to territorial claims, this procedural approach has been extended progressively to extraterritorial abuses.[28] The United Nations (UN) treaty bodies have also embraced this approach and have increasingly required states to provide remedies for victims of cross-border human rights abuses committed by non-state actors.[29]

Although there are differences in the approaches taken by various human rights courts and treaty bodies, with the ECtHR being substantially more conservative than the rest of human rights adjudication, the trend has been

[25] Palombo (n 13) 157–219; see also ECtHR, *Rantsev v Cyprus and Russia*, App no 25965/04, 7 January 2010.

[26] Shany (n 6); Milanovic (n 8) 209–22.

[27] Efrén C Olivares Alanís, 'Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence from the Inter-American System of Human Rights' (2013) 5 *Goettingen Journal of International Law* 187; Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2015) 25 *Duke Journal of Comparative and International Law* 1; Diana Contreras-Garduño and Sebastiaan Rombouts, 'Collective Reparations for Indigenous Communities before the Inter-American Court of Human Rights' (2011) 27 *Utrecht Journal of International and European Law* 4; Mario Melo, 'Recent Advances in the Justiciability of Indigenous Rights in the Inter-American System of Human Rights' (2006) 4 *SUR-Intenational Journal on Human Rights* 31; Aniko Raisz, 'Indigenous Communities before the Inter-American Court of Human Rights: New Century, New Era' (2008) 5 *Miskolc Journal of International Law* 35; Vasiliki Saranti, 'International Justice and Protection of Indigenous Peoples: The Case Law of the Inter-American Court of Human Rights' (2012) 9 *US-China Law Review* 427.

[28] IACtHR, *Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment of 27 June 2012, Ser (C) No 245; IACtHR *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment of 29 March 2006, Ser (C) No 146; IACtHR, *Yakye Axa Indigenous Community v Paraguay*, Judgment of 17 June 2005. Ser (C) No 125; Inter-American Commission on Human Rights, 'Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities', 31 December 2015, OEA/SerL/V/II Doc. 47/15; IACtHR, *Kalina and Lokono Peoples v Suriname*, Judgment of 25 November 2015, Ser (C) No 309; IACtHR, *Advisory Opinion on the Environment and Human Rights* [2017] IACtHR OC-23/17.

[29] Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Germany, adopted by the Committee at Its 106th Session (15 October–2 November 2012), UN Doc CCPR/C/DEU/CO/6, para 16; Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on the Fourth Periodic Report of Austria (13 December 2013), UN Doc E/C.12/AUT/CO/4, para 12; CESCR, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (10 August 2017), UN Doc E/C.12/GC/24, paras 16, 33; Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America (29 August 2014), UN Doc CERD/C/USA/CO/7-9, para 10.

increasingly to admit the application of the *procedural rights exception* in cases of both negative and positive obligations.[30]

2.3. The obligation approach

The divisions among human rights scholars as to the application of the *procedural rights exception* raised a further question. If the jurisdictional test depends on whether a right could be considered procedural or not, or, according to some, an obligation could be regarded as positive or negative, then should we not reconceptualise the relation between jurisdiction and obligations? Answering 'yes' means reconsidering the public international law assertion that human rights obligations depend on jurisdiction and, therefore, there can be no human rights obligations if there is no jurisdiction. Conversely, following this logic, jurisdiction and obligations are intrinsically connected and dependent on each other. Thus, the jurisdictional test depends on the nature of states' obligations.

Scholars have taken this approach, especially regarding economic, social and cultural rights. The Maastricht Principles – a soft law document written by several leading scholars on the extraterritorial obligations of states in the area of economic, social and cultural rights – argue that there are three jurisdictional tests for two types of obligation.[31]

The first is the traditional approach: jurisdiction depends on a state's authority or effective control over a foreign territory or person. This test is applicable to a foreign state's action or omission.

The second is the functional or foreseeability approach, which includes the procedural approach but goes beyond it: jurisdiction depends on the foreseeable effects that a territorial state's action or omission has abroad. Therefore, a state has jurisdiction over a civil law case brought by a victim because its military bases were used to strike an attack on foreign soil. In this case, the use of the state territory had foreseeable repercussions in terms of human rights abuses abroad. Although often these cases could be constructed around the paradigm of procedural rights (for example, a state is to provide foreign victims with the right to an effective remedy when its actions or omissions have foreseeable effects abroad), it may also be extended to substantive rights. A victim may not just seek a procedural right to litigate against the state for its military strike, but may also argue that the state should not provide its military bases for foreign military operations that would foreseeably violate human rights abroad. This foreseeability or functional approach questions the traditional notion of effective control over a territory or authority and control over a person. It reinterprets control in terms of causality: whether the state could foreseeably expect its actions or omissions to cause

[30] See, eg, *Rantsev v Cyprus and Russia* (n 25); *Jaloud v The Netherlands* (n 19); *Hanan v Germany* (n 23); *Guzelyurtlu and Others v Cyprus and Turkey* (n 23).

[31] Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084, Principles 8, 9.

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human rights abuses. In *Alejandre v Cuba*, for example, the Inter-American Commission on Human Rights ruled that a Cuban's extraterritorial missile attack violated the American Declaration of the Rights and Duties of Man because Cuba could 'control' the reasonably foreseeable effects of its military operation.[32] The Commission's approach, later confirmed in several cases,[33] considers the control test in terms of causality instead of control over a territory or person. The Human Rights Committee has followed the same approach, based on a foreseeability test applicable to both substantive and procedural obligations.[34] If one analyses control as causality, it is apparent that perpetrating a military strike on foreign territory may foreseeably result in human rights abuses.

The third is the decisive influence jurisdictional test applicable to obligations of a global character, requiring states to cooperate to fulfil human rights at the global level. In these cases, the jurisdictional test depends on the decisive influence or measures that a state may exercise or take to achieve a collective goal. These could include, for example, the obligations arising from the fight against climate change. Jurisdiction may depend on a state's ability to reduce not only its own CO_2 emissions but also those of multinationals headquartered within its territory.[35] The UN treaty bodies have extensively applied the decisive influence test in numerous decisions, especially regarding states' obligations to conduct appropriate due diligence when signing or implementing trade and investment agreements that would influence the conduct of investors worldwide.[36] Even the more conservative ECtHR has applied the test in a few cases unrelated to obligations of a global character. In the cases of *Treska* and *Vrioni*, for instance, the ECtHR considered whether

[32] IAComHR, *Alejandre Jr v Cuba*, Report No 86/99, 29 September 1999.

[33] IAComHR, *Franklin Guillermo Aisalla Molina Ecuador v Colombia*, Report No112/10, 21 October 2010; IAComHR, *Danny Honorario Bastidas Meneses and Others v Ecuador*, Report No 153/11, 2 November 2011.

[34] Human Rights Committee, General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (3 September 2019), UN Doc CCPR/C/GC/36, paras 21–22.

[35] See, eg, Joint Statement on Human Rights and Climate Change by the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee on Economic Social and Cultural Rights (CESCR), the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), the Committee on the Rights of the Child (CRC) and the Committee on the Rights of Persons with Disabilities (CRPD) (14 May 2020), UN Doc HRI/2019/1, https://digitallibrary.un.org/record/3871313?ln=en; Lorenzo Gradoni and Martina Mantovani, 'No Kidding!', *Völkerrechtsblog*, 23 March 2022, https://voelkerrechtsblog.org/no-kidding.

[36] CRC, General Comment No. 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights (17 April 2013), UN Doc CRC/C/GC/16, para 46; CESCR, General Comment No 24 (n 29) para 13; CESCR, Concluding Observations on the Fourth Periodic Report of France (13 July 2016), UN Doc E/C.12/FRA/CO/4, paras 9–10; CESCR, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Switzerland (26 November 2010), UN Doc E/C.12/CHE/CO/2-3/, para 24; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Switzerland (7 December 2012), UN Doc A/HRC/22/11, para 123.85; CRC, Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland (4 February 2015), UN Doc CRC/C/CHE/CO/2-4, para 24.

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Italy had jurisdiction over Albania based on the decisive influence test. The question was whether Italy exercised a decisive influence on the decision made by the Albanian government to confiscate the property of Albanian nationals.[37]

Although entrenched in the extraterritoriality paradigm, the obligation approach innovatively attempts to reconceptualise extraterritoriality around the relationship between jurisdiction and obligations.

2.4. Reconciliation?

None of the above approaches have been able to reconcile the jurisprudence of human rights courts and treaty bodies on extraterritoriality. Each approach entails several problems that make the extraterritoriality paradigm unfit to respond to global human rights crises.

First, the traditional approach is the most compelling and easy to understand from a theoretical standpoint: no jurisdiction, no human rights abuse. Jurisdiction arises when the victim is within the territory of a state or when the state exercises such a level of control over a foreign territory or person that the territory could be assimilated into its own, or the person could be considered to be under the state's authority. This approach is straightforward: unless an abuse occurred in a situation of military occupation, the captivity of prisoners, or similar, we should not even consider the human rights question. However, it is an increasingly unsatisfactory approach because it ignores the variety of ways in which a state can abuse human rights abroad in a globalised world. It also dismisses several human rights obligations of a global character that require states to act abroad. Nowadays, human rights obligations increasingly include, for example, undertaking appropriate human rights due diligence when signing trade deals, reducing carbon emissions and meeting an adequate target, and contributing to the fight against climate change. These obligations are, by their nature, global and require states to act both within and outside their territories, and often in cooperation with other states. If one adopts the traditional approach, several human rights obligations would never be enforceable.[38] For example, in 2016, the Committee on Economic Social and Cultural Rights urged France to adopt a mandatory due diligence law (at the time under consideration by the French Parliament) entitling, under certain conditions, (foreign) victims to file civil complaints against French parent companies for their failure to exercise appropriate due diligence over their (foreign) subsidiaries and supply chains, resulting in

[37] ECtHR, *Nikolaus and Jurgen Treska v Albania and Italy*, App no 26937/04, 29 June 2006; ECtHR, *Vrioni and Others v Albania and Italy*, App nos 35720/04 and 42832/06, 29 September 2009.

[38] Carmen Gonzalez, 'Environmental Justice, Human Rights, and the Global South' (2015) 13 *Santa Clara Journal of International Law* 151; Samantha Besson, 'ESIL Reflection – Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!', https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap; Lea Raible, 'Expanding Human Rights Obligations to Facilitate Climate Justice? A Note on Shortcomings and Risks', *EJIL: Talk!*, 15 November 2021, https://www.ejiltalk.org/expanding-human-rights-obligations-to-facilitate-climate-justice-a-note-on-shortcomings-and-risks.

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(cross-border) human rights and environmental abuses.[39] France adopted the law.[40] However, imagine if France had not adopted the due diligence law, and a victim of human rights abuses committed by a French corporate group in Indonesia were to file a complaint against France for failing to secure her rights. Under the traditional extraterritorial approach, the Indonesian victim would be outside French jurisdiction in this scenario. Thus, on the one hand, France shall adopt the law but, on the other, if it does not, it would not be responsible for the human rights and environmental abuses derived from its failure to adopt such a law. Following this logic, these human rights obligations exist, but cannot be enforced.

Second, the procedural approach attempts to open a back door for victims to file complaints against states and non-state actors that abuse human rights across the border while maintaining the traditional jurisdictional test based on authority or effective control. To continue with the example of military strikes, a Belgrade citizen has the right to file a complaint against Italy in civil courts because it provided its military bases for an airstrike resulting in the death of his relative. As much as this attempt is commendable, it is not convincing from the doctrinal perspective. There are, in fact, various versions of this approach, each attempting to justify its exception to the traditional rule on jurisdiction, such as the procedural rights or the negative obligations exceptions.[41] However, these *distinguo* are not compelling: it is not clear why the approach should be limited to procedural rights, and it is even less clear why, for some scholars, the approach should be limited to negative obligations. If a victim has the right to file a civil law complaint against a state because it provided its military bases for bombing a foreign territory, it is illogical for the same victim not to be entitled to claim a violation in respect of the attack itself.

Third, the obligation approach attempts to fill the gaps between jurisdictional tests and obligations. It is the only test to address the question of obligations of a global character. According to this approach, jurisdiction and obligations are interlinked: the jurisdictional test depends on the nature of the obligation at stake. The approach is compelling, but it brings counter-intuitive results in an attempt to reconcile the existing human rights jurisprudence.[42]

On the one hand, according to this approach, the Netherlands could potentially have jurisdiction over a Kiribati citizen who becomes a climate change refugee and accuses the state of failing to reduce its emissions in accordance with the Glasgow Climate Pact, provided that such a failure had a decisive influence on the rising water that is detrimentally affecting Kiribati.[43] This example

[39] CESCR, 'Concluding Observations on the Fourth Periodic Report of France' (n 36) para 13.

[40] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre 2017 (JORF). The law applies to French holding companies that employ at least 5,000 group employees in France or 10,000 group employees globally.

[41] Milanovic (n 8) 209–22; Gonzalez (n 8); Shany (n 6); Besson (n 8).

[42] De Schutter and others (n 31).

[43] See a similar case concerning Kiribati climate change refugees seeking asylum in New Zealand (although jurisdiction was not an issue in this case) and decided by the Human Rights Committee: Human Rights Committee, Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 2728/2016 (7 January 2020), UN Doc CCPR/C/127/D/2728/2016.

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is not far from current litigation. Dutch courts held both the Netherlands and the corporation Royal Dutch Shell Plc responsible for failing to comply with climate law.[44] A French administrative court also condemned France for its contribution to climate change.[45] The ECtHR has recently admitted a case brought by a group of Portuguese children against 33 European states for their failure to tackle climate change, resulting in an impairment of their human rights.[46] The Union of Swiss Senior Women for Climate Protection filed a similar case against Switzerland with the ECtHR.[47]

On the other hand, the obligation approach maintains that the applicable jurisdictional test sometimes remains authority or effective control. Thus, in the context of foreign military operations, a state may not be held to account for human rights abuses unless it controls a foreign state or person.

It is hard to reconcile that states have jurisdiction over victims of human rights abuses deriving from climate change but, at the same time, do not have jurisdiction over their military strikes.

This short analysis shows that the extraterritoriality paradigm does not fit human rights obligations well. The difficulties in applying a traditional public international law conception of jurisdiction to human rights were already apparent 20 years ago, in cases such as *Bankovic v Belgium*, where states could escape responsibility for military strikes. A considerable doctrinal effort has been put into modifying this formalist approach to fit the purposes of human rights treaties. This resulted in several exceptions that enabled victims to file complaints against states that were abusing human rights extraterritorially. However, these stretches of the law met a new challenge when faced with global obligations requiring states to act outside their borders or collectively, without asserting authority or effective control over a foreign territory or person. These obligations increasingly reveal the flaws of the extraterritoriality paradigm in its application to human rights treaties.

3. Universal human rights

The paradigm of universality perfectly fits within the human rights rhetoric. Since the Universal Declaration of Human Rights was adopted in 1948,[48] the debate over the universality of human rights has always been current. On the one hand, some scholars argue that human rights are inherently universal because they are fundamental rights for all people;[49] on the other hand, some

[44] *The Netherlands v Urgenda Foundation*, Hoge Raad der Nederlanden [Supreme Court of the Netherlands], 20 December 2019, Case No 19/00135; *Vereniging Milieudefensie v Royal Dutch Shell* (n 4).

[45] *Association Oxfam France, Association Notre Affaire à Tous, Fondation pour la Nature et l'Homme, Association GreenPeace France* (2021) Tribunal Administratif de Paris 1904967, 1904968, 1904972, 1904976/4-1.

[46] ECtHR, *Duarte Agostinho and Others v Portugal and 32 Other States*, App no 39371/20, December 2020.

[47] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, App no 53600/20, April 2022.

[48] UNGA Res 217A (III) (10 December 1948), UN Doc A/810.

[49] Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 *The Annals of the American Academy of Political and Social Science* 10; Louis Henkin, *The Age of Rights* (Columbia

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respond that human rights are not universal but a cultural construction built upon the idea of rights as historically developed in the West and furthering a neoliberal ideology.[50] Between these views, most scholars consider human rights as fundamental but general legal principles that states must implement in their domestic systems. Each state has margins for adopting IHRL into its national legal system and traditions. This debate between universality and various cultural approaches to human rights has always been at the centre of the human rights discourse and its foundations.[51]

However, litigators, judges and even scholars who specialise in the extraterritorial application of human rights treaties have rarely taken seriously the debate over the universality of human rights.[52] It is assumed that one needs to focus on the jurisdictional language of legally binding human rights treaties to understand if and when they can apply extraterritorially, while the language of universality belongs to the non-legal dimension of the Universal Declaration of Human Rights. This attitude has often prevented human rights adjudication from considering universality in its case law, even when applicants referred to the notion of universal jurisdiction.

Universal jurisdiction enables domestic courts to assert jurisdiction over persons who could be considered enemies of humankind. In these cases the perpetrators commit such an outrageous crime, defined as a *jus cogens* violation, that they could be prosecuted anywhere in the world, no matter where the crime was committed.[53] These are exceptional cases concerning the breach of *jus cogens* norms, including the provision against genocide, torture and crimes against humanity. Some believe the list of *jus cogens* norms could be extended to other crimes. For instance, the International Law Commission provisionally adopted its draft conclusions on peremptory norms of general international law (*jus cogens*). The text refers to an extended list of *jus cogens*, including crimes of aggression, humanitarian law, racial discrimination, apartheid, slavery and self-determination. The list is non-exhaustive and is under review after several states made a number of

University Press 1990); Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950); Julia Kozma and others, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010).

[50] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005); David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101; Nehal Bhuta, 'The Frontiers of Extraterritoriality: Human Rights as Global Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016) 1; Fidèle Ingiyimbere, 'Human Rights as an Imperialist Ideology' in Fidèle Ingiyimbere (ed), *Domesticating Human Rights: A Reappraisal of their Cultural-Political Critiques and their Imperialistic Use* (Springer International 2017) 13.

[51] Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015); Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 *Australian Yearbook of International Law* 82.

[52] Shany (n 6). For a remarkable exception see, eg, *Al-Skeini and Others v United Kingdom* (n 19) concurring opinion of Judge Bonello.

[53] Henry A Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs New York* 86; Kenneth Roth, 'The Case for Universal Jurisdiction' (2001) 80 *Foreign Affairs New York* 150.

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comments and observations on the text; but even this extensive list refers to a limited number of rights.[54]

In domestic courts, universal jurisdiction had its ups and downs. Cases of universal jurisdiction include, for example, the case of Eichmann, a Nazi official convicted in Israel for crimes committed in the Third Reich at a time when Israel did not even exist as a state; or the case of Pinochet, in which the House of Lords ruled that Pinochet had to be extradited to Spain for crimes committed in Chile.[55] In some circumstances, immunity concerns prevented domestic courts from asserting universal jurisdiction. For instance, Belgium enacted a universal jurisdiction statute on the basis of which a Belgian prosecutor issued an arrest warrant for the Minister of Foreign Affairs of the Democratic Republic of Congo (DRC). The case went all the way to the ICJ, which ruled in favour of the DRC because the Belgian arrest warrant violated the immunity of a Congolese minister.[56] In sum, under public international law states can assert universal jurisdiction over defendants for *jus cogens* violations, provided that such assertion does not violate other established principles of international law, such as immunity.

Victims have also raised the question of universal jurisdiction in international human rights courts: do states have obligations to exercise universal jurisdiction over human rights abuses outside their territories? Stated differently, should we apply the paradigm of universality over *jus cogens* violations (not requiring authority and control over a person or effective control over a territory) rather than the traditional paradigm of extraterritoriality (requiring authority and control over a person or effective control over a territory)? The answer to this question has almost univocally been 'no'. International human rights adjudication has largely ignored the paradigm of universality.

Even in cases of *jus cogens* violation, courts have analysed the jurisdictional question under the lens of the traditional authority or effective control test. For example, the ECtHR faced questions about universal jurisdiction in several cases involving immunity. The Court ruled in these cases that immunity

[54] International Law Commission (ILC), Preremptory Norms of General International Law (*Jus Cogens*) (29 May 2019), UN Doc A/CN.4/L.936; Dire Tladi, Fifth Report on Peremptory Norms of General International Law (*Jus Cogens*) (session of the International Law Commission of 24 January 2022), UN Doc A/CN.4/747.

[55] CrimA 336/61, *Eichmann v Attorney General of the Government of Israel*, 29 May 1962, 36 *International Law Reports* 277; Covey Oliver, 'The Attorney-General of the Government of Israel v. Eichmann' (1962) 56 *American Journal of International Law* 805; *Regina v Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet; Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet* [1998] UKHL 41; Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 *European Journal of International Law* 237; Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491; for insights on the historical debate that justified the use of universal jurisdiction by domestic courts to punish war crimes see Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 *California Law Review* 530.

[56] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3.

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trumps *jus cogens* obligations that could give rise to universal jurisdiction.[57] However, in *Nait Liman v Switzerland*, the immunity question was irrelevant. The ECtHR had to analyse whether Swiss courts had jurisdiction over a Tunisian citizen, resident in Switzerland, who filed a civil complaint against the Tunisian Ministry of Interior; the claimant was hospitalised in Switzerland for a brief period, and made allegations of torture. The ECtHR ruled that Swiss courts were not obliged to assert jurisdiction over the case because neither the victim nor the perpetrator were under Swiss authority and control when the alleged torture occurred.[58] This approach demonstrates unwillingness on the part of the ECtHR to embrace the paradigm of universality in its jurisprudence. The Court applies the jurisdictional limitations entailed in the paradigm of extraterritoriality even in cases of *jus cogens* violations.[59]

In a more liberal decision the Committee against Torture ruled that states have an obligation to exercise jurisdiction over, or extradite the perpetrator of *jus cogens* crimes, as long as the defendant is physically present in the state's territory. The Committee found Senegal in breach of the Convention against Torture because it had failed to prosecute and extradite the President of Chad, Hissène Habré, for allegations of torture.[60] The complainants were Chadian, the alleged acts of torture were committed in Chad, but President Habré was physically present in Senegal. The question arose as to whether Senegal had jurisdiction over the case. The Committee found that the state had jurisdiction over the complainants because they filed a lawsuit in Senegal against President Habré. Once jurisdiction had been established, the Committee found that Senegal was under an obligation to prosecute or extradite the perpetrator of alleged *jus cogens* violations. As much as this is a decision that favours universal jurisdiction and uses the language of universality, it can still be analysed within the paradigm of extraterritoriality: jurisdiction is asserted because the victim filed a complaint within the state's territory.

The Committee confirmed the orthodoxy of the extraterritorial approach in a subsequent case filed against Canada by complainants who allegedly survived torture in Guantanamo Bay. The Canadian Center for International Justice, a non-governmental organisation (NGO), filed relevant evidence with a Canadian justice of the peace to initiate criminal action against President Bush for alleged torture suffered by several victims in Guantanamo Bay. President Bush was in Canada for a conference at the time, but the complainants were not. The case seemed very similar to the *Habré* case, except that the victims had never been physically present in Canada to file a private complaint against President Bush. Instead, an NGO presented criminal information to a justice of the peace in British Columbia without directly involving the victims

[57] ECtHR, *Al-Adsani v United Kingdom*, App no 35763/97, 21 November 2001; ECtHR, *Jones and Others v United Kingdom*, App nos 34356/06 and 40528/06, 14 January 2014.

[58] ECtHR, *Nait-Liman v Switzerland*, App no 51357/07, 21 June 2016; ECtHR, *Nait-Liman v Switzerland*, App no 51357/07, 15 March 2018.

[59] Hovell (n 10).

[60] Committee against Torture, *Suleyamane Guengueng et al. v Senegal*, No 181/2001 (19 May 2006), UN Doc CAT/C/36/D/181/2001.

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in the proceedings. This was a sufficient reason for the Committee to consider the applicants to be outside Canadian jurisdiction. The limited proceedings initiated in Canada were not enough for the victims to be considered 'present' within the state's territory. This confirms that the Committee against Torture applies a jurisdictional test based on state control over victims, reproducing the paradigm of extraterritoriality even in universal jurisdiction cases.[61]

A significant exception to this closure towards universality is certain jurisprudence of the Inter-American Commission and Court of Human Rights, which has been developed primarily in a number of separate opinions by Judge Cançado Trindade.[62] This approach focuses on the importance of *jus cogens* as universal rights that will consistently be enforced regardless of the jurisdictional limitations of international law. In this conception, *jus cogens* rights correspond to *erga omnes* obligations. The cogency of such obligations trumps the jurisdictional limitations that states include in human rights treaties. Accordingly, even when a state has not consented to a *jus cogens* obligation, it is still obliged to fulfil it. Following this logic, in several cases concerning *erga omnes* obligations, the Inter-American Commission and Court of Human Rights have overcome jurisdictional limitations *ratione temporis*, *materiae* or *loci*.[63] In *Espinoza v Chile*, for example, the Commission held that Chile, which avoided prosecuting state agents for alleged *jus cogens* violations because of an amnesty law, had to accept the universal jurisdiction of other countries over such criminals.[64]

A recent decision by the Committee on the Elimination of Racial Discrimination also embraced the paradigm of universality. In the *Inter-State Communication submitted by the State of Palestine against Israel*,[65] Israel argued that the Committee had no jurisdiction over the case because Israel had expressly excluded treaty relations with Palestine. Despite this formal exclusion, the Committee asserted jurisdiction over the claim because the prohibition of racial discrimination, upon which Palestine's allegations were based, has *jus cogens* character and is applicable *erga omnes*. Thus, such obligations trump jurisdictional limitations that a state party may impose on others

[61] Committee against Torture, *HBA and Others v Canada*, Communication No 563/2013 (11 February 2016), UN Doc CAT/C/56/D/536/2013.

[62] Antonio A Cançado Trindade, 'Une Ere d'Avancées Jurisprudentielles et Institutionelles: Souvernirs de la Cour Interamericaine des Droits de l'Homme', *Le particularisme interaméricain des droits de l'homme: En l'honneur du 40e anniversaire de la Convention américaine des droits de l'homme* (Editions A Pedone 2009); Antonio A Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (3rd edn, Brill 2020); Mahmoud Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' (1996) 59 *Law and Contemporary Problems* 63.

[63] See, eg, the concurring opinions of Judge Cançado Trindade in IACtHR, *Bamaca Velasquez v Guatemala*, Judgment of 25 November 2000, (Ser C) No 70; IACtHR, *Myrna Mack Chang v Guatemala*, Judgment of 25 November 2003, (Ser C) No 101; IACtHR, *Blake v Guatemala*, Judgment of 24 January 1998, (Ser C) No 36; *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion [2003] IACtHR 18–03 OC.

[64] Inter-American Commission on Human Rights, *Carmelo Soria Espinoza v Chile*, Report No 133/99 (19 November 1999).

[65] Committee on the Elimination of Racial Discrimination, Inter-State Communication submitted by the State of Palestine against Israel: Decision on Admissibility (17 June 2021), UN Doc CERD/C/103/4.

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because each state must fulfil *erga omnes* obligations towards all members of the international community.

This approach differs substantially from the traditional analysis based on the authority or effective control test. Nevertheless, it has been applied in a limited number of cases. Furthermore, these cases have not focused on the cross-border implementation of such *erga omnes* obligations.

The paradigm of universality may resonate well with human rights victims and NGOs, but not with human rights adjudication. Instead of applying the language of universal jurisdiction, most application of human rights treaties is subject to a jurisdictional test based on the extraterritoriality paradigm. The jurisdictional question is not, as universal jurisdiction would entail, whether a crime could be considered as *jus cogens* or, in other words, a violation of *erga omnes* obligations, but rather whether a state has authority and control over a person or effective control over a territory. The orthodoxy of the extraterritorial approach to jurisdiction is so embedded in the jurisprudence of human rights courts and treaty bodies that it determines even the admissibility of cases concerning *jus cogens* violations.

4. Transnational human rights

The paradigm of transnationality has been entirely foreign to human rights until recently. Philip Jessup described transnational law in a 1956 Storrs lecture:[66]

> I shall use, instead of 'international law', the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.

The definition of 'transnational law' is still contested.[67] However, it is common ground that transnational law transcends the public and private spheres and applies to non-state actors. By contrast, public international law regulates the relationship between states. The language of transnationality is typically applicable to commercial relations and often connected with the global development of the *lex mercatoria*, or global commercial law. Scholars often use these terms interchangeably and analyse them under various lenses. Some argue that they are non-state laws because they originate from transnational contractual agreements. In such agreements commercial partners regulate their relationships with reference to soft law standards, such as those included in the UNIDROIT principles, and, in the event of disputes, they refer to the authority of an arbitrator rather than a judge. Others, instead, have underlined that the *lex mercatoria* could not exist without states. Domestic laws allow for contracts to establish a transnational legal system that regulates the

[66] Philip C Jessup, *Transnational Law* (Yale University Press 1956) 136.

[67] See Craig Scott, '"Transnational Law" as Proto-Concept: Three Conceptions' (2009) 10 *German Law Journal* 859; Caiphas B Soyapi, 'A Case for Transnational Law in Contemporary Times' (2020) 23 *Potchefstroom Electronic Law Journal* 1.

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relationship between commercial actors. In addition, commercial contracts typically refer to a state law that regulates the relationship between the parties.[68]

Regardless of the approach one takes, it is clear that traditional domestic laws had to deal with transnational law by establishing rules that, on the one hand, determine the limits in which transnational law can act (for example, when a contract is illegal or an arbitration award is unenforceable under national law), and, on the other, establish the grounds for transnational law to flourish (such as by adopting appropriate rules of private international law that determine which law is applicable to which commercial transaction). Thus, nowadays, transnational commercial law combines domestic laws, international soft law principles, precedents from national courts and arbitration tribunals, and contractual provisions. For example, transnational commercial law would encompass the case of South African and Philippine companies signing a contract under English law, which includes an arbitration clause referring to the competence of the London Court of International Arbitration and the UNIDROIT principles. In the event of a dispute between the parties, the London Court of International Arbitration would interpret the contract by referring both to the UNIDROIT soft legal principles and English law.

In a globalised world the concept of 'transnational' moved swiftly from the contractual to the litigation arena. Transnational civil litigation became a tool to address disputes between persons from different jurisdictions. These include not only commercial parties but also, for example, family law, when partners come from different countries, tort litigation, when the claimant and respondent are from different states, or the harm that occurred in one country was determined by the actions made in another. These cases often combine the application of public and private, international and domestic law. For example, in a transnational family law dispute between a Chinese and British partner living in the United States, married in Italy and having two children, a number of competing laws would apply: the contractual law of the place of marriage (Italy), immigration law (public US law), public international law (the Convention on the Rights of the Child), and private international law to determine which rules would apply to the case.[69]

Furthermore, transnational civil litigation became a public law tool. Harold Koh theorised the transnational legal process as the creation of transnational law by several non-state actors, including not only commercial actors but also NGOs, litigators, individuals and international organisations. These actors engage with states in a normative and dynamic process to apply several

[68] Gilles Cuniberti, 'Three Theories of Lex Mercatoria' (2014) 52 *Columbia Journal of Transnational Law* 369; Ralph Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14 *Indiana Journal of Global Legal Studies* 447; Gunther Teubner, 'Breaking Frames: Economic Globalisation and the Emergence of Lex Mercatoria' (2002) 5 *European Journal of Social Theory* 199.

[69] eg, Marylin Johnson Raisch, 'Update: Transnational and Comparative Family Law: Harmonization and Implementation', *Globalex*, April 2022, https://www.nyulawglobal.org/globalex/Transnational_Comparative_Family_Law1.html; Claire Fenton-Glynn, 'Transnational Family Law' in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021) 575.

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laws at the transnational level. He also defined transnational public law litigation as a tool to '[... v]indicate public rights and values through judicial remedies'[70] by combining domestic and international litigation. Transnational public law litigation originates from private claims filed to vindicate private rights or interests, but its overall goal is to push for a paradigm shift and establish new public law norms.[71]

Human rights are a significant part of this process. In 1991, Koh referred to the Alien Tort Statute litigation in the United States as a primary example of transnational public law litigation. The Alien Tort Statute uniquely combines causes of actions in tort law with violations of customary international law. Furthermore, it affects the private international law dimension by allowing domestic courts to assert jurisdiction in respect of violations that occurred outside US borders.[72] This statute, considered an anomaly in 1991, is no longer that unique. Strategic human rights litigation has increasingly assumed a transnational dimension.[73] Recently, for example, the Hague Court of Appeal decided a case against one of the parent companies and a subsidiary of the Shell group for transnational human rights and environmental abuses committed in Nigeria. The Hague Court of Appeal asserted jurisdiction over human rights abuses committed in Nigeria and applied Nigerian and English law to the case based on private international law rules.[74] Canadian and UK courts have decided similar cases by recognising the jurisdiction of domestic courts

[70] Koh (n 11) 2347.

[71] Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24 *Penn State International Law Review* 745; Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181; Koh (n 11).

[72] Ross J Corbett, 'Kiobel, Bauman, and the Presumption Against the Extraterritorial Application of the Alien Tort Statute' (2015) 13 *Northwestern Journal of International Human Rights* 50; Virginia Monken Gomez, 'The Sosa Standard: What Does It Mean for Future ATS Litigation?' (2006) 33 *Pepperdine Law Review* 469; Barnali Choudhury, 'Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses' (2005) 26 *Northwestern Journal of International Law & Business* 43; Liesbeth FH Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International 2012); Liesbeth FH Enneking, 'Crossing the Atlantic – The Political and Legal Feasibility of European Foreign Direct Liability Cases' (2009) 40 *The George Washington International Law Review* 903; Tyler Giannini, Susan Farbstein and Anthony C Arend, 'The Alien Tort Statute and Corporate Liability' (2011) 160 *University of Pennsylvania Law Review PENNumbra* 99.

[73] Duffy (n 11); Seck (n 9); Sara L Seck, 'Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance' (2012) 13 *German Law Journal* 1363; Sara L Seck, 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' (2011) 3 *Trade, Law & Development* 164; Srilatha Batliwala, 'Grassroots Movements as Transnational Actors: Implications for Global Civil Society' (2002) 13 *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 393; Gibney (n 9); Mark Gibney, 'Toward a Theory of Extraterritoriality' (2010–2011) 95 *Minnesota Law Review: Headnotes* 81.

[74] *Akpan v Royal Dutch Shell Plc*, 200.127.813 (2015) Court of Appeal of The Hague (Den Haag); *Oguru v Shell Petroleum NV*, 2021:1825 (2021) Court of Appeal of The Hague (Den Haag); *Dooh v Shell Petroleum NV*, 2021:133 (2021) Court of Appeal of The Hague (Den Haag); Lucas Roorda and Daniel Leader, 'Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court' (2021) 6 *Business and Human Rights Journal* 368.

on parent companies headquartered in their territories for the alleged transnational torts committed through their subsidiaries in foreign jurisdictions. These cases, in various ways, combined tort law with violations of environmental, human rights and customary international laws.[75] Cases like these do not differ in complexity and transnationality from commercial law cases. Significantly, in 2019 the Hague Rules on Business and Human Rights Arbitration were enacted, providing a framework for businesses and victims of human rights abuses to address their dispute in an arbitral tribunal rather than a domestic court.[76] This corroborates the parallelism between the transnational use of commercial and human rights law. The fluidity of the concept of transnationality has allowed for its application by domestic courts to commercial cases as well as environmental or human rights cases, overcoming the dichotomy between the public and private domains.

How do domestic courts deal with jurisdiction when they apply human rights law transnationally? It is impossible to provide a univocal answer to this question as the transnational use of human rights law is developed by numerous courts in various countries applying different private international law rules that address the issue of jurisdiction. However, the pattern of domestic courts, at least sometimes, is more liberal in its interpretation than the jurisdictional approach taken by international human rights courts. There is no general principle according to which a court must assert jurisdiction over the victim of abuse. Conversely, jurisdiction is typically asserted by domestic courts on the basis of the location of the perpetrator or the place where the harmful event occurred. For example, domestic courts in the European Union assert jurisdiction over parent companies for transnational human rights abuses committed by their subsidiaries based on the private international law Brussels I Regulation. The Regulation states that domestic courts have jurisdiction over a company as long as it is incorporated within the territory of their state. This jurisdictional test based on the defendant's presence in the state territory is more liberal than the authority or effective control test applied by international human rights courts to determine whether the victim of a potential human rights abuse is within state jurisdiction.[77] Another relevant example is the already mentioned decision by the

[75] *Nevsun Resources Ltd. v Araya* (n 3); Peter Muchlinski, 'Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: *Nevsun Resources Limited v Araya*' (2020) 1 *Amicus Curiae* 505; Suzanne Chiodo, 'UK Supreme Court Rules that English Companies Can Be Sued for Actions of Foreign Subsidiaries in the Interests of "Substantial Justice": Vedanta Resources v Lungowe [2019] UKSC 20' (2019) 38 *Civil Justice Quarterly* 300; *Vedanta Resources Plc and Another (Appellants) v Lungowe and Others (Respondents)* [2019] EWCA Civ 1528, UKSC 20; Roorda and Leader (n 74); *Okpabi & Others v Royal Dutch Shell Plc & Anor* [2021] UKSC 3.

[76] Bruno Simma and others, 'The Hague Rules on Business and Human Rights Arbitration' (Center for International Legal Cooperation 2019).

[77] Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1; Parliament and Council Regulation (EU) 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1; John Burke, 'Foreclosure of the Doctrine of Forum Non Conveniens under the Brussels I Regulation: Advantages and Disadvantage' (2008) 3 *The European Legal Forum* 121; Gilles Cuniberti, 'Forum

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UK Court of Appeal concerning the sale of weapons to Saudi Arabia that could potentially be used to kill civilians in Yemen. The Court of Appeal ruled that the sale was unlawful because the UK government did not take into sufficient consideration the potential violations of humanitarian law. From a domestic law perspective, UK courts have jurisdiction over the decision of the UK government to sell weapons to a foreign country (even if foreigners perceive the harmful effects of such a sale outside the UK).[78] However, under the lens of IHRL, the UK would typically have no jurisdiction over foreign victims who are not under its authority and control. It is true that the applicant, in this case, was a UK NGO, but the alleged violations of humanitarian law were committed against Yemeni civilians. According to the jurisdictional test adopted in *Bankovic v Belgium* and subsequent judgments delivered by the ECtHR, states do not have jurisdiction even over their own bombings in a foreign land, let alone on the decision to sell weapons to a third state that might use them against civilians. Thus, the jurisdictional test adopted by domestic courts in Europe might be more liberal than the authority and control over the victim test of international human rights courts.

Given the increasing number of cases in which domestic courts have asserted jurisdiction over cross-border human rights abuses, litigators have started to refer to transnational law in international human rights courts. Domestic case law is cited as persuasive authority in cross-border human rights cases. In *Nait Liman v Switzerland*, for instance, the ECtHR considered the jurisdictional approach taken by the Hague District Court in the Netherlands in the cross-border *Shell* case mentioned above.[79] The ECtHR distinguished *Nait Liman* from the *Shell* case because the former would qualify as a universal jurisdiction case, while the latter would not. In the *Shell* case, the jurisdictional link was the Shell parent company incorporated in the Netherlands. Nevertheless, the fact that the ECtHR engaged with the jurisdictional rules adopted by a District Court in the Netherlands demonstrates the increasing relevance of domestic cases that address cross-border human rights abuses on public international law. In the climate change case of *Duarte Agostinho and Others v Portugal and 32 Other States*, which is currently pending before the ECtHR, the applicants referred to the Dutch *Urgenda* case, which found the Netherlands responsible for failing to sufficiently reduce its emissions that were contributing to climate change. The case is particularly relevant because the Dutch Supreme Court held that the Netherlands' failure to reduce its emissions violated the European Convention on Human Rights, and referred to the state's obligations to take preventive and precautionary measures to

Non Conveniens and the Brussels Convention' (2005) 54 *International and Comparative Law Quarterly* 973; Trevor C Hartley, 'Choice-of-Court Agreements, Lis Pendens, Human Rights and the Realities of International Business: Reflections on the Gasser Case' in *Le droit international privé: Esprit et méthodes: Mélanges en l'honneur de Paul Lagarde* (Dalloz-Sirey 2005).

[78] *Campaign Against Arms Trade* (n 2).

[79] *Nait-Liman v Switzerland* (n 58) para 183. At the time, the Hague District Court decided the case, subsequently ruled in 2015 and 2021 by the Court of Appeal: *Akpan v Royal Dutch Shell Plc* [2013] DC Hague C/09/337050/HA ZA 09-1580; *Akpan v Royal Dutch Shell Plc* (n 74); *Oguru v Shell Petroleum NV* (n 74); *Dooh v Shell Petroleum NV* (n 74).

avoid or minimise the negative consequences of climate change. The case also addressed the global nature of human rights obligations requiring each state to limit its share of carbon emissions in order to fight climate change collectively.[80] It is yet to be seen if the ECtHR will agree with such an interpretation of global obligations in relation to the fight against climate change.

Therefore, it is clear that the jurisdictional test adopted in domestic cases dealing with cross-border human rights abuses is substantially different from the jurisdictional test applied by international human rights courts. Domestic courts increasingly assert jurisdiction over state and non-state actors, not based on the authority or effective control test, but rather on other criteria, such as the location of the perpetrator of a prospective human rights abuse.

5. Cross-Fertilisation?

International human rights adjudication has so far addressed cross-border human rights abuses by stretching, case after case, the extraterritoriality paradigm. While this technique retains the benefit of building on established jurisdictional principles in international law, the number of global challenges has increased in such a way that international human rights courts face an extraterritorial dilemma: to avoid cross-border cases or stretch the concepts of jurisdiction and extraterritoriality even further?

This article has pointed out that alternatives to the extraterritoriality paradigm could better reflect the increasingly global nature of human rights abuses. First, there is the paradigm of universality, the application of which, although inherently linked to human rights, has been avoided and applied in only a few cases of universal jurisdiction. Even in these exceptional cases, international human rights courts have often reconducted their analysis of universality to the jurisdictional rules of extraterritoriality. Second, there is the paradigm of transnationality, which litigators borrowed from commercial, contractual and tort law, and have increasingly applied to transnational public law litigation. This paradigm offers a range of avenues for domestic courts to assert jurisdiction over cross-border human rights abuses perpetrated by states or non-state actors. Thus, there seem to be two bodies of human rights law following different rules on jurisdiction: (i) IHRL, following the extraterritoriality paradigm, and (ii) domestic human rights law, adopting the language of universality (in exceptional cases of universal jurisdiction) and transnationality (in other human rights cases).

The question is whether international human rights courts could learn from these alternative paradigms developed by domestic courts. In 1999, Anne-Marie Slaughter argued that international and national courts were increasingly taking part in a transjudicial dialogue that was beneficial for developing general

[80] *The Netherlands v Urgenda Foundation* (n 44) paras 5.1–5.10; *Duarte Agostinho and Others v Portugal and 32 Other States* (n 46); *Duarte Agostinho and Others v Portugal and 32 Other States*, Complaint to ECtHR, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint-1.pdf.

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principles of international law, especially in the human rights field.[81] Today, such transjudicial dialogue is standard practice: international and national courts listen and learn from each other in various fields, including not only international criminal law and international human rights, but also intellectual property, trade or environmental law.[82] Against this background, why not open this dialogue also as it pertains to the concepts of jurisdiction? Moving beyond the extraterritoriality paradigm would allow international human rights courts to address global challenges, such as the human rights abuses resulting from climate change, that do not fit within the jurisdictional test of authority and control over victims or effective control over a territory.

To a certain extent, one could interpret the movement towards the obligation approach as a re-assessment of extraterritoriality because it focuses on the nature of obligations rather than on the authority or effective control test. However, this approach is still not convincing because it attempts to reconcile obligations of a global character with extraterritoriality, a challenging task resulting in a patchwork of jurisprudence. As a result, it is increasingly hard nowadays to predict how and if a state has extraterritorial human rights obligations. This uncertainty delegitimises the authority of human rights courts in the eyes of states, which increasingly criticise their decisions as politically motivated instead of based on legal principles.[83]

The alternative could be for international human rights courts to apply the jurisdictional test of extraterritoriality conservatively based on authority or effective control. This would simplify their task but could delegitimise them in the eyes of victims of human rights abuses. One of the main functions of the public international human rights legal system is to establish a framework of state responsibilities that enables domestic courts to apply human rights law in practice in bilateral relations between non-state actors. International human rights courts, by interpreting human rights law, detail the duties of states (for

[81] Anne-Marie Slaughter, 'Judicial Globalization' (1999) 40 *Virginia Journal of International Law* 1103.

[82] Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 *Yale Human Rights & Development Law Journal* 85; Sergey Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-Fertilization' (2015) 84 *Nordic Journal of International Law* 371; Alston and Crawford (n 13); Antonio A Cançado Trindade, 'The Merits of Coordination of International Courts on Human Rights' (2004) 2 *Journal of International Criminal Justice* 309.

[83] eg, a number of states have become increasingly sceptical or have even withdrawn from human rights institutions: Lord Hoffmann, 'The Universality of Human Rights', *Judicial Studies Board Annual Lecture*, 19 March 2009; Anushka Asthana and Rowena Mason, 'UK Must Leave European Convention on Human Rights, Says Theresa May', *The Guardian*, 25 April 2016, http://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum; Heather Nauert, 'The United States Withdraws from UNESCO', United Nations Educational Scientific and Cultural Organization Press Release, 12 October 2017, https://www.un.org/unispal/document/the-united-states-withdraws-from-unesco-us-department-of-state-press-release; Mythili Sampathkumar and Emily Shugerman, 'US Withdraws from UN Human Rights Council', *The Independent*, 20 June 2018, https://www.independent.co.uk/news/world/americas/us-politics/us-un-human-rights-council-leaves-trump-withdraw-nikki-haley-a8407151.html; Dalia Palombo, 'Human Rights between Hopes and Failures' in Jan Wouters and others (eds), *Can We still Afford Human Rights?* (Edward Elgar 2020) 143.

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example, to free people from inhuman and degrading treatment), and domestic courts implement these duties in domestic cases (such as by ordering protection for vulnerable individuals in cases of domestic violence). However, if the paradigm of extraterritoriality de facto prevents international human rights courts from assessing state conduct in an increasing number of cases, domestic courts would have to address these problems on their own. If, for instance, international human rights courts were to avoid addressing difficult questions of climate change because no climate change case meets the jurisdictional test of extraterritoriality, the issue would not disappear. It would have to be addressed by domestic courts with the instruments of tort law, and with no guidance regarding the relationship between human rights law and climate change. For instance, in the already-mentioned *Urgenda* case, the Dutch Supreme Court referred extensively to various provisions of the European Convention on Human Rights. However, the ECtHR has not yet decided any case related to climate change. Assuming that the ECtHR were to dismiss pending cases[84] for lack of jurisdiction over victims affected by climate change, who potentially could be located anywhere in the world, then this would leave courts, such as the Dutch Supreme Court, alone in interpreting the European Convention on complex cross-border cases. Such an approach, avoiding questions of a global character, in the long-term would delegitimise the role of human rights courts, the decisions of which would become less relevant and valuable to an increasing number of victims detrimentally affected by global crises.

Conversely, private law (especially tort law) may become a preferred instrument for victims of human rights abuses to seek justice because it allows them to file transnational complaints in domestic courts.[85] One can already see this new trend emerging. In *Mexico v Smith & Wesson* (referred to above),[86] Mexico, allegedly suffering from the illegal smuggling of weapons into its territory, resulting in criminal activities and human rights abuses, decided to file a transnational claim in US domestic courts against several arms manufacturers. Mexico did not opt to file an international suit against the US for its failure to regulate the extraterritorial trade of weapons. A sovereign state chose transnational public law over public international law to address a global challenge: the cross-border trade of weapons resulting in human rights abuses. This case provides an eloquent example of the decrease in relevance of public international law and the increasing importance of transnational public law in addressing cross-border human rights abuses.

Therefore, if cases concerning obligations of a global character multiply in the years to come and international human rights courts dismiss them on jurisdictional grounds, victims are likely to turn to transnational law. This would result in a highly fragmented human rights system in which forum shopping would become the norm for victims to seek justice in cross-border human

[84] *Duarte Agostinho and Others v Portugal and 32 Other States* (n 46); *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (n 47).

[85] Scott (n 11); Enneking (2012) (n 72); Duffy (n 11).

[86] *Estados Unidos Mexicanos v Smith & Wesson Brands Inc and Others* (n 5).

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rights abuses. International human rights courts would risk failing to guide states in their implementation of human rights law between private parties. Conversely, if international human rights adjudication sets the frame for how obligations of a global character are to apply in various contexts, domestic and international jurisprudence on human rights would complement each other in deciding human rights questions that have a global impact.

The open question is how human rights courts could effectively engage in such transjudicial dialogue. This article suggests that the first step should be admitting that the extraterritoriality paradigm is not fit to address global challenges. Once extraterritoriality is recognised as a useful but not omni-comprehensive framework to determine whether states owe human rights obligations to distant strangers, universality and transnationality could be tested on a case-by-case basis. This would allow international human rights courts to develop a fresh and coherent jurisprudence around these alternative frameworks. In a nutshell, instead of attempting to apply extraterritoriality to cases that clearly do not fit within the paradigm, international human rights adjudication should find alternative narratives to address global challenges. Stretching the boundaries of extraterritoriality has resulted in a jurisprudence so rich in exceptions to the rule to become incoherent, artificial and ultimately at risk of compromising the rule of law. Conversely, recognising the limits of extraterritoriality would liberate human rights courts from decades of precedents constructing jurisdiction in a narrow sense. It would allow them to shape and incorporate universality, transnationality, or (why not?) even new future narratives into a jurisprudence that could coherently and effectively address the global challenges we face.

6. Conclusion

Twenty years ago, when the ECtHR decided *Bankovic v Belgium*, it was still possible to believe that cases of extraterritorial human rights abuses would be rare and not disrupt the traditional application of human rights law. Nowadays, however, human rights cases increasingly address the 'global' in terms of both the responsibility of states for their transboundary actions and the responsibility of states in regulating the global activities of private entities. Therefore, it is time to reconceptualise jurisdiction in the light of transnationality and universality. The 'universal' has always been an integral part of human rights rhetoric, but international human rights courts have mostly ignored or minimised its relevance. The 'transnational' is a dimension that traditionally belongs to commerce but is adopted by human rights strategic litigation. Instead of focusing on extraterritoriality and its multiple exceptions, international human rights adjudication and scholars should look at a broader horizon of languages and concepts to implement human rights law in a globalised world.

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