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SYMPOSIUM ON INCIDENTAL JURISDICTION

INCIDENTAL JURISDICTION IN HUMAN RIGHTS LITIGATION: SURPRISING ABSENCE AND RIVAL TECHNIQUES

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Human rights courts and bodies do not rely on the concept of incidental jurisdiction. As far as I am aware, they never have. Given that these courts and bodies are in many ways typical examples of international courts, this is at first glance surprising. However, a closer look suggests that human rights bodies employ rival techniques to tackle the same problem to which incidental jurisdiction is supposedly responding. This essay sets out, first, that there is nothing unique about the institutional set up of human rights courts and human rights bodies in international law that might explain the absence of incidental jurisdiction. Second, I offer a plausible reconstruction of this absence. I argue that it is not only a rational response to the particular demands of human rights litigation, but that it may even be normatively preferable. The tension between dispute settlement and state consent is modified and heightened in international human rights law; this justifies treating incidental questions with the weight usually attached to the main issues of a case by turning them into questions of treaty interpretation. Third, I illustrate these rival techniques in two areas: jurisdiction in international human rights law, and cases involving armed conflicts.

The Absence of Incidental Jurisdiction

The doctrine of incidental jurisdiction, as I understand it, responds to the following problem. The jurisdiction of international courts and tribunals is typically limited. Real life disputes often do not fit within these limits, but cut across them. For this reason, international courts seeking to settle disputes will often need to look beyond the confines of their jurisdictional mandate.[1] One explanation for the surprising lack of reliance on incidental jurisdiction would be that human rights courts do not face the problem of limited jurisdiction coupled with disputes that do not respect this limit. But I do not think this is plausible.

The fundamental characteristic of international courts that gives rise to the doctrine of incidental jurisdiction is that their jurisdiction is limited in some shape or form. The standard form of this limitation is that such bodies are tasked with settling disputes relating to a particular instrument only.[2] In this respect, human rights bodies are typical: the UN Human Rights Committee is concerned with the implementation of the International Covenant on Civil and Political Rights, the European Court of Human Rights (ECtHR) with the European Convention on Human Rights (ECHR), and so forth.

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[1] Peter Tzeng, *The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction*, 50 N.Y.U. J. Int'l L. & Pol. 447 (2018).

[2] Examples include the International Tribunal for the Law of the Sea, World Trade Organization dispute settlement mechanisms, and investment arbitration.

Similar to other international courts, human rights bodies find themselves confronted with cases that do not fit neatly within their remit. There are plenty of scenarios at human rights courts that would be prime examples of cases where questions of incidental jurisdiction could arise. Consider, for example, cases involving contested territory. The interstate claim brought by Ukraine against Russia at the ECtHR (prior to Russia's suspension from the Council of Europe) is illustrative.[3] Ukraine alleges that Russia is in control of Crimea where it tolerates administrative practices that violate the ECHR. In its admissibility decision, the ECtHR stated that it is not called upon to decide if Russia's annexation of Crimea was lawful because this would be outside of the scope of the dispute.[4] Had this meant that the ECtHR was not able to adjudicate the alleged human rights violation, this would indeed be exactly the kind of problem a doctrine of incidental jurisdiction is intended to solve. But it did not mean that. The court instead found that Russia has jurisdiction over Crimea in the sense of Article 1 of the ECHR and accordingly declared the claim admissible. Jurisdiction in this sense is a concept the court developed based on treaty interpretation of the ECHR rather than areas of international law that fall outside of it. I will come back to this point below.

Given that human rights bodies are (1) typical in terms of their limited jurisdiction and (2) regularly encounter disputes that go beyond that remit, it is remarkable that human rights bodies do not rely on a doctrine of incidental jurisdiction. We are thus faced with the question if human rights bodies are making a mistake in this regard. The next section takes up the task of answering it.

Why and How the Absence Might Be Justified

That the absence of incidental jurisdiction in human rights litigation is remarkable does not mean it is a problem. This section shows that it may not be. The stakes in human rights litigation are heightened because of the (real or perceived) moral weight of the questions addressed. That is, because of the substance of human rights treaties, the questions they address are perceived to be fundamental. This in turn generates a heavier burden of justification. For human rights bodies, the focus on the outcome of their decisions means that their legitimacy is also thought to be content-dependent in the sense that it is tied to whether their decisions are thought to be acceptable—whether from a state consent perspective or from a moral perspective. Human rights bodies—particularly when adjudicating claims—are faced with the same dilemma as many other international courts and tribunals, but need to work harder to create their own legitimacy.

Why would this justify the absence of a doctrine of incidental jurisdiction? On the face of it, this strong dependence on content for legitimacy would suggest that a tool like incidental jurisdiction would be more, rather than less, useful. However, this argument does not withstand scrutiny because of the particular kind of normative stakes in human rights litigation. Legitimacy of authority exercised by courts requires that adjudication protects the autonomy of those involved.[5] Autonomy on this account comes in two forms: personal and political. Personal autonomy means an individual's freedom of choice, while political autonomy means the capacity to participate in a political community as an equal.[6] It is important to note that neither form of autonomy comes unconstrained. Personal autonomy is restricted by the autonomy of everyone else. Political autonomy concerns equal authorship

[3] Ukraine v. Russia (Re Crimea), App. Nos. 20958/14 and 38334/18, Decision (Dec. 16, 2020). While this is an interstate claim and as such not a typical example of human rights litigation, the questions involved would be exactly the same had an individual living in Crimea brought a claim against Russia.

[4] *Id.*, (e.g.) paras. 244, 339. *See also* Marko Milanović, *Does the European Court of Human Rights Have to Decide on Sovereignty Over Crimea? Part I: Jurisdiction in Article 1 ECHR*, EJIL:*Talk!* (Sept. 23, 2019).

[5] Alain Zysset & Antoinette Scherz, *Proportionality as Procedure: Strengthening the Legitimate Authority of the UN Committee on Economic, Social and Cultural Rights*, 10 Glob. Constitutionalism 524, 534–35 (2021).

[6] Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, ch. 3 (1996).

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in decisions made by a political community, ideally ensured through democratic participation. It does not necessarily extend to having one's preferences honored.[7] Even subject to these qualifications, however, it should be clear that these forms of autonomy can and do conflict. Human rights litigation is at the heart of this conflict because it can ensure increased personal autonomy, which will often result in a decrease in political autonomy or the personal autonomy of others.

Human autonomy, then, is implicated on both "sides" of the tension between state consent and a normatively desirable outcome of the litigation for the applicant. A normatively desirable outcome will often result in greater individual rights protection and is thus likely to uphold individual autonomy. State consent can be understood as the consent of a political community and so favoring it upholds political autonomy. This means that for human rights courts, both morality—that is entertaining claims and potentially finding in an applicant's favor—and state consent—not entertaining claims and thus respecting the political community's decisions—protect autonomy.

It would be tempting to think that this means human rights bodies may decide whatever they like because no matter which side of the tension their decisions fall on, they still protect autonomy in some form and accordingly there is no problem as regards their legitimacy. But this would be too quick. Instead, it means that human rights bodies are faced with a content-dependent tension that requires true attenuation on the level of the substance (as opposed to procedural questions) of a case. Such attenuation is best attempted when reasoning on the merits of a case as opposed to the jurisdictional stage. Only an acknowledgement that this is what human rights bodies are required to do will afford the opportunity to bring attenuation about in a way that creates content-independent legitimacy. This kind of authority means that judgments by a body ought to be obeyed regardless of their substance. For courts this is often more important than authority that depends on the content of a finding. This is why at least some questions that might be treated as indispensable according to a doctrine of incidental jurisdiction need to be addressed with more substance than the form of a doctrine of incidental jurisdiction would allow.

Human rights bodies do not acknowledge this explicitly. But they do make use of what I call rival techniques to the doctrine of incidental jurisdiction to respond to the need to create autonomy-based (both personal and political), but content-independent legitimacy.

Rival Techniques

Neither the absence of incidental jurisdiction nor the justification for its absence offered above mean that human rights bodies are not faced with the problem the doctrine of incidental jurisdiction is supposed to solve. However, it is possible to conceive of some of the idiosyncrasies of the field as what I would call "rival techniques" to tackle the issue. The tool human rights bodies employ to shape these techniques is treaty interpretation and I think this might be why it is sometimes claimed that interpreting human rights instruments ought to be special either in terms of methods or scope.[8] However, drawing on the analysis above, we can now say that what unites these techniques is not just their form, but also their substance. The relevant feature of these rival techniques is that they can be read as a response to the need to attenuate the tension between individual and political autonomy instead of avoiding it. As such, they attach to incidental questions the kind of weight that would otherwise only be afforded to the merits of a claim. Two examples illustrate the point: the meaning of jurisdiction in international human rights law, and the adjudication of rights violations in armed conflict by human rights bodies. These

[7] Zysset & Scherz, *supra* note 5, at 534–35.

[8] International Law Commission, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, adopted at the 58th Session, paras. 12–13, UN Doc. A/61/10 (2006); Martin Scheinin, *Impact on the Law of Treaties*, *in* The Impact of Human Rights Law on General International Law (Menno T. Kamminga & Martin Scheinin eds., 2009).

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examples show the intersection of human rights law with other areas of international law, specifically the international law of territory and international humanitarian law.

Consider, first, how human rights bodies have interpreted "jurisdiction" for the purposes of applying human rights treaties. They have viewed it as referring to a threshold criterion for the existence and application of state human rights obligations.[9] The concept is particularly prominent and important when it comes to extraterritorial obligations, that is, obligations owed to individuals not present within the relevant state's territory.[10] In cases such as the interstate complaint by Ukraine against Russia mentioned above, where the territory in question is contested, establishing which state owes human rights duties to individuals in that area could easily involve an incidental question.

If the meaning of jurisdiction in international human rights law were tied to title to territory, for example, a human rights body would as a matter of course either not be able to adjudicate cases involving contested territory or would have to decide on matters of territorial status. But this is not what human rights bodies have done. Instead, and admittedly involving more than a few hiccups,[11] they have interpreted jurisdiction independently of territorial status, and as a specific aspect of the respective instrument they are tasked with implementing. Human rights bodies have thus transformed the question of jurisdiction of states in international human rights law into a question of treaty interpretation. This means that this kind of "jurisdiction" does not need to be brought within the body's jurisdiction—as understood when referring to, say, incidental jurisdiction. Because it is a question of treaty interpretation it falls squarely within their remit anyway.

This has two further consequences. First, it allows human rights bodies to sidestep questions of sovereignty while adjudicating cases involving contested territory. Second, this approach allows the bodies to analyze extraterritoriality in great depth, resulting in sophisticated tests to identify jurisdiction.[12] The depth and sophistication involved are also a way to attenuate the tension between individual and political autonomy. Interpreting jurisdiction as a threshold criterion provides a framework to take into account when it is justified to impose obligations on states (involving political autonomy) toward individuals abroad (responding to individual autonomy in turn). This is true even though, formally, analysis of jurisdiction is part of the admissibility stage.

Next, consider how human rights bodies respond to the adjudication of alleged human rights violations in armed conflict. Situations of armed conflict are governed by international humanitarian law, which in some situations provides fewer rights protections compared to those provided under human rights law. The two most prominent examples are the right to life and the right against arbitrary detention.[13] In *Hassan v. UK*,[14] for example, the ECtHR had to decide whether indefinite security detention, which is prohibited under ECHR Article 5 in

[9] *See, e.g.*, HRC, *Lopez Burgos v. Uruguay*, Communication No. 52/1979, paras. 12.2 and 12.3, UN Doc. CCPR/C/13/D/52/1979 (July 29, 1981); Al-Skeini v. UK, App. No. 55721/07, Judgment (Eur. Ct. Hum. Rts. July 7, 2011); Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 Leiden J. Int'l L. 857 (2012).

[10] *See generally* Marko Milanović, Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy (2011); Lea Raible, Human Rights Unbound: A Theory of Extraterritoriality (2020).

[11] *See, e.g.*, Catan v. Moldova and Russia, App. No. 43370/04, Judgment (Eur. Ct. Hum. Rts. Oct. 19, 2012) (which identified residual obligations based on title to territory).

[12] Whether one agrees with them or not, the tests developed by the ECtHR in particular are an example of this: *Al-Skeini v. UK*, *supra* note 9, paras. 133–39.

[13] Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law*, 40 Isr. L. Rev. 310 (2007).

[14] Hassan v. UK, App. No. 29750/09, Judgment (Eur. Ct. Hum. Rts. Sept. 16, 2014). *See further* Lawrence Hill-Cawthorne, *The Grand Chamber Judgment in* Hassan v. UK, EJIL:*Talk!* (Sept. 16, 2014).

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peacetime, may be permitted during international armed conflict because international humanitarian law authorizes such detention.[15]

The court could have treated the existence of an armed conflict, the legality of such detention, and the relationship between international humanitarian law and international human rights law as indispensable issues that—although outside its remit—needed to be decided. Instead, however, the ECtHR interpreted Article 5 of the ECHR "in light of" international humanitarian law, reading into it the additional authorizations for detention and, by virtue of this, treated the question of whether there is an armed conflict as a question about the interpretation of the ECHR.[16] Whatever its deficiencies, this approach transformed what could have been an incidental question into the main issue of the case. The ECtHR explicitly relied on norms regarding treaty interpretation—specifically Vienna Convention on the Law of Treaties Article 31(3)(b)–(c)—to make any interpretation and application of international humanitarian law in effect also an interpretation of the ECHR. As with the meaning of jurisdiction, this allowed the court to develop nuanced frameworks to attenuate tensions between individual and political autonomy. It gave the ECtHR the leeway to take into account state consent and thus political autonomy in the form of state obligations under international humanitarian law, which compete with those under the ECHR. At the same time, by subsuming the adjudication entirely under the ECHR, the court preserved its own supervisory function and accordingly protected individual autonomy.

Conclusion

That human rights bodies do not employ a doctrine of incidental jurisdiction at all is surprising, but only at first glance. Not relying on this doctrine and instead finding ways to openly address the tension between individual and political autonomy may even be an advantage and human rights bodies would do well to preserve this approach. States have not always reacted well to the rival techniques discussed above. As one would expect, they have occasionally accused human rights bodies of overreach. However, these accusations usually do not relate to the jurisdictional remit of human rights courts and bodies. Instead, they concern the substance of judgments and disputes as to the scope and interpretation of obligations. As such, even by inviting disagreement, human rights bodies contribute to the development of the debate and thus the law—perfectly in keeping with their function.

[15] *Hassan v. UK*, *supra* note 14, paras. 96–111.

[16] *Id.*

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