

THE “EFFECTIVE CONTROL” REGIME: A CONTRADICTION TO THE UNIVERSAL NATURE OF HUMAN RIGHTS OBLIGATIONS

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ABSTRACT

The essay question places an opinion on the current status quo regarding the extraterritorial human rights obligation of States. It puts forth the opinion, as an answer to the question, that the international treaties and conventions regarding State obligation to protect and fulfil human rights beyond its territory is limited by the prevalent definitions of 'jurisdiction' which do not allow a State to exercise its human rights obligations beyond territories or persons under its "effective control". This contradicts the promise enumerated in Article 28, the idea of universality of human rights and the fact that States can in fact exercise influence beyond its borders/jurisdiction due to rapid globalization and digital developments.

INTRODUCTION

With States becoming increasingly willing to influence human rights of persons living outside their respective territories, it is a pertinent question that whether the emergence of recognized extraterritorial human rights obligations are sufficient to ensure the promise stated under Article 28 of the Universal Declaration of Human Rights. Despite a clear rise in extraterritorial activities and/or activities with extraterritorial implications, the said question is not yet solved satisfactorily.

THE DILEMMA OF THE TRADITIONAL APPROACH

Traditionally, recognition of extraterritorial obligations of States with regards to human rights is determined by the, bilateral or multilateral, human rights treaties between States. In general, it is recognized that human rights treaties concerning civil and political rights are applicable extraterritorially as far as states interpret and implement their obligations justly. For example, the International Covenant on Civil and Political Rights (ICCPR), the Inter-American Convention on Human Rights (I-ACHR), and the European Convention on Human Rights (ECHR) each enshrine their range of applicability. Art. 2 (1) ICCPR states that the state party has the obligation “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. ECHR articulates in Article 1 the obligation to “secure to everyone within their jurisdiction the rights and freedoms.” And the I-ACHR codifies in Article 1 the states’ obligation “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.” The Human Rights Committee (HRC) has also made an assumption regarding effective control by assuming that the ICCPR is applicable outside of a State’s territory if it wields a satisfactory amount of “effective control”. The European Court of Human Rights (ECtHR) has also consistently held that the ICCPR is applicable extraterritorially in exceptional circumstances, one of which is presence of “effective control”. The ECHR has in the *Al Skeini*¹ and *Milanovic*² case has also expanded the meaning of

¹ Case of *Al Skeini and Others v. United Kingdom*, ECHR 2011, Application no. 55721/07.

² *Milanovic v. Serbia*, ECHR 2010, Application no. 44614/07.

‘jurisdiction’ by stating ‘whenever the state, through its agents, exercises control and authority over an individual,’ the state is obligated under Article 1 of the ECHR “...secure to that individual the rights and freedoms of the Convention that are relevant to the situation of that individual.”’ The Court does not neglect the requirement of a nexus between the exercise of authority and control and the proximity of the object, person, or territory.

Thus, quite evident that the ICCPR, ECHR, and I-ACHR are extraterritorially applicable if there is an effective control over a territory, an area, or a specific person. Hence the lack of effective control, and the subsequent lack of jurisdiction results in the lack of a human rights obligation for areas or persons outside of the State’s jurisdiction. This effectively means that States are under no obligation to respect, protect and fulfil human rights abroad, at least according to the text of the aforementioned Conventions, which gives States the ability to turn a blind eye to blatant human rights violations committed in foreign States, if they so choose to do.

In contrast to the aforementioned Conventions which are consistent with regards to the “effective control” theory, it is widely accepted that the International Covenant on Economic, Social and Cultural Rights’ (ICESCR) applicability is not limited to a special territory or jurisdiction. This view is primarily based upon Article 2(1) which states: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation . . . to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means” In contrast to the above-mentioned treaties, the application of the Covenant is not limited to the exercise of jurisdiction. Indeed, the said Article emphasizes on international assistance and cooperation and contains explicit regulations regarding international obligations of the state’s party. Some argue for the extraterritorial application of the Covenant, relying on the idea of international assistance and cooperation in Articles 2(1), 11(1) and 23 of the ICESCR. The Committee on Economic, Social and Cultural Rights (CESCR), leans toward a comprehensive understanding of the extraterritorial applicability of the Covenant without referring to a specific normative foundation.

Despite the possibility of resolving the question of extraterritorial obligation of States using the texts of the aforementioned Conventions, especially the ICESCR, the said approach is

generally quite limiting and poses an interesting dilemma. On one hand, the text of conventions like the ICESCR do not limit exercise of jurisdiction extraterritorially with regards to human rights obligations, while on the other hand using the text of the other aforementioned Conventions such as the ICCPR fail to include extraterritorial jurisdiction without presence of “effective control”. Indeed, using the text of these conventions as the basis of an argument is quite difficult considering their application on differing circumstances may produce differing results. Furthermore, interpretation and analysis of human rights obligations in other international treaties may leave one unclear and confounded. To illustrate this, one can see the clear contrast in the texts of treaties such as UN Convention on the Rights of Child (UNCRC) and The UN Convention on the Rights of Persons with Disabilities (CRPD).

Article 2(1) of the UNCRC states: “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction. . . .” in contrast to Article 4(1) of the CRPD which states: “State Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.” The provisions of the ICCPR and ECHR are another example as Article 1 of the ECHR can be interpreted as referring only to the obligation to secure, while Article 2 (1) of the ICCPR could reasonably be read as attaching the jurisdictional threshold only to the obligation to ensure, but not the obligation to respect. This means that while the positive obligation is limited to the exercise of jurisdiction, the negative obligation is not territorially limited and, thus, is not subject to jurisdiction.

The paradoxical nature of the differing texts of a multitude of International treaties creates another problem. These treaties and conventions fall short of addressing the dynamic nature of human rights and State obligations in an ever changing world. These changes are primarily catalyzed by increasing globalization. There have been enormous social, cultural, political and economic changes that have arisen due to global functional differentiation and structural changes beyond the legal system. As a result, State influence is no longer limited to their territorial jurisdiction or an area over which they exercise “effective control”. Furtherance of digitalization and the advent of global mass media have resulted in States being able to exercise influence in a globally distributed manner. The assumption that a State’s influence does not

extend beyond its territory is hence rendered obsolete which gives rise to a need for such dynamics to be addressed uniformly.

Finally, the lack of consistency regarding application of human rights obligations of States extraterritorially is contradictory to the idea of the universality of human rights. If the idea presents that human rights must be upheld universally and without derogation, then the limitation on exercising extraterritorial obligation to the sphere of 'jurisdiction' is erroneous. The traditional concept of human rights being binding only within a State's jurisdiction is narrow and limits the possibility of human rights transcending jurisdictional limitations, which the idea of universality advocates.

CONCLUSION

As globalization and the digital age have allowed States' spheres of influence expand from merely in their jurisdiction, concepts such as the "effective control" theory are becoming increasingly outdated. Human rights imply extraterritorial obligations beyond the notion of state jurisdiction whenever states interact and communicate beyond the sphere of their jurisdiction and violate their obligation to respect, to protect, and to fulfil. Human rights, in their basic principles of universality and indivisibility imply that extraterritorial obligations of states go beyond the concept of jurisdiction and must not only be applicable to the rights of ICESCR, but to all other human rights treaties as well. Hence, I conclude that the promise set forth in Article 28 of the UDHR which states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" cannot be satisfactorily fulfilled by the current status quo concerning extraterritorial human rights obligations of States.