

Extraterritorial State Obligations Beyond the Concept of Jurisdiction

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Abstract

This Article discusses the extraterritorial human rights obligations of states and proposes a new approach for conceptualizing them. While extraterritorial state obligations within the concept of state jurisdiction are indisputably recognized, a more comprehensive perspective beyond jurisdiction is generally lacking. This Article aims to fill that gap. First, it discusses the traditional notions of extraterritorial state obligations and demonstrates their weaknesses. Second, a new concept of extraterritorial state obligations borrowing elements from systems theory is then suggested. The Article argues that comprehensive and general extraterritorial state obligations mainly build upon the normative idea of human rights. Human rights have universal validity and prescribe obligations that are independent of the jurisdiction of a state. What matters is that states can violate human rights beyond their jurisdiction and can influence violations of human rights committed by other actors. Finally, this Article outlines the scope and content of extraterritorial human rights obligations of states.

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A. Introduction

The surveillance of communications conducted by the US Intelligence Service National Security Agency (NSA) has caused worldwide concern and criticism. The NSA has been accused of systematic surveillance of politicians and officials both within and outside of the United States (US), among others. The public outcry following the publication of these accusations was enormous. But how should the NSA's actions be evaluated legally? Does the NSA have an obligation to consider human rights when carrying out actions outside of the US territory?

International law recognizes that the applicability of human rights treaties in principle is related to the exercise of jurisdiction,¹ whereas the jurisdictional competence of a state is primarily determined territorially.² Furthermore, according to customary international law and international human rights provisions, it is also recognized that states can exercise jurisdiction outside of their territories. Such cases could include the activities of the diplomatic or consular agents of a state abroad and actions on board craft and vessels registered in, or flying the flag of, the relevant state.³ Likewise, the extraterritorial application of human rights is recognized according to the concept of exercise of jurisdiction. That is, the state exercises effective control. But the requirements and details concerning the exercise of effective control are disputable.⁴

The concept of human rights sketched above was intended to regulate the relationship between the state and individuals within the territory of the states. The influence of globalization and transnationalization, among other elements, has thrown new dynamics into play. On the one hand, states influence human rights globally, beyond the sphere of their jurisdiction. On the other hand, private actors have also become powerful agents with the ability to influence human rights globally. In line with these new dynamics, there is a new debate in international human rights law concerning the extraterritorial human rights obligations of states beyond the concept of jurisdiction. The issue not only concerns the question of whether states have the obligation to respect human rights and prevent human rights violations, but also whether they have a so-called positive obligation to protect and fulfill human rights.

¹ Nicola Wenzel, *Human Rights, Treaties, Extraterritorial Application and Effects*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 3 (2008).

² See, e.g., *Al-Skeini v. Great Britain*, App. No. 55721/07, para. 131–32 (July 7, 2011), <http://hudoc.echr.coe.int/>; see also *Bankovic v. Belgium*, App. No. 52207/99, para. 59 (Dec. 12, 2001), <http://hudoc.echr.coe.int/>.

³ See *Bankovic*, App. No. 52207/99 at para. 67–73; see also *Al-Skeini*, App. No. 55721/07 at para. 133–34.

⁴ See Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARV. INT'L L. J. 81, 111–19 (2015); Oona Hathaway et al., *Human Rights Abroad: When do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389 (2011). See also *Al-Skeini*, App. No. 55721/07 at para. 133; *Bankovic*, App. No. 52207/99 at para. 67.

Against this background concerning the realization, violation, and endangerment of human rights, this Article addresses the question of extraterritorial human rights obligations of states and aims to present a new way of conceiving states' comprehensive extraterritorial obligations—that is, an obligation to respect, protect and fulfil—that goes beyond the recognized extraterritorial obligations within the notion of jurisdiction. In other words, it will propose a concept which does not operate with criteria such as exercising effective control. This unconventional concept that is presented draws from the premises of Systems Theory and further develops the divisional concept of fundamental rights elaborated on by Gunther Teubner for extraterritorial human rights obligations beyond the notion of state jurisdiction. Therefore, in Section B, this Article first summarizes the current discussion on extraterritorial state obligations. Then, in Section C, it demonstrates the shortcomings of the current discussion for justifying a comprehensive extraterritorial application of human rights. Finally, in Section D, the Article proposes a sociologically-oriented legal concept that can universalize the application of human rights and thus justify generalized extraterritorial obligations of states and outline the content and extent of extraterritorial human rights obligations.

B. Extraterritorial State Obligations According to Traditional Concepts

The question of states' extraterritorial obligations cannot be answered generally for all human rights norms. Moreover, recognition is determined in reference to the human rights treaty in question.⁵ In general, it is recognized that human rights treaties concerning civil and political rights are extraterritorially applicable as far as states exercise jurisdiction outside of their territory. Basically, the core argument lies in the wording and text of the convention in question. 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 articulate their range of spatial applicability. Accordingly, 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."

⁵ Cf. Hathaway, *supra* note 4; Milanovic, *supra* note 4, at 1.

The requirements for exercising jurisdiction are generally similar. The complaint and monitoring bodies of the aforementioned treaties have determined that the exercise of jurisdiction should function based on “effective control.”⁶ According to this concept, human rights are applied extraterritorially whenever the state has effective control over the territory, person, or situation in question.⁷ This concept can also be called “The Spatial Model” and “The Personal Model.”⁸ The Human Rights Committee (HCR), for instance, assumes that the ICCPR is applicable outside of the territory of a state party if it exercises effective control.⁹ The ECtHR, for example, has consistently held that the convention is only extraterritorially applicable in certain exceptional circumstances. This is the case whenever the state exercises effective control over a particular area outside its territory.¹⁰ Later, the Court specified and revised its jurisprudence slightly.¹¹ Indeed, the court extended the definition of the “jurisdiction,” stating that, “whenever the state, through its agents, exercises control and authority over an individual,” the state is obligated under Article 1 of the ECHR “to secure to that individual the rights and freedoms of the Convention that are relevant to the situation of that individual.”¹² The Court does not relinquish its main requirement of having a nexus between the exercise of authority and control and the proximity of the object, person, or territory.¹³ The Court stresses in *Al-Skeini* case:

The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of *physical power and control over the person* in question.¹⁴

⁶ See, e.g., Hathaway, *supra* note 4. FONS COOMANS & MENNO T. KAMMINGA, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2004); JOHN CERONE, OUT OF BOUNDS?: CONSIDERING THE REACH OF INTERNATIONAL HUMAN RIGHTS LAW (2006).

⁷ See Hathaway, *supra* note 4, at 17.

⁸ See, e.g., Milanovic, *supra* note 4, at 111–18.

⁹ Hum. Rts. Comm., *Gen. Comment 31: The Nature of the Gen. Legal Obligation on States Parties to the Covenant*, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

¹⁰ See *Bankovic*, App. No. 52207/99 at para. 67–71. See also *Behrami v. France*, App. No. 71412/01 (May 2, 2007), <http://hudoc.echr.coe.int/>; *Samarati v. France*, App. No. 78166/01 (May 2, 2007), <http://hudoc.echr.coe.int/>. Cf. Milanovic, *supra* note 4, at 112, 114.

¹¹ *Al-Skeini*, App. No. 55721/07. See also Milanovic, *supra* note 4, at 112–18; Hathaway, *supra* note 4, at 17–25.

¹² *Al-Skeini*, App. No. 55721/07 at para. 133, 137.

¹³ Cf. *id.*, at 134, 138.

¹⁴ *Id.*, at 136 (emphasis added).

Accordingly, a case where military drones are used in areas not under the control of a state most likely will not be considered a case of extraterritorial jurisdiction.¹⁵

In a new unspectacular case, the Court implicitly expanded the extraterritorial application of the convention—probably for special situations. In May 2014, in the case *Gray v. Germany*,¹⁶ the Court stated that Germany has a positive obligation to investigate the death of a British citizen caused by a private German individual even though the death took place in UK. One can argue that the Court recognized the existence of extraterritorial human rights obligations regardless of whether the state was exercising effective control over the territory—in this case, the UK—or a person—in this case, a British citizen.¹⁷ It is unclear whether the conclusions of this case can be generalized and applied to the example of military drones.

The jurisprudence of the Inter-American Human Rights System follows a similar approach to the extraterritorial application of human rights treaties. The Inter-American Commission on Human Rights (I-ACoHR) has reaffirmed that the Convention is not only applied extraterritorially in the case of exercising “authority or control” (effective control) over a territory and person, but also when the state exercises “authority or control” over the specific situation in which the event occurs.¹⁸

In sum, it is widely recognized 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. As a result, in the case of a lack of effective control and, subsequently, a lack of jurisdiction, there are no human rights obligations for states outside of their jurisdiction. This means that states have neither the obligation to respect nor the obligation to protect and fulfill human rights. Thus, in such circumstances, for example, states would have no obligation to regulate the activities of home companies abroad.

The discussion concerning the extraterritorial application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is fundamentally different. The International Court of Justice (ICJ) has stated in its advisory opinion to the Construction of the Wall in the Occupied Palestinian Territories that the Covenant entails extraterritorial human rights obligations for state parties referring to the concept of jurisdiction.¹⁹ In contrast, for the

¹⁵ Cf. Milanovic, *supra* note 4, at 118.

¹⁶ *Gray v. Germany*, App. No. 49278/09 (May 22, 2014), <http://hudoc.echr.coe.int/>.

¹⁷ Cf. MARKO MILANOVIC, *GRAY V. GERMANY AND EXTRATERRITORIAL POSITIVE OBLIGATION TO INVESTIGATE* (2014).

¹⁸ See Hathaway, *supra* note 4, at 25–27.

¹⁹ Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 ¶ 111 (July 9). See Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural*

ICESCR, it is widely accepted that its applicability is not limited to a special territory or exercise of jurisdiction.²⁰ This understanding is primarily based on the wording of the ICESCR. According to Art. 2 (1): “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.²¹ Furthermore, the ICESCR emphasizes international assistance and cooperation and contains explicit regulations regarding international obligations of the states party.²²

The normative justification of the state’s extraterritorial obligations is less clear than the extraterritorial applicability of the Covenant. Some authors argue for the extraterritorial application of the Covenant, relying on the idea of international assistance and cooperation in Art. 2 (1), 11 (1) and 23 of the ICESCR, for instance.²³ The Committee on Economic, Social and Cultural Rights (CESCR), increasingly leans toward a comprehensive understanding of the extraterritorial applicability of the Covenant without referring to a specific normative foundation.²⁴

Rights, 11 HUM. RTS. L. REV. 1, 8 (2011) (detailing the approach of the UN Committee on Economic Social and Cultural Rights regarding to extraterritorial obligations of states).

²⁰ See Jean Ziegler (Special Rapporteur on the Right to Food), *Rep. on the Right to Food*, ¶ 43, U.N. Doc. E/CN.4/2005/47 (Feb. 8, 2005); Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 12: Right to Adequate Food*, ¶ 36, U.N. Doc. E/C.12/1999/5 (May 12, 1999); Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 15: The Right to Water*, ¶ 29, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 18: The Right to Work*, ¶ 29, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 19: The Right to Soc. Sec.*, ¶ 54, U.N. Doc. E/C.12/GC/19 (Nov. 23, 2008); see also Christian Curtis & Magdalena Sepúlveda, *Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?*, in 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 54 (2009).

²¹ See also Fons Coomans, *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisation*, 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 360, 362 (2007); Jean Ziegler (Special Rapporteur on the Right to Food), *Rep. on the Right to Food*, ¶ 44, U.N. Doc. E/CN.4/2005/47 (Feb. 8, 2005).

²² See, e.g., International Covenant on Economic, Social and Cultural Rights, arts. 11, 23, Dec. 16, 1966, 999 U.N.T.S. 3.

²³ Cf. Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 12: Right to Adequate Food*, ¶ 36, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

²⁴ See, e.g., Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 14: The Right to the Highest Attainable Standard of Health*, ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 15: The Right to Water*, ¶ 33, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 18: The Right to Work*, ¶¶ 29–30, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006).

Recently, an international commission of international lawyers and human rights experts worked on this issue and devised what are called the Maastricht Principles on the Extraterritorial Obligations of States.²⁵ Similarly to the CESCR, the experts propose a comprehensive extraterritorial obligation of states, regardless of the traditional notion of jurisdiction and exercise of effective control.²⁶ For the normative foundation of the extraterritorial obligations, they refer to the “resources of international human rights law, including the Charter of the United Nations; the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and other universal and regional instruments.”²⁷ As far as the scope of the obligations is concerned, they articulate a duty to respect, protect, and fulfill extraterritorial obligations, with a slight modification of the obligations in contrast to the territorial context.²⁸

Other bodies of the United Nations (UN) concur with the CESCR and Maastricht Principles for extraterritorial obligations of states without limiting the application of human rights to the notions of jurisdiction and effective control. This is especially true for the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (CRC). The CERD, for instance, stated in its *Concluding Observation* to the US that:

[T]he Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable.²⁹

The CRC also endorses a comprehensive obligation of states beyond the notion of jurisdiction.³⁰ Although the theoretical foundation for the extraterritorial obligations of the states is not clear, it is widely recognized that the ICESCR entails comprehensive extraterritorial obligations of states beyond the notion of jurisdiction.³¹

²⁵ ETO CONSORTIUM, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECON., SOC. AND CULTURAL RTS. (2013) [henceforth MAASTRICHT PRINCIPLES].

²⁶ See *id.*, at ¶¶ 4, 9.

²⁷ *Id.*, at ¶ 6.

²⁸ *Id.*, at ¶¶ 8, 19.

²⁹ See Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Rep. of the U.S., ¶ 30, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

³⁰ See, e.g., Comm. on the Rights of the Child, *Gen. Comment 16: On State Obligations Regarding the Impact of the Bus. Sector on Children’s Rts.*, ¶ 38, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013).

³¹ See, e.g., Sigrun I. Skogly & Mark Gibney, *Transnational Human Rights Obligations*, 24 HUM. RTS. Q. 781, 786 (2002); S. I. Skogly, *Extraterritoriality: Universal Human Rights Without Universal Obligations?*, in RES. HANDBOOK ON INT’L HUM. RTS. L. 75 (2010); FONS COOMANS, THE EXTRATERRITORIAL APPLICATION OF THE INTERNATIONAL COVENANT ON

C. Critique of the Classical Concept

It is possible to resolve the question of states' extraterritorial obligations with the text of treaties; yet, this approach is narrow and gives rise to many paradoxes. On the one hand, not all international human rights treaties have jurisdictional or territorial limitations in their wording. On the other hand, primarily using the text of the treaties as the basis of an argument is problematic as it can produce different results for different human rights treaties and norms. As described above, while the extraterritorial application of the ICCPR is recognized as falling within the notion of jurisdiction, the extraterritorial application of the ICESCR is, in contrast, recognized beyond the notion of jurisdiction without considering effective control criteria. If human rights were exclusively codified in one or another treaty, the result could be acceptable and convincing. However, this is not always the case, as the right to freedom of association demonstrates. This right is, on the one hand, codified in ICESCR—in Art. 8—and, on the other hand, included in the ICCPR, in Article 22. The exclusive and primary orientation of the wording of the norms of the treaties means that the right to freedom of association in Art. 22 ICCPR is extraterritorially applicable only where jurisdiction is exercised, while the same right in Art. 8 ICESCR is extraterritorially applicable regardless of the exercise of jurisdiction. These different applications of the same right are very hard to justify, since both norms articulate and secure the same normative interest. Furthermore, the identical limitations of the norms demonstrate that they are not essentially different.³²

Interpreting and analyzing the text of human rights norms in other international treaties also gives rise to confusion. For instance, according to Art. 2 (1) of the UN Convention on the Rights of Child (UNCRC), this treaty is only extraterritorially applicable within the framework of state jurisdiction. It states that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction. . . ." The UN Convention on the Rights of Persons with Disabilities (CRPD), in contrast, does not seem to restrict the exercise of jurisdiction.³³ According to Article 4, Paragraph. 1, "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."

ECONOMIC, SOCIAL AND CULTURAL RIGHTS 183 (Fons Coomans & Menno T. Kamminga eds., 2004). See also Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 12: Right to Adequate Food*, ¶ 30, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

³² Cf. International Covenant on Economic, Social and Cultural Rights, art. 8.1(a), 8.2–8.3, Dec. 16, 1966, 999 U.N.T.S. 3; International Covenant on Civil and Political Rights, art. 22(2), (3), Dec. 19, 1966, 999 U.N.T.S. 171.

³³ See also Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13 (stating it does not limit the application to the exercise of jurisdiction); cf. Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13.

The provisions of the ICCPR and ECHR are another example. Some authors argue that 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.³⁴

These examples demonstrate the dilemma of human rights regarding the extraterritorial obligations of states if the question of extraterritorial application is primarily answered according to the wording of the treaties and if extraterritorial human rights obligations are differentiated according to the treaty in which they are codified.

Furthermore, it is not convincing to base an argument on the texts of the conventions and to treat different the extraterritorial application of human rights because such an approach cannot do justice to the idea of human rights nor does it sufficiently consider global and social changes, and the evolution of rights. Enormous social changes have occurred because of global functional differentiation and structural changes beyond the legal system. The changes are caused principally by the globalization and transnationalization of relations and operations, but also by global war and postcolonial practices, such as land grabbing.³⁵ As a result, the operations and the influence of states are no longer primarily restricted to their territory and jurisdiction. Furthermore, their operations and spheres of influence are distributed globally in different ways.³⁶ The assumption of the limitation of the states' influence only to their own sphere of jurisdiction and the following premise of the limited application of human rights is not only doubtful but de facto erroneous.

It is also contrary to the idea of the universality of human rights. If the universal validity of human rights rests on the assumption that human rights are valid in all countries, and that all states are bound to respect human rights everywhere, then the limitation of the application and, thus, the obligations of states to the sphere of jurisdiction, must be questioned. The traditional notion that human rights are binding only within a state's

³⁴ See Milanovic, *supra* note 4, at 118–19.

³⁵ Cf. Andreas Fischer-Lescano & Kolja Möller, *The Struggle for Transnational Social Rights*, in *TRANSNATIONALISATION OF SOC. RTS.* (Andreas Fischer-Lescano & Kolja Möller eds., 2016); Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739 (2006); Matias E. Margulis et al., *Land Grabbing and Global Governance: Critical Perspectives*, 10 *GLOBALIZATIONS* 1 (2013).

³⁶ See Skogly, *supra* note 31, at 783; Coomans, *supra* note 19, at 2. See generally Jan Klabbers, *Hannah Arendt and the Languages of Global Governance*, in *HANNAH ARENDT AND THE LAW* 229 (Marco Goldini & Christopher McCorkindale eds., 2012).

jurisdiction is altogether too narrow, and is therefore incompatible with the idea that human rights must be realized universally.³⁷

The dilemma caused by the traditional understanding of the application of human rights limited by jurisdiction is especially obvious against the backdrop of the digital age.³⁸ The NSA not only surveilled individuals within the US and violated their rights of privacy and correspondence³⁹, but also surveilled and violated the rights of individuals outside of its jurisdiction. How should the extraterritorial obligations of the US, beyond the notion of the jurisdiction, be explained against the backdrop of the limited extraterritorial application of the ICCPR, in the case of NSA's surveillance of the electronic post and conversations of foreign politicians, officials and individuals? In this context, it seems to be difficult to argue that the US has had effective control, as understood in General Comment 31 of the HRC, over places of surveillance in, for example, Germany, Brazil, Mexico, or over Angela Merkel and Dilma Rousseff. Therefore, the Concluding Observation of the HRC to the human rights situation in the US is surprising. After expressing its concern to the surveillance activities of the NSA both within and outside of the US, the HRC states as follows:

The State party should: (a) take all necessary measures to ensure that its surveillance activities, both *within and outside the United States*, conform to its obligations under the Covenant, including [A]rticle 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity *regardless of the nationality or location of individuals* whose communications are under direct surveillance. . . .⁴⁰

The HRC seems to advocate that the human rights obligations of the US exist extraterritorially regardless of the exercise of jurisdiction. But this conclusion contradicts the previous opinion of the HRC and therefore also contradicts the wording of Art. 2 (1) of the ICCPR.

Likewise, based on the jurisprudence of the ECtHR and jurisprudence of the Inter-American Human Rights System, it is difficult to draw the conclusion that the US has extraterritorial human rights obligations when the NSA surveils or intercepts the communications of person outside of US. Because of the lack of the nexus between exercise of authority and control on the one hand, and the proximity to the territory or person on the other, it is hardly

³⁷ Jean Ziegler (Special Rapporteur on the Right to Food), *Rep. on the Right to Food*, ¶ 34, U.N. Doc. E/CN.4/2005/47 (Feb. 8, 2005).

³⁸ See Milanovic, *supra* note 4.

³⁹ See, e.g., International Covenant on Civil and Political Rights, art. 17, Dec. 19, 1966, 999 U.N.T.S. 171.

⁴⁰ United Nations Human Rights Committee, *Concluding Observations on the Fourth Report of the United States of America* ¶ 22 (Apr. 23, 2014), <http://www.refworld.org/docid/5374afcd4.html> (emphasis added).

convincing to argue that there is effective overall control of the territory in question—for example, Germany—or authority and control over individuals—for example, Angela Merkel. Indeed, one could consider the decision-making process over the exercise of jurisdiction, for example, and argue that US officials have effective control over the situation. Nevertheless, this will not be helpful, because the proximity between the decision-making process and the effected individual is missing. Otherwise, the ECtHR in *Bankovic* case could have argued that the pilot of the military aircraft had control over the decision and therefore, it was within the state's jurisdiction. But the Court did not make such an argument. The Court in the *Al-Skeini* also stressed the proximity of the affected individual to the state agents.

To summarize, it seems that the paradox of the limitation of the application of human rights is diminishing. Yet, the extraterritorial human rights obligations of states are generally restricted to the exercise of jurisdiction, as determined by the criterion of effective control. Furthermore, determining the issue according to the treaty in question produces paradoxical results. Therefore, we need a new concept that can explain comprehensive extraterritorial human rights obligations of states for all treaties beyond the concept of state jurisdiction. This is especially urgent because of the notion of the absoluteness, universality, and inseparability of human rights. In the next section, I propose a new concept to justify the extraterritorial obligations of states beyond the notion of state jurisdiction.

D. Extraterritorial Obligations Beyond the Notion of State Jurisdiction

Assuming that human rights have general extraterritorial applicability is made easier by relying on the normative power of human rights, discussed in Subsection I below. Because of social differentiation, globalization, and transnationalization, it is also necessary to consider the operations—that is, the acts and communications—of states as essential criteria for the new concept of human rights' extraterritorial applicability, discussed in Subsection II below.

I. Normative Power of Human Rights

A generally accepted universal concept of human rights does not exist. The foundation, origin, and content of human rights are more controversial than ever.⁴¹ Within the UN framework, there is no clear or universal philosophical foundation of human rights.⁴² In fact, when the Universal Declaration of Human Rights (UDHR) was created, this question was not

⁴¹ Cf. CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009); UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2008); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002); Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996); Michael Freeman, *The Philosophical Foundations of Human Rights*, 16 HUM. RTS. Q. 491 (1994).

⁴² See ALLAN WINGATE, UNESCO, *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* (1949). Cf. Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. OF JURIS. 1 (1999).

considered to be of great significance.⁴³ In general, the normative reasons for the emergence of modern rights were not of primary importance.⁴⁴ They were considered important only insofar as they reflected human experience and societal struggles.⁴⁵ The UDHR can indeed be considered as a good example of reflecting human experiences and societal struggles. The UDHR is not based on abstract philosophical thinking, but reflects normative values formed against the background of human experiences during WWII. Its preamble demonstrates that its normative values are shaped by the experiences of people. Human rights in their normative conception are, therefore, the outcome of diverse struggles and protests against injustice generally, and more specifically against the absence of freedom, equality, and independence, as well as oppression and humiliation. Be it from the perspective of liberal Western thinking or from a critical Third World perspective, human rights in their modern formation are responses to structural experiences of injustice.⁴⁶ In other words, it is their facticity which vests normative power in modern human rights. Another aspect of this facticity that completes the concept of human rights as pre-legal and latent rights⁴⁷ is their codification in a great number international covenants and national constitutions. Since this codification—and the creation of human rights in international and national jurisprudence—is not exhaustive, further codification or creation of “new” human rights is possible. And because the structural experience of injustice is not definitive, there also can be no final or ultimate codification and legal acknowledgement of human rights.

As far as the legal doctrine is concerned, human rights originally have been conceived primarily as negative rights against state intervention, and were therefore limited to the territory of states. The most important reason for this limitation is that at the time of the emergence of modern human rights, the endangerment of the political system—that is, the state—as the most differentiated system of society was the most urgent concern.⁴⁸ But there is a more comprehensive idea behind human rights. Accordingly, we face new challenges and intensive discussion over the extraterritorial obligations of states or over

⁴³ See Glendon, *supra* note 42, at 1–3. Nonetheless, there are scholars who see Natural Law as the foundation of the Declaration. See, e.g., Andrew Woodcock, *Jacques Maritain, Natural Law and the Universal Declaration of Human Rights*, 8 J. THE HIST. INT’L L. 245 (2006).

⁴⁴ See, e.g., CHRISTOPHER THORNHILL, *A SOCIOLOGY OF CONSTITUTIONS: CONSTITUTIONS AND STATE LEGITIMACY IN HISTORICAL-SOCIOLOGICAL PERSPECTIVE* ch. 3 (2011).

⁴⁵ See *id.* at 181; GERHARD OESTREICH, *GESCHICHTE DER MENSCHENRECHTE UND GRUNDFREIHEITEN IM UMRISSE* (1978).

⁴⁶ See, e.g., José-Manuel Barreto, *Imperialism and Decolonization as Scenarios of Human Rights History*, in *HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE* (José-Manuel Barreto ed., 2013); ALAN M. DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS* (2004); Winfried Brugger, *Menschenrechte im modernen Staat*, 114 ARCHIV DES ÖFFENTLICHEN RECHTS 537 (1989).

⁴⁷ See Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors*, 69 MOD. L. REV. 327, 335–36 (2006).

⁴⁸ *Id.* at 336–38.

whether actors other than states, especially transnational corporations, have human rights obligations.⁴⁹ Because of the comprehensive understanding of human rights, they cannot be restricted exclusively to the protection against violations within the sphere in which states exercise jurisdiction. Consequently, as states expand their spheres of operation, their human rights obligations have also expanded. As stated above the concept of state jurisdiction—that is, effective control—is indisputably recognized to mean that states have extraterritorial human rights obligations beyond their territory. Nevertheless, this development is not satisfactory. The normative power of human rights cannot be restricted to the sphere of states' jurisdiction. The idea behind human rights aims, as outlined above, is to prevent and abolish all kinds of injustice, regardless where the injustice takes place.

Indeed, this insight seems to be accepted by, among others, the HRC. Despite the wording of Art. 2 (1) of the ICCPR and its former standpoint in GC No 31, the HRC concluded that the US has human rights obligations regardless of where the surveillance takes place. Therefore, the Committee apparently does not require the exercise of jurisdiction and exercise of effective control.⁵⁰

Therefore, only the universal claim of human rights for justice and protection both within the territory and jurisdiction as well as beyond can normatively undergird states' general and comprehensive extraterritorial human rights obligations. Accordingly, a new concept of extraterritorial human rights obligations of states must first be based on the insight that human rights apply to all conditions where human beings are violated and threatened in their fundamental interests and rights—basic rights.⁵¹ The basis for the extraterritorial applicability of human rights beyond the notion of state jurisdiction is therefore the normative claim that human rights entail the obligation to respect, protect, and fulfil, on a global level, the fundamental interests of individuals regardless of the place of action and the place of violation.⁵² Therefore, the question of exercising jurisdiction is not relevant; the potential to affect the realization of human rights, however, is relevant. That means that the starting point of any human rights inquiry should be states' potential to violate human rights directly or indirectly—that is, to fail to respect, protect, and fulfill human rights obligations—wherever they operate. Consequently, that applies to the cases when states operate beyond their sphere of jurisdiction. Similarly, concerning the scope of extraterritorial jurisdiction,

⁴⁹See Ibrahim Kanalan, *Horizontal Effect of Human Rights in the Era of Transnational Constellations: On the Accountability of Private Actors for Human Rights Violations*, 7 EUR. YEARBOOK INT'L ECON. L. 423 (Christoph Herrmann et al. eds., 2016); Hilal Elver (Special Rapporteur on the Right to Food), *Rep. on the Right to Food*, ¶ 38, U.N. Doc. A/HRC/28/65 (2014); ANDREW CLAPHAM, HUMAN RIGHTS AND NON-STATE ACTORS (2013); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); PHILIP ALSTON, NON-STATE ACTORS AND HUMAN RIGHTS (2005).

⁵⁰United Nations Human Rights Committee, *supra* note 40, at ¶ 22; see also *id.* at ¶ 9.

⁵¹See generally HENRY SHUE, BASIC RIGHTS, SUBSISTENCE, AFFLUENCE, AND US FOREIGN POLICY (1996).

⁵²For the complexity to determine whether the place of action or the place of violation should be decisive for the determination of extraterritorial obligations, see Milanovic, *supra* note 4, at 127–130.

the Maastricht Principles provide that the state has human rights obligations in “situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social, and cultural rights extraterritorially, in accordance with international law.”⁵³

II. Unlimited Extraterritorial Obligations as the Result of Unlimited Operations and Communications

The next question is: How can territorially-bound states be charged with human rights obligations outside their territory and beyond the sphere in which they exercise jurisdiction? The answer is rooted in the expansion of state power across borders. During the emergence of human rights, their enshrinement in new national constitutions in the 18th century, and their codification at the international level after World War II, the home state and national actors were seen as the primary threat to human rights. Since then, this assumption has changed as a result of global societal developments. With globalization and transnationalization, states operate not just within their territory and jurisdiction, but also, increasingly, beyond national borders. They influence human rights not only locally and nationally, but also globally and transnationally,⁵⁴ as the surveillance activities of the NSA demonstrate.

Systems Theory has, especially as regards the horizontal effect of human rights, evolved around the expansion of functional systems and has developed a fundamentally new concept of human rights: The so-called *divisional (ecological) human rights concept*.⁵⁵ Against the background of the functional differentiation and rationality maximization of diverse global functional systems, Niklas Luhmann argues that the functional differentiation could potentially endanger people and society and result in increased unpredictability and uncontrollability.⁵⁶ Subsequently, Gunther Teubner claims that the consequences of the fragmentation of society are central to the human rights question today.⁵⁷ The expansionist tendencies of the fragmented, and operationally closed, functional systems of a global society are the reason for current global problems.⁵⁸ Therefore, not only do human rights

⁵³ MAASTRICHT PRINCIPLES at ¶ 9 lit. c.

⁵⁴ See also *id.* at 1–2.

⁵⁵ Gunther Teubner, *Transnational Fundamental Rights: Horizontal Effect?*, 3 NETHERLANDS J. OF LEGAL PHIL. 191 (2011); Teubner, *supra* note 47; Kanalan, *supra* note 49, at 423.

⁵⁶ NIKLAS LUHMANN, *DIE GESELLSCHAFT DER GESELLSCHAFT* 630, 1088 (1997).

⁵⁷ Teubner, *supra* note 47, at 338–39.

⁵⁸ Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 225 MICH. J. INT'L L. 999, 1005–07 (2004); Gunther Teubner, *Fragmented*

regulate the relation between the political system and individuals, but they also regulate the manifold relations of individuals to diverse functional systems.⁵⁹ Accordingly, the human rights question is: How do we visualize the consequences of the expansion of social systems in their social, human, and ecological environment?⁶⁰ In other words, human rights have to be understood as “a response to problems that transcend society,” that is, problems that “demand an ecological sensitivity of communication.” The “point is to constrain the institutions’ acts in such a way that they do not do injustice to the intrinsic rights of their social and human ecologies.”⁶¹ The function of human rights is, therefore, not only to protect individuals against interference by the state; human rights have both inclusionary and exclusionary functions.⁶² They enable everyone to access functional systems and societal institutions, and they protect people from being excluded from such access.

This concept is critical for establishing the extraterritorial obligations of states. First, based on systems theory, I argue that with the functional differentiation and rationality maximization of the diverse functional systems, there has not only emerged enormous potential for endangering people and society through other functional systems than the political system, but⁶³ in addition, this danger has emerged globally and transnationally.⁶⁴ Amidst this polycentric globalization, it must be assumed that the political system has diminished territorial borders and operates globally and transnationally, just as the other functional systems do. Consequently, as a part of the autonomous “global villages,” the political system develops a global momentum, which is self-dynamic.⁶⁵

Indeed, there is an urge on the part of the state to expand beyond the sphere of its jurisdiction. The urge to expand political systems cannot be limited to the territory of states or to the sphere of exercise of jurisdiction, regardless of whether this urge is embodied by worldwide surveillance activities of security agencies, the so-called global war on terrorism, military interventions in other countries, the so-called trade and investment protection agreements of industrialized countries with countries from the global south, or the policies

Foundations—Societal Constitutionalism Beyond the Nation State, in *THE TWILIGHT OF CONSTITUTIONALISM?* 327, 329–30 (Petra Dobner & Martin Loughlin eds., 2010).

⁵⁹ Teubner, *supra* note 47, at 338–42; Teubner, *supra* note 55, at 203–09.

⁶⁰ Teubner, *supra* note 47, at 333–36; Teubner, *supra* note 55, at 206–09.

⁶¹ Teubner, *supra* note 47, at 333–34.

⁶² Teubner, *supra* note 55, at 206–09.

⁶³ See Fischer-Lescano, *supra* note 58, at 1005–07.

⁶⁴ See also Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 *ZEITSCHRIFT FÜR AUSLAENDISCHES OEFFENTLICHES RECHT* 1, 11–13 (2003).

⁶⁵ *Id.* at 11–12.

of UN, World Bank or International Monetary Fund, which are driven by states. Accordingly, human rights are no longer exclusively about the regulation of the relation between individuals and political systems—home states—but rather about the diverse relations of the individuals to global political systems and, thus, other states.⁶⁶ Foreign states are involved, separately or as members of international organizations, in manifold interactions with countless communications, which can violate human rights beyond the sphere of exercise of jurisdiction.⁶⁷ Thus, the core problem of human rights in an age of transnationalism is caused by cross-border operations and communications. Human rights violations always emerge whenever there is communication at all.⁶⁸

The traditional concept of human rights, with the premise that human rights obligations of the State are merely exceptional beyond the territory of the states in question—within the notion of exercising jurisdiction—was plausible to a certain degree, as long as the sphere of operations and exercising power of the States was generally limited to their own territory and power was exercised in the extraterritorial sphere only in exceptional circumstances. These concepts and assumptions are no longer convincing in the context of the conditions outlined here. The interests and relations to be protected are no longer only between the home state and individuals, but also between individuals and diverse foreign states. This new multiplicity of relations requires a new concept which accounts for these developments.

Such a new concept can succeed if the divisional, ecological concept of fundamental rights is developed and formulated as proposed for extraterritorial human rights obligations. Considering the divisional concept of fundamental rights and the expansion of functional systems between all states and world residents, the question of human rights will no longer primarily be a problem between the home state and its residents. Consequently, human rights offer an answer to the problems of cross-border communications. The concept encompasses relations of all states to all individuals, which would be regulated by human rights.

⁶⁶ Cf. Teubner, *supra* note 47, at 338–39; Teubner, *supra* note 55, at 206–09.

⁶⁷ See, e.g., Andreas Fischer-Lescano, *Competencies of the Troika: Legal Limitations of the Organs of the European Union*, in *ECONOMIC AND FINANCIAL CRISIS AND COLLECTIVE LABOUR LAW IN EUROPE* (Niklas Bruun et al. eds., 2014). See Smita Narula, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis*, 13 *YALE HUM. RTS. & DEV. L. J.* 403, 407 (2010) (elaborating on the measures of the EU Commission, European Central Bank and International Monetary Fund and the violation of manifold rights of persons in Greece). See generally JAN KLABBERS, *Hannah Arendt and the Languages of Global Governance*, in *HANNAH ARENDT AND THE LAW* (2012) (explaining the violation of the right to food by the measures of international organizations).

⁶⁸ See Teubner, *supra* note 47, at 336–37; Teubner, *supra* note 55, at 206–09.

The basis for this proposal can be identified partially in international law itself,⁶⁹ if one interprets and solidifies the relevant human rights norms in a dynamic way. The initial point of reference is the UN Charter, which in Article 55, Lit. C, states that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms *for all* without distinction as to race, sex, language, or religion.”⁷⁰ The preamble also stresses that the aim is “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.” The Universal Declaration on Human Rights (UDHR) accentuates these principles in its preamble and states that: “recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world,” and that the member states “have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”⁷¹.

Finally, these basic principles have been implemented in many conventions of the UN—for example, the ICCPR and the ICESCR. According to these basic principles and statements on which the idea of human rights is based, the commitment to human rights, their extraordinary rule and function, and their respect and fulfilment cannot be limited to the relation between a state and the individuals subject to its jurisdiction. It would be paradoxical to declare human rights as the basis of justice, freedom, and peace in the world and simultaneously to limit the application of the normative requirements, basic principles, and standards to the sphere of the jurisdiction of the state. It is hardly convincing to accentuate the fundamental, universal, and absolute character of human rights provisions and to simultaneously keep them within the frontiers of the concept of state jurisdiction. Why should a violation of human rights be less condemnable if the violation has taken place outside the sphere of jurisdiction of states? And why, in this situation, should human dignity be less protectable? The “solemn commitment of all States to fulfil their obligations to promote *universal* respect for, and observance and protection of, all human rights and fundamental freedoms *for all* in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law”⁷² will no longer be empty words if human rights apply to the actions of the states beyond the sphere of their jurisdiction.

⁶⁹ Cf. MAASTRICHT PRINCIPLES at ¶ 6.

⁷⁰ See U.N. Charter art. 55 (emphasis added).

⁷¹ See also U.N. Charter art. 56.

⁷² U.N. Gen. Assembly, *Vienna Declaration and Programme of Action*, ¶ 1, U.N. Doc. A/CONF.157/23 (July 12, 1993) (emphasis added).

Finally, through the above-outlined jurisprudence of the ECtHR in the *Gray* case, the Concluding Observations of the HRC concerning the human rights situation in the US, the General Comments of the CESCR and the Maastricht Principles, this Article shows that theoretically elaborated and normatively founded progress is already being reflected in practice. In other words, existing practice demonstrates the practicability of the proposed concept.

III. Content and Extent of Extraterritorial Human Rights Obligations

As far as the content and extent of the extraterritorial human rights obligations are concerned, human rights impose three obligations on states: to respect, to protect, and to fulfill its human rights obligations. Accordingly, these obligations, generally, must be the baseline for extraterritorial obligations of the states as well.⁷³ The Maastricht Principles on Extraterritorial Obligations of States accurately stresses that extraterritorial obligations encompass the obligations to respect, to protect, and to fulfill its human rights obligations.⁷⁴ Nevertheless, these obligations need to be slightly modified for the extraterritorial context. On the one hand, states must act in accordance with international law and avoid violating the sovereignty of other states.⁷⁵ On the other hand, the extent of these obligations is defined and shaped by the realm of influence of foreign states, their capacity, and their resources.⁷⁶

In line with these premises, the obligation to respect includes the obligation to refrain from conduct that can violate or influence the violation of human rights outside of the jurisdiction of states. This means, for example, that omitting acts within international organizations such as the UN, International Monetary Fund, World Bank, and World Trade Organization can cause human rights violations. Accordingly, the Committee on Economic Social and Cultural Rights stated in its General Comment concerning the relationship between economic sanctions and respect for economic, social, and cultural rights that there are obligations relating to the party or parties responsible for the imposition, maintenance, or implementation of the sanctions, whether it be the international community, an international or regional organization, or a state or group of states.

⁷³ See, e.g., Jean Ziegler (Special Rapporteur on the Right to Food), *Rep. on the Right to Food*, ¶ 47, U.N. Doc. E/CN.4/2005/47 (Jan. 24, 2005); Skogly, *supra* note 31, at 75; Magdalena Sepúlveda Carmona, *The Obligations of 'International Assistance and Cooperation' Under the International Covenant on Economic, Social and Cultural Rights. A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8*, 13 THE INT'L J. OF HUM. RTS. 86, 90 (2009); Coomans, *supra* note 19, at 192.

⁷⁴ MAASTRICHT PRINCIPLES at ¶¶ 8, 19–35. See also Hilal Elver (Special Rapporteur on the Right to Food), *Rep. on the Right to Food*, ¶¶ 41–48, U.N. Doc. A/HRC/28/65 (Jan. 12, 2014).

⁷⁵ See also *id.* ¶ 10.

⁷⁶ Cf. *id.* ¶¶ 26, 31.

This set of obligations encompasses, among others, an effective monitoring system to anticipate and to track sanctions affecting human rights. Further, it embodies the obligation “to take steps, individually and through international assistance and cooperation, especially economic and technical’ to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.”⁷⁷

As mentioned before, UN Human Rights Committee stated, likewise, in its Concluding Observation to the US that the US should “take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including [A]rticle 17.”⁷⁸ That is, the US must refrain from all activities which can violate the right to privacy.

The second obligation is to protect. This obligation is especially important to regulate the obligation of private actors, specifically transnational corporations, towards human rights. Because home states are not able or not willing to avoid human rights violation committed by private actors for different reasons, it is of enormous importance that home states regulate the activities of corporations domiciled within their jurisdictions. Home states have the obligation to take necessary measures within their influence to prevent human rights violations committed by private actors—for example, transnational corporations—outside of their territory and jurisdiction.⁷⁹ This obligation includes the necessity to act within international organizations, according to this premise, and to take all necessary measures to avoid human rights violation of the organization of which they are part.⁸⁰

Last, but not least, states have the extraterritorial obligation to fulfill human rights. They are obligated, separately and jointly, through international cooperation and assistance to take steps enabling the universal fulfilment of human rights.⁸¹ Concerning the obligation to also fulfill the extraterritorial dimension of this obligation, states have to conduct their obligation within their capacity and maximize available resources.⁸² On the one hand, they have to contribute to the realization of human rights by creating and supporting the necessary conditions so that the individuals and communities can realize their human rights on their own—which is their obligation to facilitate. Yet on the other hand, they must provide, if

⁷⁷ Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment 8: The Relationship Between Econ. Sanctions and Respect for Econ., Soc. and Cultural Rts.*, ¶¶ 11–14, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997).

⁷⁸ United Nations Human Rights Committee, *supra* note 40, at ¶ 22.

⁷⁹ MAASTRICHT PRINCIPLES at ¶¶ 23–27; Coomans, *supra* note 19, at 193.

⁸⁰ Carmona, *supra* note 73, at 91.

⁸¹ MAASTRICHT PRINCIPLES at ¶¶ 28–35.

⁸² *See id.* at ¶ 31.

necessary, resources indirectly or directly—with the consent of the states in question—via international assistance and cooperation, according to their obligation to provide.

Even though the obligation to fulfill may be most controversial, the legal basis for this obligation is codified in international law itself. Accordingly, Articles 55 and 56 of the UN Charter, Articles 2 and 11 of the ICESCR, and Art. 4 of the UN Convention on Rights of the Child, for instance, express the basis and framework of this obligation. Therefore, the Committee on the Rights of the Child states in its General Comment to the “General measures of implementation of the Convention” that when “States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation.”⁸³

To summarize, states have the obligation to respect, to protect, and to fulfill human rights extraterritorially beyond their jurisdictions. Even these obligations must be modified slightly in the context of extraterritorial state obligations.

E. Conclusion

Globalization has entailed the transnationalization of communications, which has transcended national borders and largely relativized territorial borders for specific systems and regimes. This process is true for law in general, as well as for human rights specifically. Consequently, human rights have transcended borders and obtained relevance beyond the territory of nation-states. As a result, human rights violations are no longer exclusively committed by home states within their territories and spheres of jurisdiction or through actors subject to their jurisdiction. Furthermore, foreign states—directly or indirectly—and private actors based in foreign states, are involved in human rights violations. Their acts and omissions influence the respect, protection, and fulfilment of human rights. The development of a world with digital communications illustrates this thesis. The occurrences surrounding the NSA have shown that neither territorial borders nor the sphere of jurisdiction is decisive for human rights violations. Therefore, territorial borders and the notion of state jurisdiction cannot be decisive for extraterritorial obligations of states. 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 fulfill.

The idea of human rights, its normative power and the basic principles of universality and indivisibility suggest that extraterritorial obligations of states beyond the concept of jurisdiction are not only applicable to the rights of ICESCR, but rather must be applied to all human rights. Continuing to insist on the traditional concept would produce more and more

⁸³ Comm. on the Rts. of the Child, *Gen. Comment 5: Gen. Measures of Implementation of the Convention on the Rts. of the Child*, ¶ 7, U.N. Doc. CRC/GC/2003/5 (2003).

paradoxes. For example, if the HRC recognizes contrary to its original opinion that in the case of the activities of the NSA, the ICCPR implies extraterritorial obligations beyond the notion of state jurisdiction, it creates an apparent exception. Human rights violations without exercising jurisdiction in the digital age are not limited to surveillance, as illustrated. Another example is using military drones without exercising jurisdiction. Military drones and their actors perform far away from the territory of the state. The existing concept of effective control does not seem to be helpful in this case as well. The exercise of jurisdiction is problematic because it is disputable that there is effective control over a territory or a person. To assess the case of military drones differently from the case of surveillances—what the UNHRC tends to do—⁸⁴ would scarcely be comprehensible; indeed, it would be contradictory. Contradictions like this can be avoided if one argues with the concept which is proposed here. According to this concept, the case of military drones is also an extraterritorial human rights obligation because the state performs an act which has a potential effect on human rights. As in the words of the Maastricht Principles, they are “in a position to exercise decisive influence” to realization of human rights extraterritorially.⁸⁵

To avoid such paradoxes and, thus, avoid rendering the protection of human rights arbitrary, in this Article, I have proposed a new concept for extraterritorial obligations of states. On the one hand, this concept maintains the same extraterritorial obligations of states for all conventions beyond the notion of jurisdiction. On the other hand, it is responsive to developments such as globalization and transnationalization and can be applied to further changes in the human rights system because it takes societal and social realities into account.

⁸⁴ Cf. *e.g.*, United Nations Human Rights Committee, *supra* note 40, at ¶ 9.

⁸⁵ MAASTRICHT PRINCIPLES at ¶ 9(c).

