

Investigating the extraterritorial application of the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights

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SUMMARY

The territorial scope of the application of human rights treaties has been a core discussion when dealing with the enforcement of human rights obligations imposed by human rights treaties on State Parties. In particular, this is because the conduct of a State may affect the human rights of people situated outside the State's territorial borders. Accordingly, to afford protection to the affected States, most international human rights instruments contain the so-called jurisdictional clause which aims to identify the range of people to whom States owe their human rights obligations under a treaty. However, the term "jurisdiction" has not achieved an undoubted definition as yet and remains a continued area of contention. The subject matter of this article is the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It concerns therefore, the applicability of these human rights treaties to the conduct of a State which affects the rights of people outside its territorial borders and results in the lack of the full enjoyment of the human rights recognised in the Covenants, and which would be qualified as a violation of human rights treaty had it been undertaken on the State Party's own territory. Although most of the literature on this topic relates specifically to armed conflict and military occupation, the author applies the tests established for the determination of the extraterritoriality of the treaties in circumstances inclusive of and beyond armed conflict and military occupation.

1 Introduction

The second half of the twentieth century has given birth to the adoption of significant multilateral international human rights law instruments.¹ These new instruments were different from the treaties that had come before them as they specifically regulated the legal relationship that

1 Hathaway "Human rights Abroad: When do Human Rights Treaty Obligations apply extraterritorially" 2011 *Yale Law Faculty Scholarship Series* 1.

existed between a sovereign State and its human rights guarantees to its own citizens, in its own territorial frontiers. From this point, States could no longer act in their own national territory with complete impunity.² A question that rises from these circumstances is whether there are any limits placed by human rights treaties on States in respect of the States' conduct outside of their own territorial frontiers. Over the years, scholars and courts have expressed their views on the position regarding the applicability of human rights obligations abroad,³ focusing on aspects that address the framework of extraterritoriality. Nonetheless, the author concludes that this issue remains unsettled, giving rise to great controversies in current international human rights law. In confronting these controversies, this article explores the extraterritorial applicability of the ICCPR and the ICESCR.

2 Interpretation: A point of departure

There is a general presumption under international law reflected in Article 29 of the Vienna Convention on the Law of Treaties (VCLT) that a treaty binds a State within its territory in whole, unless a different interpretation appears from the text of the treaty or it is otherwise established.⁴ However, this Article concerns merely the possibility of restricting the application of a treaty to parts of a State territory and does not address the issue regarding the application of the treaty outside of a State's territory.⁵ It is the submission of the author that this treaty provision specifically intends to prevent States from claiming that a treaty does not bind certain parts of its territory, it does not establish that a treaty - for example the ICESCR, which does not restrict its binding character only within a territory of a State Party - would not have extraterritorial application.⁶

It follows, then, that the scope of the extraterritorial application of these human rights treaties must be determined by reference to their own provisions and the general presumption can be rebutted through the application of the rules of interpretation contained in Articles 31 to 33 of the VCLT, *inter-alia*, by considering the relevant subsequent State practice, context, purpose and the *travaux préparatoires* in respect of each treaty.⁷

2 Hathaway 2011 *Law Faculty Scholarship Series* 1.

3 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* (2013) 1.

4 Art 29 of the Vienna Convention of the Law of Treaties 1969 (hereinafter, VCLT).

5 Gondek *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009) 11.

6 Kunnemann "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in *Extraterritorial Application of Human Rights Treaties* (eds Coomans and Kamminga) (2004) 201.

7 Sinchak "The Extra-territorial Application of Human Rights Treaties: Al-Skeini et al. v United Kingdom" 2011 *Pace Int. Law Rev. Online Companion* 416.

For most human rights treaties under international law, the central requirement which allows for the extraterritorial applicability of these treaties is the exercise of “jurisdiction”.⁸ These treaties use variable terms such as “subject to” or “within” a State’s jurisdiction. The author accepts and argues that the restriction of the extraterritorial applicability of human rights treaties is aimed at introducing a reasonable limit to a State’s responsibility under the treaties as it is impractical that States should be expected to protect the human rights of all persons all over the world.

The International Court of Justice (ICJ) in its 1986 *Nicaragua* judgment espouses what the term jurisdiction could be. This paper argues that although the judgment itself does not concern jurisdiction *per se*, but the exercise of effective control, the Court seems to suggest that “the exercise of effective control” either on persons or territory equals jurisdiction.⁹ The factual determination of whether a State exercises jurisdiction in the territory of another State is usually clear-cut when dealing with cases involving the military occupation of a foreign territory by another State’s military base.¹⁰

The Human Rights Committee (HRC) in its Concluding Observations on Croatia,¹¹ its Concluding Observations on Israel,¹² as well as the European Court of Human Rights (ECtHR) in *Cyprus v Turkey*,¹³ came to the conclusion that if a State has effective control in a foreign territory as a result of its military action, that State exercises jurisdiction and will be responsible under the international human rights treaties framework for any violations or damages which result from such exercise of jurisdiction.¹⁴ On this note, it is significant to consider what “extraterritorial application” of the ICCPR and the ICESCR means in order to determine whether the threshold for their extraterritorial applicability fits the “jurisdiction test” set in the preceding paragraph. To appropriately understand and follow the debates and discussions

8 See the International Covenant on Civil and Political Rights 1966 (hereinafter, ICCPR).

9 *Nicaragua v United States of America* 1986 ICJ Rep 14 para 115 (hereinafter, 1986 Nicaragua).

10 Benvenisti “Occupation, Belligerent” 2009 *MPEPIL* 1-3.

11 See Human Rights Committee “Concluding Observations of the Human Rights Committee on Croatia” (2009) *Refworld* 7 and 10.

12 See Human Rights Committee “Concluding Observations on the fourth periodic report of Israel” (2014) *Refworld* 10.

13 *Cyprus v Turkey* 1978 (13) DR 85.

14 See *Loizidou and Cyprus (intervening) v Turkey* 1996 ECHR 64. Subsequently, the Court clarified in its 2001 *Bankovic and Others v Belgium and Others Appl No 52207/99* case that the European Convention on Human Rights (ECHR) would apply extraterritorially only in the situation of inhabitants of a territory being under the effective territorial control of an ECHR Contracting State. It is notable that the Court in that case went on to hold that the North Atlantic Treaty Organization (NATO) member States did not exercise effective control over the territory of the Federal Republic of Yugoslavia, and that the extraterritorial application of the Covenant was therefore inadmissible.

surrounding the text of Article 2(1) of the ICCPR, it is important to quote the relevant provision, which reads:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁵ (own emphasis).

The text of this provision suggests that the ICCPR’s extraterritorial application is subject to the jurisdictional clause. On further investigation, the same cannot undoubtedly be said about the ICESCR, which does not contain a jurisdictional clause which delimits a State’s fundamental obligations to its own territory or subject to its jurisdiction.¹⁶ Instead, the ICESCR refers to the undertakings by which States are to take steps “through international assistance and co-operation”.¹⁷ These two treaties were drafted concurrently, therefore, the differences in the language used would ordinarily be considered to be substantially significant as the territorial applicability of the treaties might be intended to be different in scope.¹⁸ Therefore, this article will particularly consider the circumstances under which the treaties have extraterritorial application.¹⁹

It is the submission of the author that the texts of the two treaties seem to suggest that the standard used to determine the extraterritorial applicability of each treaty may be different. The ICCPR has an explicit jurisdictional clause, providing protection for individuals within its territory and subject to its jurisdiction. Because of the explicit circumscription of jurisdiction, extraterritorial jurisdiction may be more difficult to substantiate in comparison to the ICESCR which does not contain a similar jurisdictional clause circumscribing its application.²⁰ However, as to whether this is the case, remains unclear and international law does not seem to resolve this issue, as it provides no

15 Art 2(1) of the ICCPR.

16 Askin “Economic and Social Rights: Extraterritorial Application” 2019 *MPIL* 3; Coomans and Kamminga *Extra-territorial Application of Human Rights Treaties* (2004) 1-29; Skogly *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (2006) 1-34.

17 International Covenant on Economic, Social and Cultural Rights 1966 (hereinafter, ICESCR).

18 McGoldrick “Extra-territorial application of the ICCPR” in *Extra-territorial Application of Human Rights Treaties* (Coomans and Kamminga) (2004) 47.

19 *Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) 2004 ICJ Reports 163 para 111 (hereinafter, Wall Advisory Opinion).

20 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 1-34.

legal certainty in respect of standards that trigger the extraterritorial applicability of human rights treaties in general.²¹

3 The international law framework regarding the application of human rights law treaties

3.1 Interpreting the scope of the ICCPR's application

When considering the territorial scope of the ICCPR, regard must be had to the basic rules of treaty interpretation as contained in the VCLT. It is worth noting that the ICJ stated in its 1989 *Arbitral Award* judgment that “Article 31 of the [VCLT] ... may in many respects be considered as a codification of existing customary international law ...”²² and therefore, is applicable to all treaties, even when the States concerned are not parties to the VCLT.²³ In particular, Article 31(1) of the VCLT provides that a treaty shall be interpreted in *good faith* and in accordance with the ordinary meaning of the terms of the treaty in their context and in light of its *object and purpose*.²⁴

This paper argues that on a *prima facie* basis, when following this fundamental rule of treaty interpretation, the conclusion that follows is that the ICCPR does not provide for human rights obligations on State Parties to people who are not within the territory of that State. This suggests that the ICCPR does not apply to a State Party in respect of areas beyond its territorial frontiers.²⁵ In support of this *prima facie* case, Conrad Harper, the then legal advisor of the United States Department of State, submits that the Covenant is not regarded as having extraterritorial application because the dual requirement restricts the scope of the Covenant to individuals who are within the territory of a State and under the jurisdiction of such State. In support of this argument, Harper submits that the *travaux préparatoires* underscore a clear understanding between

21 CESCR “General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities” (2017) para 10; see also International Commission of Jurists Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997.

22 *Guinea-Bissau v Senegal* ICJ Reports 1991 para 53.

23 Mbengue “Rules of interpretation (Article 32 of the VCLT)” 2016 *FILJ* 388-412.

24 Article 31(1) of the VCLT; see also *Australia v France* 1974 ICJ Rep 253, 268.

25 Human Rights Committee “Consideration of reports submitted by States Parties under article 40 of the Covenant” (2008) *Refworld* 109; see Dennis & Surena “Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice” 2008 *Eur. Hum. Rights Law Rev.* 714; see also McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 45-50.

the drafters of the Covenant to limit the territorial reach of the obligations recognised in the Covenant.²⁶

This means that the interpretation of the word “and” in Article 2(1) of the ICCPR would naturally be seen to suggest a cumulative test that the individuals must be (i) within the State’s territory and (ii) subject to the State’s jurisdiction.²⁷ However, this paper argues that this would be inconsistent with the object and purpose of the ICCPR and therefore manifestly absurd. Article 12(4) of the ICCPR supports this opposing view as it contemplates that in order for an individual to invoke the provisions of Article 12(4), that individual must be outside of the State’s territory. Therefore, it is the submission of the author that following a restricted interpretation of the provision would void Article 12(4) of its substance if it can only be invoked if the individual is already within the territory of the State.²⁸

Such a restrictive interpretation as proposed by Harper also differs from that which follows when we employ the consideration of subsequent practice in terms of Article 31(3)(b) of the VCLT, which supports the extraterritorial scope of the ICCPR.²⁹ The ICJ has relied on the concept of subsequent practice in its *Wall Advisory Opinion*;³⁰ in *Certain Expenses*,³¹ and in the *Namibia Advisory Opinion*.³² In these three cases, the ICJ considered the practice of the “relevant organs” such as the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC), to determine the meaning of provisions in the United Nations Charter.³³

Accordingly, the author disagrees with Harper that the *travaux préparatoires* underscore a clear understanding between the drafters of the Covenant to restrict the territorial reach of the Covenant. It is notable that during the drafting phase of the negotiations over the ICCPR, the United States (US) had proposed an amendment to Article 2(1) of the

26 See Human Rights Committee “Statement of State Department Legal Adviser, Conrad Harper” 53rd Session.

27 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 47.

28 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 48.

29 *Wall Advisory Opinion supra*, para 109.

30 *Wall Advisory Opinion supra*, paras 94-96.

31 See discussion of *Certain Expenses of the United Nations (Article 17 paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962 on Lauterpacht “The Development of the Law of International Organizations by the Decisions of International Tribunals” 1976 *Rec. Cours* 460; Blokker “Beyond ‘Dili’: On the Powers and Practice of International Organizations” in *State, Sovereignty, and International Governance* (ed Kreijen) (2002) 312-318.

32 *Legal consequences for States of the continued presence of SA in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion 1971 ICJ Rep. (hereinafter, *Namibia Advisory Opinion*).

33 Arato “Treaty interpretation and Constitutional Transformation: Informal change in International Organisations” (2013) 38 *Yale J. Int’l L.* 289-326.

Covenant. The proposed amendment read “each State Party hereto undertakes to ensure to all individuals *within its territory* the rights set forth in this Covenant ...”³⁴ and was discussed at the fifth and sixth sessions of the Human Rights Commission, where it was ultimately rejected.³⁵ The British delegate, Ms Bowie, challenged the wording of the proposed amendment. She argued that such an amendment would unreasonably restrict “the guarantees of those rights to individuals *actually* on the territory of a State, while the original text extended it to all individuals within its jurisdiction”.³⁶ Following which the US opted to propose that the phrase “within its territory *and* subject to its” be added immediately before the word “jurisdiction”, so that the provision would read “each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory* and *subject to its jurisdiction* the rights recognized in the present Covenant ...”.³⁷

As a result thereof, the Lebanese delegate, Mr Azkoul, requested clarifications regarding the implications of the proposed wording put forth by the US. He specifically expressed that if the implication was the restrictive interpretation that both territory and jurisdictional control must be present for a State to bear obligations in terms of the treaty, then he would object to such amendment and/or interpretation.³⁸

This remark allowed the US representative, Mrs Roosevelt, the opportunity to explain the purpose and implications of the amendment. Her explanation was that the amendment would indeed restrict the application of the treaty to a dual threshold of: (i) territory and (ii) jurisdiction.³⁹ This interpretation did not find much favour. The Yugoslav representative expressed that there was a difference between those individuals who are within the territory of a State, and those subject to the jurisdiction of the State. The Greece representative proceeded to suggest that Article 2(1) must be read with the effect that the words “within its territory” and “subject to its jurisdiction” are distinct and disjunctive tests that give rise to the same obligations. The Chilean

34 For a detailed discussion see the United Nations Document E/CN.4/224.

35 United Nations “Summary record of the 125th meeting of the Commission on Human Rights (Fifth Session)” 1949; see also United Nations “Summary record of the 138th meeting of the Commission on Human Rights: Sixth Session” 1950.

36 United Nations “Summary record of the 125th meeting of the Commission on Human Rights (Fifth Session)” 1949 *supra*; see also United Nations “Summary record of the 138th meeting of the Commission on Human Rights: Sixth Session” 1950 *supra*.

37 This which became the final wording of the Covenant. See United Nations “Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the proposed additional Articles: Memorandum by the Secretary-General” 1950 para 15 (hereinafter, *Compilation of Comments*).

38 *Compilation of Comments supra*, para 24.

39 Follow this discussion from United Nations “Summary record of the 193rd meeting of the Commission on Human Rights: Sixth Session” 1949 paras 17-87.

representative agreed with this, indicating that the concept of national territory and that of national jurisdiction were distinct matters.

This paper argues that the discussion surrounding the amendment indicates that no such clear understanding was underscored by the drafters as proposed by Harper. Amongst other representatives, those of Lebanon, Belgium, and Yugoslavia, indicated their dissent to the implied interpretation of the amendment as proposed by the US. Subsequently, in response to the US's claim that the ICCPR has no extraterritorial effect, the HRC Stated in its Concluding observations on the fourth periodic report of the US that:

“[It] regrets that the State Party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice. The Committee further notes that the State Party has only limited avenues to ensure that State and local governments respect and implement the Covenant, and that its provisions have been declared to be nonself-executing at the time of ratification. Taken together, these elements considerably limit the legal reach and practical relevance of the Covenant (art. 2). The State Party should: (a) Interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extra-territorial application of the Covenant under certain circumstances ...”⁴⁰

Moreover, long before HRC's Concluding observation, the ICJ in its 2004 *Wall Advisory Opinion*, opined that the ICCPR is applicable to the conduct of a State outside of its own territory, in the exercise of its jurisdiction.⁴¹ Furthermore, the HRC had acknowledged in its General Comment No. 31 that a State Party has obligations to respect and ensure the protection of the rights recognised in the Covenant to any person who is within the effective control of that State, even if not situated in the territory of the State Party.⁴² This was already long indicated by the HRC in its 1986 General Comment No. 15, where the Committee had indicated that the enjoyment of the rights recognised in the Covenant is not limited to citizens of State Parties but must also be extended to every individual,

40 Human Rights Committee “Concluding observations on the fourth periodic report of the United States of America” 2014 para 14.

41 *Wall Advisory Opinion supra*, para 111.

42 Human Rights Committee “General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” 2004 OXIO 10. The Human Rights Committee is the supervisory body of the ICCPR constituted by independent experts that monitor the implementation of the treaty. The Committee also publishes its interpretation of the content of human rights provisions in general comments and these general comments are important when dealing with treaty interpretation as they provide guidance as subsidiary means of treaty interpretation pursuant to Article 38(1)(d) of the Statute of the ICJ.

(irrespective of their nationality or statelessness) who find themselves in the territory or subject to the jurisdiction of the State Party.⁴³

As early as in 1977, the Committee had already expressed that the Covenant had extraterritorial application, which stems from the fulfilment of either one of the requirements Stated in Article 2(1), arguing that the literal interpretation of Article 2(1) would lead to the absurd conclusion that State Parties could perpetrate with impunity abroad human rights violations that were prohibited within their own territory.⁴⁴ It is the submission of the author that notwithstanding the Committee's consistent practice, the debate surrounding the extraterritorial applicability of the treaty has not escaped the hands of international law in recent times. In 2004 the government of Sweden raised an objection to Turkey's declaration that its ratification of the Covenant extends obligations arising from the Covenant only in respect of its national territory. Sweden opined that the duty to respect and ensure the protection and fulfilment of all rights in the Covenant is an obligation upon all State Parties to all persons under the States' jurisdiction and a limitation on the basis of the principle of national territory is inconsistent with the obligations imposed by the Covenant on all State Parties and therefore, incompatible with the object and purpose of the Covenant.⁴⁵

3 2 Illustration: Controversy regarding Article 2(1) of the ICCPR's scope of application

For purposes of this illustration it must be borne in mind that jurisdiction is subject to "effective control".⁴⁶ The ICJ in *Nicaragua* had to consider whether some actions by the *contras* in violation of international humanitarian law (such as the killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping)⁴⁷ could be attributed to the US.

The Court held that this could not be the case because effective control by the US over the *contras'* individual acts in violation of international humanitarian law was not established. This paper argues that from the reading of the Court's judgment, effective control would be equal to the issuance of directions to the *contras* by the US concerning specific operations (such as the indiscriminate killing of civilians, etc.), that is to say, an exercise of authority over the *contras'* individual acts.⁴⁸

43 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* 35-56.

44 Kalin and Kunzli 2009 *The law of International Human Rights Protection* (2009) 132-133.

45 Sweden "Objection to the declarations and reservation made by Turkey upon ratification" 2004 *United Nations Treaty Series* 222.

46 1986 *Nicaragua supra*. See also *Bankovic v Belgium supra* where the Court establishes a territorial or spatial model of jurisdiction. Although the Court never bluntly deserted the spatial model, the Court has, before and after *Bankovic*, developed case law that appears to depart from the strict territorial/spatial model of jurisdiction.

47 1986 *Nicaragua supra*, paras 20, 113.

48 1986 *Nicaragua supra*, para 115.

Subsequently, the author posits that since a receiving State does not exercise such authority over a sending State's diplomats or members of its armed forces, if Article 2(1) of the ICCPR is to be interpreted as constituting a cumulative test, this would mean foreign diplomats or members of foreign armed forces stationed on the territory of another State pursuant to international agreements between the two States, would not benefit from human rights recognised in the treaty, as they would not be considered beneficiaries of human rights per that restrictive interpretation.

The author argues that this is because the receiving State has no general power to exercise authority (adjudicative or enforcement jurisdiction) over said diplomats within its territory.⁴⁹ Subsequently, if the State has no effective control over a foreign diplomat, it translates that it has no jurisdiction over said diplomat and that means the receiving State would have no human rights obligations in respect of the diplomat because the diplomat is not subject to its jurisdiction. Similarly, the sending State would also have no human rights obligations in respect of the diplomat because the diplomat is not within its national territory. Therefore, this paper concludes that a restrictive interpretation of Article 2(1) of the ICCPR would void the treaty of its purpose as it excludes certain categories of persons/situations from protections afforded by international human rights.

3 2 1 The possible interpretation that favours the extraterritorial application of the ICCPR

This paper argues that on a deeper level of inquiry, Article 2(1) of the ICCPR acknowledges that it is *de facto* capable of extraterritorial application. However, this is only possible if the requirement "within a State's territory and subject to the jurisdiction of the State" has been established.⁵⁰ It is the submission of the author that the context of the word "and" operates as a disjunctive word that is used to create clear, distinct and independent requirements that are not cumulative to establish the extraterritorial applicability of the Covenant.⁵¹ In fact, the HRC unequivocally interprets the requirements found in Article 2(1) disjunctively and rejects the interpretation that the requirements are cumulative.⁵² In addition, the ICJ in its *Wall Advisory Opinion* addressing the question of the applicability of the ICCPR, left no doubt that it does not subscribe to the strictly literal "conjunctive" interpretation of the Covenant, but rather favours that which offers a disjunctive approach.⁵³ The Court considered the object and purpose of the ICCPR and concluded

49 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 44.

50 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 43.

51 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 55; see also Kalin and Kunzli 2009 *The law of International Human Rights Protection* 132.

52 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* 55 and 56.

that even in situations where jurisdiction is exercised beyond national territory, a State should be bound to comply with the treaty provisions.⁵⁴

Accordingly, the effect of the term “and” in Article 2(1) of the treaty is the same as that of the word “or”.⁵⁵ As such, this paper argues that only in circumstances where the State has established that its peoples are within the territory of another State, *or* are subject to the jurisdiction of another State, will the latter State also incur obligations to respect, protect and fulfil the rights recognised in the Covenant in respect of those individuals.⁵⁶ In effect, it is sufficient to accept either one of the requirements in Article 2(1) to establish the extraterritorial applicability of the Covenant.

In this section, the study particularly focuses on the second part of Article 2(1) of the ICCPR: “subject to its jurisdiction”, as it primarily concerns itself with issues potentially occurring outside the territorial borders of the State and thus directly relates to the question of extraterritoriality. In this respect, the primary question should not be whether the treaty imposes obligations which find extraterritorial application, but rather, in what circumstances the treaty will find extraterritorial application.

The consistent jurisprudence and authoritative statements of the relevant international human rights law bodies such as the HRC, as well as the ICJ, in respect of the American and European Conventions on Human Rights and the Convention Against Torture (CAT), have been to interpret the term “jurisdiction” in these treaties as operating extraterritorially in certain circumstances.⁵⁷ The author argues that although there is not much commentary in support of the extraterritorial effect of the term “jurisdiction” in the ICCPR, the meaning of the term in the Covenant is arguably of an extraterritorial effect.

In the *Namibia Advisory Opinion*, the ICJ opined that South Africa was responsible for the violations of the rights of the people of Namibia because physical control of a territory and not sovereignty or legitimacy

53 Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 205.

54 *Wall Advisory Opinion supra*, paras 109-111; Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 206; *Wall Advisory Opinion supra: Declaration of Judge Buergenthal* 240 para 2.

55 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 47-48.

56 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 47-48.

57 United Nations “Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America” (2006) 15; see United Nations “General Comment No. 2: Implementation of Article 2 by States Parties” 2007; see also Wilde “The extraterritorial application of international human rights law on civil and political rights” in *Routledge Handbook of International Human Rights Law* (eds Sheeran and Roodley) (2013) 635-661.

of title, is the basis upon which State responsibility for acts affecting other States must be decided.⁵⁸ Wilde suggests that as a general proposition, the echo of the Court's Statement can be traced through later decisions on the spatial applicability of human rights treaty law in two related but distinct ways:

"In the first place, the fundamental point that State responsibility should not be limited to situations where a State enjoys title is the basic underpinning of extraterritorial applicability. In the second place, the particular concept of 'physical control over territory' as a basis for determining where the obligations should subsist."⁵⁹

This opinion paved the Court's pronouncements on issues regarding the extraterritorial application of human rights treaties in subsequent matters.⁶⁰ Evidently, the ICJ, in its *Wall Advisory Opinion*, as well as the *DRC v Uganda* judgment, appeared to espouse and assume that even though there is less authoritative commentary on the extraterritorial applicability and meaning of the term "jurisdiction" in the ICCPR, the treaty reflected an extraterritorial application.⁶¹ The Court acknowledged that this interpretation was consistent with the drafting history of the Covenant as the drafters of the Covenant had not intended the wording of Article 2(1) to allow a State to evade its obligations when it exercised jurisdiction abroad.⁶² The Court considered the ICCPR's *travaux préparatoires* and observed that they did not exclude the extraterritorial applicability of the Covenant.⁶³ Instead, the Court decided that the *travaux préparatoires* of the Covenant reinforce the disjunctive reading of the phrase "within its territory and subject to its jurisdiction".⁶⁴

This interpretation is also assumed to have been favoured by most States during the drafting of the Covenant as pointed out in the preceding paragraphs.⁶⁵ Moreover, the author acknowledges that although there is room to argue against the extraterritorial applicability of the Covenant from the preparatory works, it must be considered that the applicability of the Covenant to States operating abroad was not considered, except in cases of military occupation.⁶⁶ Thus, it cannot be said that the

58 Namibia Advisory Opinion 54 par 118.

59 Wilde 2013 *Routledge Handbook of International Human Rights Law* 663.

60 Wilde 2013 *Routledge Handbook of International Human Rights Law* 650-663.

61 *Wall Advisory Opinion supra*, paras 109-112; *Democratic Republic of the Congo v Uganda* 2005 ICJ Reports 168 paras 216, 217 (hereinafter, *Armed Activities*).

62 Kalin and Kunzli 2009 *The law of International Human Rights Protection* 132-133.

63 *Wall Advisory Opinion supra*, para 109.

64 *Wall Advisory Opinion supra*.

65 See United Nations Documents "E/CN.4/224" 1949; see also United Nations Documents "E/CN.4/SR125" 1949.

66 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 37-40.

Covenant is by all means not capable of finding an interpretation that favours extraterritorial application.⁶⁷

During the 6th Session of the HRC in its 194th meeting, several issues were raised regarding Article 2(1), however, most of them were merely “flagged up but not necessarily agreed upon and thus there was no clear and decisive answer” regarding various issues for the current study.⁶⁸ It is on this basis that it is reasonably fair to conclude that much room was left for subsequent interpretation of the Covenant.⁶⁹ This paper argues that such subsequent interpretation of the Covenant as indicated in the preceding paragraphs favours the extraterritorial application of the Covenant. Even the report of the then Special Rapporteur of the Commission on Human Rights on the situation of human rights in Kuwait under Iraqi Occupation, Mr Walter Kälin, infers that although the occupation of Kuwait by Iraqi troops was not “within the territory” of Iraq, the application of the obligations envisaged in the Covenant were not precluded by the stipulation of the requirement of territoriality in Article 2(1).⁷⁰ The same report was referred to in the UNGA Resolution 46/135 of 17 December 1991 which was adopted with 155 votes to 1, with 10 abstentions.⁷¹ It is the submission of the author that the favour received by this report and its inclusion in the adopted resolution is important as it is indicative of the *opinio juris* shared by the global community of States regarding the issue of extraterritoriality.

3 2 2 Interpreting the scope of the ICESCR’s application

Noticeably, Article 2(1) of the ICESCR does not contain a jurisdictional clause.⁷² The Covenant makes no reference to the qualification of jurisdiction or the territory of a State.⁷³ Rather, the Covenant includes an express reference to the concept of international cooperation and assistance in order to achieve its objects and purpose.⁷⁴

The debates surrounding the ICESCR are therefore not concerned with the meaning of jurisdiction, but on whether the lack of an express

67 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 40.

68 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 29.

69 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 29.

70 See Kälin “Special Rapporteur of the Commission on Human Rights: Report on the Situation of Human Rights in Kuwait under Iraqi Occupation” 1992.

71 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 85.

72 Coomans “The extraterritorial scope of the ICESCR in the work of the United Nations Committee on Economic, Social and Cultural Rights” 2011 *Hum. Rights Law Rev.* 1 – 35.

73 Ramazanova “Extraterritorial application of Human Rights Obligations in the context of Climate Change Impacts on Small Island States” 2015 *University of Oslo* 35.

74 Article 2(1) of the ICESCR; see Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 295.

provision delimiting the States obligations to its territory or jurisdiction, renders the Covenant always applicable in an extraterritorial context, or whether a spatial test is applied to delimit the obligations of States.⁷⁵

Article 2(1) of the Covenant provides that each State Party to the Covenant shall undertake steps, independently and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the Covenant by all appropriate means as may be necessary.⁷⁶ It is the submission of the author that this provision evidences a stronger basis for the Covenant's extraterritorial application of human rights than its sister provision in the ICCPR.⁷⁷ Any restrictive approach to the interpretation of Article 2(1) of the ICESCR would render the obligation of international cooperation and assistance meaningless, especially in light of today's globalisation processes.⁷⁸

It is the submission of the author that the extraterritorial applicability of the Covenant is also alluded to in the Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.⁷⁹ Principle 28 provides that all States are under an obligation independently and jointly, through international cooperation to fulfil economic, social and cultural rights of people within their territory, as well as extraterritorially.⁸⁰ This interpretation has also been endorsed by the ICJ in its *Wall Advisory Opinion* where the Court underscored that the ICESCR finds extraterritorial application.⁸¹ Nevertheless, the Court further emphasised that the extraterritorial applicability of the ICESCR cannot be unrestricted so as to obligate State Parties to protect the human rights of all persons all over the world. The Court held that the rights recognised in the Covenant are by nature territorial and thus a State is bound by the obligations in the Covenant outside of its territory only if it exercises effective jurisdiction in another State, thus qualifying the scope for the Covenant's extraterritorial space.⁸² The author concludes that although the Court espouses the jurisdictional test for the extraterritorial application of the ICESCR, it would seem that a test based on the effects doctrine is also plausible, especially when dealing with cases of shared resources between two or more States. This test will be discussed below. It must also be noted, that although the Court itself has not made an express decision as to the application of this test specifically in respect of the ICESCR, the Court has

75 See Wilde 2013 *Routledge Handbook of International Human Rights Law* 666.

76 Article 2(1) of the ICESCR.

77 Ramazanova 2015 *University of Oslo* 39.

78 Askin 2019 *MPIL* 2 and 3.

79 Preamble, Principle 9 and 29 of the Maastricht Principles on the Extraterritorial Obligations of State in the Area of Economic, Social and Cultural Rights 2013; De Schutter *International Human Rights Law* (2014) 204.

80 Principle 28 of the Maastricht Principles on the Extraterritorial Obligations of State in the Area of Economic, Social and Cultural Rights 2013 *supra*.

81 *Wall Advisory Opinion supra*, paras 109-113.

82 *Wall Advisory Opinion supra*, para 112.

in fact espoused the effects doctrine in its 1927 *Lotus* case to the Convention of Lausanne and principles of international law.⁸³

3 2 3 Other considerations as regards the ICESCR's extraterritorial application

Reference can be made to the UN Charter as mentioned in the Preamble of the ICESCR.⁸⁴ Article 1(3) of the UN Charter provides that the purpose of the UN is to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.⁸⁵

The principle of international assistance is also emphasised in Articles 55 and 56 of the Charter, setting out that the UN shall promote the universal respect for and observance of human rights and fundamental freedoms for all and all member States shall take measures to ensure the achievement of the rights recognised in the Covenant. Accordingly, the author argues that this implies that the principle of international cooperation and assistance means that human rights obligations cannot be limited to territory as that interpretation would run against such principle. The use of the word “universal” instead of “domestic” in Article 55 of the UN Charter supports the extraterritorial application of human rights treaties. This interpretation is consistent with the practice of the ICJ which highlights that should a State Party’s conduct violate rights in the Covenant beyond its own territory, then such State Party is in breach of the UN Charter.⁸⁶ Similarly, the author argues that the use of “international” in Article 2(1) of the ICESCR to foster for assistance and cooperation, supports the extraterritorial applicability of the Covenant.⁸⁷

83 *France v Turkey* 1927 PCIJ 10; see Born & Rutledge *International Civil Litigation in United States Courts* (2007) 567-568; Gerber “Beyond Balancing: International Law Restraints on the Reach of National Laws” 1984 *Yale J. Int’l L.* 196-197, 293-294; see also Parrish “The Effects Test: Extraterritoriality’s Fifth Business” 2008 *Articles by Maurer Faculty* 1470-1478.

84 See preamble of the ICESCR; see also Kunnemann 2004 *Extraterritorial Application of Human Rights Treaties* 202.

85 Article 1(3) of the Charter of the United Nations 1945.

86 *Namibia Advisory Opinion supra*; also see Chenwi and Bulto *Extraterritorial Human Rights Obligations from an African Perspective* (2018) 44.

87 Skogly ‘Extraterritoriality: Universal Human Rights without Universal Obligations’ in *Research Handbook on International Human Rights Law* (eds Joseph & McBeth) (2010) 75.

4 The jurisprudence of the International Court of Justice and the Supervisory Bodies of the Covenants in their determinations on the question of extraterritorial application of the Covenants

The study below will show that there is evidence to support that the world court, and relevant supervisory bodies, consider the ICCPR and the ICESCR applicable on an extraterritorial basis, especially in situations where a State exercises control over the territory of another State and/or over persons who may be situated outside of that States territory.⁸⁸

This paper argues that based on the jurisprudence of the ICJ, it is clear that if violations of treaty based human rights arise from the conduct of a State in a foreign territory, such State would have been in violation of its obligations in respect of said treaty. An example of such jurisprudence is the *Namibia Advisory Opinion* where the Court advised that South Africa was in breach of its obligations under the United Nations Charter for establishing Apartheid in Namibia.⁸⁹ It is the submission of the author that although this does not specifically relate to the ICCPR nor the ICESCR, it reflects the attitude of the Court as regards the issues surrounding the territorial reach of human rights treaties. This is an issue that is core to the investigation of the ICCPR and the ICESCR's extraterritorial applicability. Therefore, the author argues that the Court's decision on the matter may be used to anticipate the attitude of the Court when approached with the question of the extraterritoriality of the ICCPR and the ICESCR. This extrapolation will be substantiated below.

The ICJ in its *1996 Bosnia Genocide* case decided that given the *erga omnes* character of rights and obligations under the Genocide Convention, as well as the fact that the treaty contains no clause limiting the treaty's application to a State Party's jurisdictional control, the obligation placed on States to prevent and punish crimes of genocide is not territorially limited.⁹⁰ As a result, the Federal Republic of Yugoslavia could be held responsible for acts of genocide perpetrated by Serb forces in Bosnia-Herzegovina.⁹¹ Although the precise basis by which the Court makes this decision in support of extraterritoriality is not immediately apparent, it can be extracted from the decision that the absence of a jurisdictional clause in a human rights law treaty, may extend a State Party's obligations even to those acts performed by the State outside of

88 For a detailed discussion see Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 121-228.

89 *Namibia Advisory Opinion supra*, paras 131 and 133.

90 *Bosnia and Herzegovina v Yugoslavia* 1996 ICJ Reports 31-33.

91 *Bosnia and Herzegovina v Yugoslavia* 1996 ICJ Reports *supra*.

its territorial or jurisdictional control.⁹² This paper suggests that the Court seems to draw this conclusion on the basis of the functional approach test.⁹³ This test bases its foundations on the effect's doctrine. It traces a State's extraterritorial conduct and establishes extraterritorial obligations on the State if the conduct in question has effects beyond the territory of the State.⁹⁴

The Genocide Convention is not the only human rights treaty that lacks a jurisdictional clause. Similarly, the ICESCR which is particularly important for this discussion, does not contain a jurisdictional clause delimiting State obligations to territory or jurisdiction.⁹⁵ Moreover, considering the context of the wording of the ICESCR obligations that State Parties shall recognise the right of "everyone" together with the obligation to take steps through "international assistance and co-operation" to fully recognise the rights in the Covenant, it may naturally be construed that the obligations imposed by the Covenant extend beyond the territorial jurisdiction of a State Party.⁹⁶ Such a conclusion is also supported by the Committee on Economic, Social and Cultural Rights (CESCR) which has outlined in its General Comment No. 24 that the obligations of State Parties under the ICESCR do not simply stop at their territorial borders.⁹⁷ The Committee expresses that obligations of State Parties to the ICESCR have an extraterritorial reach, which is generally confined to the jurisdictional test.⁹⁸

Conversely, Article 2(1) of the ICCPR *prima facie* limits a State's obligations to territory and jurisdiction. However, the HRC has interpreted the provision to mean that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if situated outside the territory of the State Party".⁹⁹ The Committee seems to suggest that although the treaty subscribes its obligations to territory and jurisdiction, an extraterritorial application of the treaty is possible in situations where a State Party exercises effective control over another State's territory. The

92 Craven "Human Rights in the realm of order: Sactions and Extraterritoriality" in *Extraterritorial Application of Human Rights Treaties* (eds Coomans & Kamminga) (2004) 251.

93 See Craven 2004 *Extraterritorial Application of Human Rights Treaties* 251.

94 Craven 2004 *Extraterritorial Application of Human Rights Treaties* 251; IACtHR *Advisory Opinion OC-23/17 Requested by the Republic of Colombia* 2017 para 81.

95 See Article 2(1) of the ICESCR; see also Craven 2004 *Extraterritorial Application of Human Rights Treaties* 252.

96 Craven 2004 *Extraterritorial Application of Human Rights Treaties* 252.

97 CESCR "General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities" 2017 para 26.

98 CESCR "General Comment No. 19: The Right to Social Security - Art. 9 of the Covenant" par 54; see also "General Comment No. 24" *supra* 2017 paras 24-37.

99 Human Rights Committee "General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" 2004 para 10.

Committee has expressed this view in *Lopez v Uruguay*, where it held that the delimitation in Article 2(1) of the ICCPR is not to be read as permitting a State to commit violations of civil and political rights in the territory of a foreign State.¹⁰⁰ Similarly, the HRC also expressed great concern over an interpretation of Article 2(1) that suggests the exclusion of the application of the treaty with respect to individuals under the jurisdiction of a State Party who find themselves within the territory of a foreign State Party.¹⁰¹

Noteworthy, the ICJ has also confirmed the extraterritorial applicability of the ICCPR in its *2004 Wall Advisory Opinion* stating that “the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside of its own territory”.¹⁰² This principle was subsequently confirmed by the Court in its decision in *DRC v Congo*.¹⁰³ Below, these judgments are discussed to briefly highlight the position espoused by the ICJ to the issue of the extraterritorial applicability of the ICCPR and the ICESCR.

4 1 The Wall Advisory Opinion

In July 2004, the ICJ delivered an Advisory Opinion in response to the request by the UNGA on the legality of the situation surrounding the “wall” by Israel in the Occupied Palestinian Territories.¹⁰⁴ The “wall” boasts a breadth between 50-100 metres, circling some areas in Palestine without adhering to the demarcation line between Israel and the Palestinian territories. The construction of the wall “seriously affected the lives of the Palestinians living in the occupied territories, impeding the exercise of a number of their fundamental rights”.¹⁰⁵ While assessing the legality of the construction the wall, the ICJ had to determine whether the ICCPR and the ICESCR are applicable outside the territory of a State Party, and if so, in which circumstances would such application follow.¹⁰⁶ Although the ICJ’s analysis of the question of the extraterritorial applicability of these treaties is rather brief, the Court left no doubt that it considers the treaties to have an extraterritorial reach. In fact, as regards Article 2(1) of the ICCPR, the Court expressed that it does not subscribe to the strict literal conjunctive interpretation of the Covenant but rather espouses a more “disjunctive” approach.¹⁰⁷ The

100 *López Burgos v Uruguay supra*, para 12.3.

101 See Human Rights Committee “Concluding Observations on the Sixth Periodic Report of Germany” 2012 para 16. The Human Rights Commission has been consistent with its position that the ICCPR is applicable and triggers obligations beyond State territory, an early pronouncement on this can be seen in *López Burgos v Uruguay supra*.

102 *Wall Advisory Opinion supra*, para 111.

103 See *Armed Activities supra*.

104 See General Assembly “10th Emergency Special Session: Resolution ES-10/14” 2003.

105 See Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 205; see also *Wall Advisory Opinion supra*, para 134.

106 *Wall Advisory Opinion supra*, para 107-113.

Court held that the ICCPR enjoys an extraterritorial application as it is applicable in respect of acts done by a State Party in the exercise of its jurisdiction outside of its own territory. In its own words, the Court said:

“While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that even when such is the case, States parties to the Covenant should be bound to comply with its provisions.”¹⁰⁸

The ICJ also considered the ICESCR’s applicability to the conduct of Israel in the Occupied Palestinian Territories. This was the first time that the ICJ acknowledged the extraterritorial applicability of the ICESCR. Although the Courts’ analysis of the issue is very succinct, it is quite remarkable as there is still very little judicial authority from the Court on the matter to date. In its opinion the Court reinforces the position taken by the CESCER in its Concluding Observations on Israel’s periodic reports by endorsing the extraterritorial applicability of the treaty.¹⁰⁹ In particular, the Court commented on the territorial reach of the ICESCR, stating that the extraterritorial applicability of the treaty should not be excluded, as the treaty’s extraterritorial effect will be triggered in a situation where a State Party exercises control (territorial jurisdiction) over the territory of another State.¹¹⁰ It is the submission of the author that the Court espouses the effective control test, instead of the functional approach test here.¹¹¹

4 2 *DRC v Uganda*

In *DRC v Uganda* the Court had to consider the extraterritorial applicability of the ICCPR in respect of Uganda’s armed activities in the territory of the DRC.¹¹² The Court gave regard that there were two situations of extraterritorial applicability that had to be considered separately. First, the occupation of the Congolese region (Ituri) by the armed forces of Uganda and second, the armed activities in other areas. The Court held that both the occupation of the Ugandan forces in the Ituri region as well as its military activities, signified the exercise of jurisdiction as per Article 2(1) of the ICCPR and thus triggered extraterritorial consequences and/or obligations.¹¹³

107 See eg. Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 185.

108 *Wall Advisory Opinion supra*, paras 109-110.

109 CESCER “Concluding Observations on the initial report of Israel” 1998 para 8.

110 *Wall Advisory Opinion supra*, para 112. Note that the CESCER refers to such territorial jurisdiction as ‘effective control’, see CESCER “Concluding observations on the initial report of Israel!” 1998 *supra*, paras 15 and 31.

111 Nonetheless, it ought to be recalled that the Court has not expressly opposed the application of the functional approach test to the ICESCR, conversely the Court has espoused such an approach to the extraterritorial application of human rights in its 1927 *Lotus* case.

112 *Armed Activities supra*; see Okowa “Case concerning armed activities on the territory of the Congo (*DRC v Uganda*)” 2006 *Int Comp Law Q* 742-753.

4 3 A brief analysis as to whether ICJ pronouncements on the extraterritorial applicability of the ICCPR and/or the ICESCR are reflective of CIL

Although the ICJ has not had many opportunities to decide on the extraterritorial application of the ICCPR or the ICESCR, it has set some standard as regards the manner it interprets the territorial scope of the Covenants. Even more significant is the fact that the ICJ has followed the jurisprudence of the supervisory bodies of the treaties when determining the territorial reach of each Covenant. Consequently, this strengthens the argument that the Covenants find extraterritorial application, even though ICJ decisions do not necessarily have the binding value of precedents as they merely constitute subsidiary means for the determination of the rules of law under the international law regime.¹¹⁴ Therefore, as regards the question whether the relevant position of the ICJ is a reflection of customary international law, one would have to assess State practice and *opinio juris* to determine the status of the position maintained by the ICJ. On that assessment, one can note that State practice on the subject of the extraterritorial applicability of the ICCPR and the ICESCR is equivocal and largely incomplete, and thus cannot decisively meet the requirement of a wide, sufficiently representative, virtually uniform and “settled State practice” as necessary to establish a rule of customary international law.¹¹⁵ Since there is no State practice in support of such position as maintained by the ICJ, no rule of custom arises.

5 Conclusion

From this article, it is clear that every human rights institution that has had to address the question of the extraterritorial applicability of the ICCPR or the ICESCR, has concluded that the Covenants embrace an extraterritorial application, at least in some situations.

As a result thereof, it is plausible to accept that the treaties are applicable to persons outside of the territory of each State Party. Moreover, the author argues that although international jurisprudence does not regard that there are different standards triggering the extraterritorial application of the Covenants, this paper suggests that a much flexible approach be adopted for matters relating to the ICESCR as its wording is much more flexible in that it has no territorial circumscription. It is the submission of the author that this approach will curb the difficulties present in the attempt of applying human rights

113 *Armed Activities supra*, para 216.

114 Article 59(d) of the Statute of the International Court of Justice 1946.

115 *Federal Republic of Germany v Netherlands* 1969 ICJ Reports paras 74-77.

treaties extraterritorially to situations that do not “wield enough control to guarantee human rights standards”,¹¹⁶ or to guarantee State responsibility for an internationally wrongful act, such as in cases of the misuse of shared resources by one State to the exclusion of a range State. While this article does not exhaust the topic on the extraterritorial applicability of the selected human rights treaties, it must be noted that it suggests that in a globalised world – where activities of one State within its territory may affect the rights of a foreign State – placing greater restrictions to the extraterritorial applicability of the treaties risks the protection of human rights.

¹¹⁶ See Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 368.