PULLING (APART) THE TRIGGERS OF EXTRATERRITORIAL JURISDICTION

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The scope of enforceability of international human rights treaties regarding civil and political rights in circumstances where states have exercised extraterritorial jurisdiction has generated significant gaps in human rights protection. The article identifies and analyses such inadequacies, which namely derive from the current triggers of extraterritorial jurisdiction based on certain legal and factual relationships existing between the state and the territory or individual in question. Further, the article proposes that such inadequacies would be alleviated through the adoption of a tripartite typology, which triggers extraterritorial jurisdiction based on territorial, non-territorial and factual control over the territory

I INTRODUCTION

In an increasingly globalised world characterised by extraterritorial migration control and a war on terror, the need to respect international human rights has never been greater. However, the persistent exercise of authority by states beyond their territories has cast into doubt the effectiveness of international human rights law in ensuring such rights are respected. The geographical scope of human rights obligations is determined by the concept of jurisdiction within the treaty in question. However, the current law governing the enforcement of international human rights treaties regarding civil and political rights extraterritorially is discernibly ambiguous and thereby generates significant gaps in human rights protection. This paper argues that in order to alleviate these inadequacies and ensure such gaps are bridged, the jurisdiction of states with regard to the aforementioned category of international treaties must be extended. This would involve recognition of extraterritorial jurisdiction in circumstances where a requisite nexus is established between the state and the foreign territory or individual. Central to this inquiry is whether the current nexuses or triggers for extraterritorial jurisdiction are adequate, or whether changes need to be made. The current triggers for extraterritorial jurisdiction are based on certain legal and factual relationships existing between the state and the territory or individual in question. Notably, the latter category

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comprises two triggers based on the spatial concept of territorial control, and control over persons in a foreign territory. The direction of jurisprudence governing these triggers and the resultant inadequacies in human rights protection will be highlighted in this paper. Further, to remedy such inadequacies a tripartite typology characterising triggers according to territorial, non-territorial and factual control based on a cause and effect requirement should be adopted by international human rights courts and the like. Such an amendment to the current law would undoubtedly draw human rights protection to the forefront in a world that is plagued with measures and controls violating human rights extraterritorially.

II JURISDICTION

In the general international law context, jurisdiction is the right of a state to lawfully prescribe and enforce rules against others.[1] Thus, it can be gleaned that the notion of jurisdiction is closely related to the principle of state sovereignty.[2] Importantly, jurisdiction circumscribes states' international human rights obligations with regard to civil and political rights.[3] This is by virtue of the fact that the *International Covenant on Civil and Political Rights* ('ICCPR') and the *European Convention on Human Rights* ('ECHR') require state parties to respect and ensure the rights of persons subject to or within their 'jurisdiction'.[4] However, the meaning and triggers of 'jurisdiction' in the international law context are disputed. As a consequence, the extent to which state parties owe human rights obligations under these covenants remains uncertain. Therefore, in order to ascertain the most desirable approach to 'jurisdiction', both the meaning and the scope of jurisdiction must be discussed. It is important to note that given the focus of this paper is on international human rights, the extraterritorial scope of these human rights obligations will comprise a large component of analysis.

A *Territorial Jurisdiction*

'Jurisdiction' is essentially territorial according to those maintaining a

[1] *Banković v Belgium* [2001] Eur Court HR 890, [59].

[2] Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Nonrefoulement Principle to Extraterritorial Interception Measures' in Bernard Ryan and Valsamis Mitsilegas, 'Extraterritorial Immigration Control: Legal Challenges' (Koninklijke Brill NV, 2010) 69, 72.

[3] Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521, 521.

[4] Article 2(1) of the ICCPR requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'; Article 1 ECHR provides that the 'High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention'.

Westphalian view of the world.[5] Under this territorial approach to jurisdiction, a state has jurisdiction over territory that is under its control[6] and owes international human rights obligations primarily to those within that territory.[7]

Notably, Article 2(1) of the ICCPR imposes an obligation on each party to respect and ensure the Covenant rights to individuals within its territory and subject to its jurisdiction. A narrow construction has led to an argument consistent with the aforementioned territorial approach that Article 2(1) provides two conditions must be met for the ICCPR obligations to apply: the individual must be both within its territory and subject to its jurisdiction.[8] This follows the treaty interpretation argument that was accepted by the Supreme Court of the United States in *Sale v Haitian Center Council*, which thereby asserted a presumption against extraterritorial jurisdiction in the context of the Refugee Convention.[9] However, the legislative history of Article 2(1) does not support such a narrow territorial construction.[10] Further, the Human Rights Committee ('HRC') and the International Court of Justice ('ICJ') have interpreted the article 'disjunctively', requiring states in appropriate circumstances to observe their human rights obligations beyond their territorial borders.[11] In addition, former ICJ Judge and esteemed United Nations Human Rights Committee member Professor Thomas Buergenthal stated that Article 2(1) should be read to impose obligations on the state to respect and ensure rights recognised both to all individual within its territory *and* to all individuals subject to its jurisdiction.[12] Most influentially, Buergenthal's assertions have obtained the imprimatur of the Human Rights Committee and UN rapporteurs.[13]

This vehement position against the territorial approach in the limited

[5] King, above n 3, 522 citing *Banković v Belgium* [2001] ECHR 890, [61].

[6] Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40(2) *Israeli Law Review* 503, 506.

[7] King, above n 3, 522.

[8] Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003-2004) 37 *Israeli Law Review* 17, 34.

[9] Thomas Gammeltoft-Hansen, 'Growing Barriers: International Refugee Law' in Mark Gibney and Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2011) 55, 71 citing *Sale v Haitian Center Council* (1993) 509 US 155.

[10] Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 *The American Journal of International Law* 78, 79.

[11] King, above n 3, 523 citing Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 11 IHRR 905 (2004) at para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 at para. 111. Also see *Democratic Republic of the Congo v Uganada* paras. 216-217.

[12] Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in Louis Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 935, 939.

[13] Meron, above n 10, 79.

context of Article 2(1) is transferrable to other human rights conventions, with Meron arguing that a narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure states respect the human rights of persons over whom it exercises jurisdiction.[14] Therefore, it appears equivocal that both scholars and the judiciary support a shift away from the territorial approach. King has resoundingly asserted that such an approach is particularly 'inadequate' in an increasingly globalised world and in the post 9/11 environment characterised by a war on terrorism.[15]

Consequently, state assertions of control outside their own territory or extraterritorially may still result in the attraction of human rights obligations under international treaties, in addition to attracting human rights obligations for such assertions within state territory. This enables a progressive approach to the notion of jurisdiction in the international human rights context, and significantly widens the scope of states' international human rights obligations.

B *Triggers Enacting Extraterritorial Jurisdiction*

When states move outside their 'sovereign nation cage', assertions of jurisdiction may be conceived of in a number of ways.[16] The question of what triggers jurisdiction, and thereafter international human rights obligations, is a prevalent issue in the field of international human rights law. This is mainly because there are few judicial authorities addressing the contentious issue, and subsequent ambiguity has derived from the interpretation of those few authorities. It can be discerned from academia and judicial authority in forthcoming discussion that there are two potential triggers of extraterritorial jurisdiction based on either lawful or factual relationships between a territory or individual and the state in question. Further, the latter basis may be subdivided into two separate triggers based on a spatial concept of territorial control and control over persons.

1 *Legal relationship*

As stated, the general international law concept of jurisdiction is primarily concerned with rules governing circumstances where a state is legally permitted to exercise its legal authority against others.[17] The legal relationship basis interprets jurisdiction for the purposes of human rights law and equates it to the interpretation of jurisdiction at general international law.[18] However, most

[14] Ibid 82.
[15] King, above n 3, 522.
[16] Thomas Gammeltoft-Hansen, 'Growing Barriers: International Refugee Law' in Mark Gibney and Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2011) 55, 65.
[17] Wilde, above n 6, 513.
[18] King, above n 3, 525.

scholars and international decision-makers have asserted that there is a difference in the scope of jurisdiction in the international human rights context. This can be gleaned from forthcoming discussion, which holistically clarifies that jurisdiction in such a context may be attracted through both lawful and unlawful exercises of authority. Despite this, a school of thought exists that only lawful exercises of authority circumscribe jurisdiction in the international human rights context.

The European Court of Human Rights arguably suggested in the seminal case *Banković v Belgium* ('*Banković*') that a legal relationship between the individuals and the state must exist in order for the state to have jurisdiction and attract international human rights obligations.[19] The case concerned a claim by six citizens of the Federal Republic of Yugoslavia to impose human rights obligation in the ECHR with regard to the NATO bombing of a building in Belgrade in 1999.[20] Upon finding that the impugned act fell outside the jurisdiction of the respondent states, the Court observed that jurisdiction is essentially territorial, with extraterritorial jurisdiction subsisting only in exceptional circumstances.[21] Significant to this discussion, it has been argued that the Court limited the meaning of extraterritorial jurisdiction in the ECHR to exercises of authority that are legally permissible, reflecting the meaning of jurisdiction in public international law generally.[22] Additionally, the Court did not apply this suggestion to the facts before them.[23] Notably, Wilde argues the approach was picked up at certain stages of the *Al-Skeini* case in the High Court of Justice and the Court of Appeal.[24]

The European Court of Human Rights and other authoritative bodies have held in other cases that extraterritorial jurisdiction requires a factual relationship between the individual and the state, regardless of whether the situation in question is lawful.[25] In the ICCPR context, the U.N. Human Rights Committee in General Comment No. 31 similarly observes that the state may exercise extraterritorial jurisdiction without a valid international legal basis for doing so.[26]

The legal relationship trigger undoubtedly significantly limits the range of

[19] *Banković v Belgium* [2001] Eur Court HR 890.
[20] King, above n 3, 532.
[21] *Banković v Belgium* [2001] Eur Court HR 890, [74].
[22] *Banković v Belgium* [2001] Eur Court HR 890, [59]-[61].
[23] Wilde, above n 6, 514.
[24] Ibid 515 citing *Al-Skeini v Sec. of State for Defence* [2004] EWHC 2911, paras 245, 269; *Al-Skeini v Sec. of State for Defence* [2005] EWCA 1609, [75]-[76].
[25] Wilde, above n 6, 509 citing *Loizidou v Turkey* (1995) ECHR 310, [62]; *Cyprus v Turkey* (2001) ECHR 155, [77].
[26] Wilde, above n 6, 513-514 citing Human Rights Committee, *General Comment No. 31: Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 10th sess, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004) para 10.

circumstances in which jurisdiction is understood to subsist extraterritorially, given it only encapsulates matters of law as opposed to the full scope of the extraterritorial state activities as matters of fact.[27] This is because the legal relationship hinges on whether the state in question has obtained consent to exercise certain authority.[28] However, this would mean that a state unlawfully exercising authority abroad does not have jurisdiction and as a consequence need not respect human rights. Wilde aptly describes this consequence of the legal relationship basis as "perverse".[29] In a similar vein, King regards the result as politically and legally unacceptable and incompatible with forthcoming case law.[30] However, without judicial clarification the legal relationship basis for triggering jurisdiction remains relevant.

2 *Factual relationship*

According to the jurisprudence of the ICJ and other human rights bodies, a factual link or relationship between a territory or individual and a state may be established through control over either a territory or specific individuals.[31] In most circumstances, such control may be exercised lawfully or unlawfully. Consequently, the primary focus of the forthcoming discussion regards whether the state exercises the requisite factual control over the territory or persons to form a factual link triggering jurisdiction and human rights obligations.

(a) *Territorial control or the 'spatial' trigger*

A notable instance where a state may allegedly have extraterritorial jurisdiction is where the state exercises a level of control over a foreign territory. This subset of extraterritorial activity is governed by the spatial test for triggering the application of extraterritorial jurisdiction.[32] The spatial concept provides that human rights obligations emanate from territorial control.[33] The rationale is that when a state controls a territory, regardless of whether the state lacks title or its presence is unlawful, it should be responsible for what happens in that territory.[34] This rationale is clearly rooted in the principle of national

[27] Wilde, above n 6, 515.
[28] King, above n 3, 525.
[29] Wilde, above n 6, 514.
[30] De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 *Baltic Yearbook of International Law* 185, 196; King, above n 3, 536.
[31] Klug and Howe, above n 2, 78 citing the *Israeli Wall Opinion,* ICJ Gen. List No. 131, 9 July 2004 and *Democratic Republic of Congo v Uganda* (2005) ICJ Gen. List No. 116, 19 December 2005.
[32] Wilde, above n 6, 504.
[33] Ibid 508.
[34] Wilde, above n 6, 508.

sovereignty.[35] Specifically, the spatial test requires that the state have 'effective control' of the foreign territory.[36] This test, which was enunciated by the European Court of Human Rights, has been subject to significant judicial and academic scrutiny.

(i) *Effective control*

The expected inquiry that has evolved from the application of the spatial test concerns the degree of control that constitutes 'effective control' under the test. This requisite criterion, to say the least, has been contentious. The primary issue arising out of this contention has been whether overall or partial control is required to trigger jurisdiction. Related to this issue is whether substantive obligations provided for in human rights conventions may be tailored according to the degree of control exerted over the foreign territory in question.

The starting point for this inquiry lies with the European Court of Human Rights. In the Court's cases concerning the occupation of the territory of Northern Cyprus by Turkish forces, the objective element of a strong military presence was considered sufficient to establish effective territorial control.[37] Notably, it was held in *Loizidou v Turkey* ('*Loizidou*') that Turkey's army exercised effective *overall* control over the territory by virtue of the strong military presence.[38] The Court considered that to find the applicants were not within jurisdiction would lead to a "regrettable vacuum in the system of human rights protection".[39] Thus, it can be discerned that overall control over a territory establishes jurisdiction and thereby triggers the applicability of human rights law.

In addition to overall control, it has been argued that effective control may also be established through control not amounting to full control over a territory. This notion asserts that states may attract *cause-and-effect jurisdiction* whereby human rights obligations apply to the extent control is exercised. Thus, the nature and scope of human rights obligations vary in direct proportion to the level of control exerted by the state over the territory.[40] The applicants in *Banković* sought to rely on cause-and-effect jurisdiction, however the European Court of Human Rights rejected the argument. The Court's basis for rejection was that the concept of jurisdiction could not be "divided and tailored in accordance with the particular circumstances of the extra-territorial act in

[35] Gammeltoft-Hansen, above n 16, 65-66.
[36] *Loizidou v Turkey* (1995) Eur Court HR 310, [62]; *Cyprus v Turkey* (2001) Eur Court HR 155, [77].
[37] Klug and Howe, above n 2, 78.
[38] (1995) Eur Court HR 310, [56].
[39] *Cyprus v Turkey* (2001) Eur Court HR 155, [78].
[40] Wilde, above n 6, 524.

question".[41] Additionally, the Court in *Loizidou* and *Cyprus v Turkey* ('*Cyprus*') held that Turkey's jurisdiction required it to secure the entire range of substantive rights provided by the ECHR.[42] Under this approach, effective territorial control requires *full physical control* over a territory.[43] This is because where a state has jurisdiction under this approach it owes all substantive rights provided for in the convention, and therefore it must have a high level of control to fulfil such obligations and respect such rights set forth in the convention. This is undoubtedly an "exceptionally high threshold" requirement for effective control.[44]

The approach has garnered support. The House of Lords in *Al-Skeini* held that jurisdiction for human rights purposes is *indivisible* in the sense that where jurisdiction exists, the relevant human rights treaty necessarily applies in full.[45] Thus, the state must guarantee every right in the treaty and owes both negative and positive duties and obligations in respect of those rights.[46] This recognises that states may not have plenary jurisdiction allowing them to exercise their powers unrestrainedly.[47]

Conversely, a few years later the Court in *Issa and others v Turkey* ('*Issa v Turkey*') reiterated that effective territorial control is characterised by a high level of control over territory.[48] The case concerned temporary military operations in Iraq, and after concluding that Turkey did not exercise overall control, the Court further considered "whether at the relevant time Turkish troops conducted operations in the area where the killings took place".[49] While the inquiry did not subsist because such operations were not conducted, Wilde argues that the further consideration is indicative of a more receptive attitude towards cause-and-effect jurisdiction.[50]

Lord Justice Sedley in *Al-Skeini* expressed notable dissent regarding the dictum in *Banković*, stating that it is incorrect to assert that a state which is unable to guarantee everything is required to guarantee nothing.[51] His Lordship also considered that jurisdiction may depend on whether the state had the power to avoid or remedy the breach in issue. This would constitute a departure from the discussed view, because only a certain degree of control may

[41] *Banković v Belgium* [2001] Eur Court HR 890, [75].
[42] *Cyprus v Turkey* (2001) Eur Court HR 155, [77].
[43] Klug and Howe, above n 2, 80.
[44] Ibid 79.
[45] *Secretary of State for Defence v Al-Skeini & Ors* [2007] UKHL 26, [69].
[46] King, above n 3, 539.
[47] Klug and Howe, above n 2, 79.
[48] (European Court of Human Rights, Second Section Chamber, Application No 31821/96, 16 November 2004) [75].
[49] *Issa and others v Turkey* (European Court of Human Rights, Second Section Chamber, Application No 31821/96, 16 November 2004) [76].
[50] Wilde, above n 6, 525.
[51] *Al-Skeini v Sec. of State for Defence* [2005] EWCA 1609, [196]-[197].

be required to alleviate the breach.

Further, Ben-Naftali and Shany express the view that requiring overall effective control based on the reasoning that obligations cannot be divided and tailored "is far too rigid and divorced from both theory and practice".[52] Such a narrow approach is refuted by a number of precedents that have established that consular and diplomatic officers are required to respect human rights with regard to their roles. Ben-Naftali and Shany argue it would simply be unreasonable to oblige such officers to provide individuals with food or health services because this would go beyond the scope of authority and material ability.[53] Further, it would also be unreasonable for short-term occupying forces in foreign countries to respect positive rights such as that to develop education.[54]

These examples clearly illustrate a need to effectively cherry-pick human rights obligations in accordance with states' level of control in certain circumstances. To suggest otherwise would mean that states exercising authority not quite amounting to full physical control will not be required to observe human rights conventions, even though certain rights in the conventions clearly must be afforded in order to serve the purpose of human rights.

(ii) *Capacity to exercise public authority*

An additional issue that has arisen in the spatial test context is whether the state must have the capacity to exercise the public governmental powers of the foreign territory it is controlling. This was suggested in *Banković*, where the European Court of Human Rights emphasised that in addition to have effective control over the territory, the control must also involve the exercise of "some or all of the public powers normally to be exercised" by the foreign government.[55] However, the Court did not explicitly or implicitly answer the question of whether the NATO bombing involved an exercise of the local government's powers.[56] Further, it was argued by the United Kingdom in *Al-Skeini* that the ECHR obligations in their very nature presuppose the exercise of civil administration. It was reasoned that to assert otherwise would result in instances where states are simply incapable of fulfilling certain obligations under the treaty in question.[57] Lord Justice Brooke in the Court of Appeal stage, along with Lord Brown in the House of Lords, largely concurred with this

[52] Ben-Naftali and Shany, above n 8, 82.
[53] Ibid.
[54] Ibid.
[55] *Banković v Belgium* [2001] Eur Court HR 890, [71].
[56] Wilde, above n 6, 516.
[57] Wilde, above n 6, 517.

reasoning.[58]

The imposition of this additional prerequisite has been subject to both judicial and academic opposition. Lord Justice Sedley in *Al-Skeini* respectfully disagreed with Lord Justice Brooke, stating that the presence or absence of adequate civil power for effective control in international law should not be tested by asking whether there is sufficient control to enforce the full range of rights set out in the convention.[59] Furthermore, Wilde simply asserts that to impose such a requirement would be wrong.[60] Wilde observes that the requirement is based on assumptions that are unexplained and difficult to sustain. Firstly, it would be incorrect and inconsistent with human rights law to apply the perquisite and thereby actually oblige a state to exercise another state's public authority.[61] Secondly, the prerequisite presupposes an approach to the relationship between different areas of international law with no basis. To accept the prerequisite within the realm of international human rights would support the proposition that where there is a clash between two areas of law (the ECHR and the foreign territory law), the state law prevails.[62] Wilde proposes that while the two may overlap in certain cases, a "relatively modest set of substantive obligations would actually subsist".[63] This is consistent with the dictum of Lord Justice Sedley in *Al-Skeini* who, as stated above, asserted it is incorrect to say that a state that is unable to guarantee everything is required to guarantee nothing.[64]

Specifically, Lord Justice Brooke had suggested in *Al-Skeini* that to have human rights law apply where a state does not have public authority would undermine the right of the local population to govern their own affairs and the right of international self-determination.[65] To refute this reasoning that the operation and integrity of the right to self-govern and self-determine would be undermined should public powers be exercised without the capacity to do so, there are clearly circumstances where the rights are not undermined.[66] For example, most conventions require identical rights to be respected and thus neither right would be undermined should the convention law prevail.[67] Further, if certain rights are not contained within the convention, a safeguard exists because conventions are generally interpreted so as to be in harmony

[58] *Al-Skeini v Sec. of State for Defence* [2005] EWCA 1609, [123]-[124]; *Al-Skeini v Sec. of State for Defence* [2007] UKHL 26.
[59] *Al-Skeini v Sec. of State for Defence* [2005] EWCA 1609, [195].
[60] Wilde, above n 6, 516.
[61] Ibid 518.
[62] Wilde, above n 6, 519.
[63] Ibid.
[64] *Al-Skeini v Sec. of State for Defence* [2005] EWCA 1609, [196]-[197].
[65] Ibid [125].
[66] Wilde, above n 6, 520.
[67] Ibid.

with other areas of international law.[68]

The additional concern raised by Lord Justice Brooke was that ECHR obligations are culturally specific and therefore may be inappropriate in certain contexts. In *Al-Skeini*, the concern was in relation to ECHR obligations being imposed in a Muslim territory.[69] However, Wilde notes that the juxtaposition of Islam and Europe and the consequent conception that the two territories are normative opposites ignores the fact that Muslim people in fact reside in both territories and therefore are subjected to the ECHR by virtue of residence in Europe.[70] In addition, there are other human rights treaties such as the ICCPR which contain similar rights to the ECHR and bind on Muslim territories anyway.[71] Consequently, the argument that such obligations are culturally specific does not have much credibility in the context of a globalised world where cultures span over territories. Interestingly, Lord Rodger in *Al Skeini* made a similar argument, focusing on the fact that imposing a body of law which reflects the values of contracting states on foreign territories is effectively human rights imperialism.[72] However, this is countered by the fact that such an argument relies on the idea that human rights law would not respect and instead override certain local customs. This certain flies in the face of the acclaimed human rights doctrine of the margin of appreciation and certain devices within treaties which attempt to reconcile the differences between contracting states and the foreign territory.[73]

(iii) *Party to the international human rights convention*

The final issue this paper will analyse is the seeming suggestion in *Banković* that territories subject to extraterritorial control, which are not parties to the international human rights convention in question, cannot be the subjects of effective territorial control that trigger extraterritorial jurisdiction. The European Court of Human Rights stated that the ECHR operated in the legal space of the contracting states, and notably emphasised that the foreign territory in question did not fall within that legal space.[74] The result of this would be that human rights violations, no matter how egregious or deliberate they may be, are not prohibited provided they are committed in territories that do not fall within the legal space or *espace juridique* of the convention. From a moral, legal or even a practical perspective, this simply cannot be justified.[75]

[68] Ibid.
[69] *Al-Skeini v Sec. of State for Defence* [2005] EWCA 1609, [126].
[70] Wilde, above n 6, 121.
[71] Ibid.
[72] *Al-Skeini v Sec. of State for Defence* [2007] UKHL 26, [78].
[73] Wilde, above n 6, 123.
[74] *Banković v Belgium* [2001] Eur Court HR 890, [80].
[75] Ben-Naftali and Shany, above n 8, 81.

Happold notably regarded such a distinction in applicability as "distasteful".[76] This position is consistent with *Drozd*, a decision by the Court in 1992 which discussed alleged violations occurring in Andorra which was not a party to the ECHR.[77] Fortunately, the Court later made it clear in *Öcalan v Turkey* and *Issa v Turkey* that it did not envisage a general exclusion of territories not contracting parties to the ECHR.[78] These cases provide sufficient support for the proposition that human rights obligations contained in international human rights treaties may extend extraterritorial into territories outside the legal space of those treaties.[79] It is important to note that it is also settled law that the ICCPR applies extraterritorially and has no geographical or legal limitation.[80]

(b) *Control over persons*

The second instance where a state may have extraterritorial jurisdiction is where a factual link is established between the individual and the state. This occurs where the state exercises control, lawfully or unlawfully, over that individual.[81] However, similar issues to that confronted in the territorial context arise in the personal context. Namely, whether jurisdiction can also be based on less than full control over persons.[82] To engender jurisdiction, it appears physical detention or custody is sufficient, as well as the provision of diplomatic and consular services in appropriate circumstances.[83] However, it remains unclear whether a broader cause and effect notion engendering jurisdiction only where a state causes a violation constitutes sufficient control over persons to establish a personal factual link.

(i) *Physical detention or custody*

The first type of factual relationship that may attract jurisdiction is that of physical detention or custody by state agents abroad. In *Lopez Burgos v*

[76] Mathew Happold, '*Bankovic v Belgium* and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 77, 88.
[77] *Drozd and Janousek v. France and Spain* (1992) 14 EHRR 745, paras (84), (89), (91).
[78] Klug and Howe, above n 2, 81 citing *Öcalan v Turkey* (European Court of Human Rights, Grand Chamber, Application No 46221/99, 12 May 2005).
[79] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford Scholarship, 2010) 231.
[80] Human Rights Committee, *General Comment No. 31: Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 10th sess, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004) para 10.
[81] *Issa and others v Turkey* (European Court of Human Rights, Second Section Chamber, Application No 31821/96, 16 November 2004) [71].
[82] Klug and Howe, above n 2, 89.
[83] King, above n 3, 530.

Uruguay, the HRC held that the arrest and subsequent mistreatment of the applicant by Uruguayan Security Forces inside Argentina brought the applicant within Uruguayuan jurisdiction with regard to the ICCPR.[84] Similarly, in *Öcalan v Turkey* the European Court of Human Rights stated that directly after being handed to Turkish officials by the Kenyan officials, the applicants were effectively under Turkish authority and therefore within Turkey's extraterritorial jurisdiction for the purposes of the convention.[85] It can be easily discerned from these cases that if a state has full physical control over a person, that person is placed within the state's extraterritorial jurisdiction.

(ii) *Consular and diplomatic services and flag state jurisdiction*

It was affirmed by the European Court of Human Rights in *Banković* that both consular and diplomatic services and board craft and vessels registered in or flying the state flag constitute widely recognised forms of extraterritorial jurisdiction.[86]

Consular and diplomatic jurisdiction as a form of extraterritorial jurisdiction was explicitly confirmed by the European Commission's decision in *W.M. v Denmark*.[87] In addition, the basis for extraterritorial jurisdiction was implicitly acknowledged by the HRC in *Mabel Pereiera Montero v Uruguay* with regard to the ICCPR.[88] In *W.M. v Denmark*, the Commission stated that authorised agents of a state including diplomatic or consular agents bring persons within their jurisdiction for the purposes of human rights protection to the extent they exercise lawful authority over such persons.[89] It is important to note that in this instance, consular and diplomatic responsibilities are considered to be proportional to the agents' jurisdictional competences, a notion that has been wholeheartedly rejected by the European Court of Human Rights in the context of establishing territorial control as outlined above.[90] In other words, the only rights applicable are those that are potentially implicated by the *lawful* functions consular and diplomatic officials can perform. It is important to highlight that, as distinct from the other bases in this section, the actions performed by the agents or officials must be lawful.

The flag state jurisdiction was explicitly confirmed in *Xhavara and others v Italy and Albania* where it was found that the flag state of an Italian patrol boat was responsible for the human rights violations it caused by its vessel to persons

[84] UN Doc CCPR/C/13/D/52/1979 (29 July 1871) [12.3].
[85] *Öcalan v Turkey* (European Court of Human Rights, Grand Chamber, Application No 46221/99, 12 May 2005) [91].
[86] *Banković v Belgium* [2001] Eur Court HR 890, [73].
[87] (European Commission of Human Rights, Application No 17392/90, 14 October 1992) [1].
[88] UN Doc CCPR/C/18/D/106/1981 (31 March 1983) [5].
[89] (European Commission of Human Rights, Application No 17392/90, 14 October 1992) [1].
[90] Klug and Howe, above n 2, 87.

involved in a collision that were not on the boat.[91] A similar finding was made by the Court in *Medvedyev and others v France*.[92]

(iii) *The broader cause and effect approach*

A broader approach to extraterritorial jurisdiction has received mixed reactions in academic and juridical fields. This approach pursues a cause and effect notion, whereby persons fall within a state's jurisdiction when a state through lawful or unlawful exercises of power causes human rights violations extraterritorially.[93] Thus, whether a technical exercise of jurisdiction or not, the type of act instituted by the state will essentially dictate who is affected, who falls within its jurisdiction, the rights violated and the extent of obligations owed. The Inter-American Commission in *Alejandre et al v Cuba* advocated such a cause and effect approach to extraterritorial jurisdiction, holding that in the absence of any territorial or physical person control exercised by the state, the sheer act of bombing established the personal link and brought the victims within the state's authority.[94] This clearly demonstrates that there is a far lower threshold to be met under this approach than the criteria for effective control over territory or person.[95] Similarly, in *Drozd and Janousek v France and Spain* the European Court of Human Rights stated that where a state's authorities produces effects outside their own territories, those persons so effect come within the state's jurisdiction.[96]

Notably, there are schools of thought that require the state to have a person in physical custody before jurisdiction may arise. However, it must be questioned whether full physical custody of a person is required in all cases to trigger jurisdiction given a state can undoubtedly detrimentally affect a person from afar.[97] This physical custody requirement arguably finds support in the aforementioned passage in *Lopez Burgos v Uruguay* which suggests that the level of physical control required to fulfil the criterion of personal control is high. The argument that a cause and effect factual relationship could trigger a state's obligations was also rejected in *Banković* on the aforementioned reasoning that rights and freedoms in the ECHR cannot be divided and tailored in accordance with the extraterritorial act in question.[98]

King has asserted that such a requirement, which seeks to identify

[91] Klug and Howe, above n 2, 85 citing *Xhavara and others v Italy and Albania* (European Court of Human Rights, Third Section Chamber, Application No 39473/09, 11 January 2001).
[92] Klug and Howe, above n 2, 85 citing *Medvedyev and others v France* (European Court of Human Rights, Grand Chamber, Application No 3394/03, 10 July 2008).
[93] King, above n 3, 551.
[94] Case 11.589, Report No 86/99, September 29 1999, [23].
[95] Klug and Howe, above n 2, 86.
[96] (1992) 14 EHRR 745, [91].
[97] King, above n 3, 525.
[98] *Banković v Belgium* [2001] Eur Court HR 890, [74]-[75].

jurisdiction only at the moment of arrest as opposed to the moment when the individual is affected by the state, is "unduly restrictive and flawed".[99] A factor that most certainly refutes such a restrictive idea is that custody is not the sole way in which a state may subject an individual to its power and control. For example, in *Cyprus* it was understood that an individual was under a state's authority when they were simply affected by acts of the state.[100] Additionally, it is arguable that the aforementioned cases confined to their facts only stand for the proposition that where a state is acting lawfully, custody is required for jurisdiction to arise. This is because in cases such as *Öcalan v Turkey* and *Lopez Burgos v Uruguay*, the state had the cooperation of local officials and therefore was lawfully entitled to arrest and detain the applicants on foreign soil.[101] This can be contrasted against instances where individuals are merely affected by a state's actions, such as the bombing in *Alejandre et al v Cuba*. Such a case can be distinguished from the former cases because it involves the purported unlawful exercise of state power on foreign territory.

It can be strongly argued that a physical requirement atop or in replacement of the cause and effect notion of extraterritorial jurisdiction would provide insufficient protection to victims of extraterritorial state acts and give rise to certain absurdities.[102] It is arguable that the European Court of Human Rights in *Issa v Turkey*, in stating that jurisdiction in situations where a state exercises authority and control flows from the fact that state officials cannot perpetrate acts on foreign soil they could not perpetrate at home, impliedly endorsed the notion that any act violating a person's human rights obligations would necessarily trigger the application of the ECHR regardless of whether the state had physical custody of the victim.[103] The Court affirmed this proposition in the case of *Isaak v Turkey*, where the line between a mere breach of a person's rights and physical custody was blurry.[104] The victim in question had been beaten to the ground to the extent he could not escape, however to pinpoint the moment when jurisdiction arose based on a distinction between the first beating and when he was overcome by the crowd and unable to flee would be artificial. On this point, King argues that the moment his physical integrity was threatened the victim was subject to the state's authority and

[99] King, above n 3, 552.
[100] *Cyprus v Turkey* (1975) 2 DR 125, 136.
[101] *Öcalan v Turkey* (European Court of Human Rights, Grand Chamber, Application No 46221/99, 12 May 2005) [95]; *Lopez Burgos v Uruguay*, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) [2.2].
[102] King, above n 3, 553.
[103] Ibid citing *Issa and others v Turkey* (European Court of Human Rights, Second Section Chamber, Application No 31821/96, 16 November 2004) [71].
[104] King, above n 3, 554 citing *Isaak and others v Turkey* (European Court of Human Rights, Third Section Chamber, Application No 44587/98, 28 September 2006).

therefore was within the jurisdiction of the state.[105]

Perhaps the strongest argument in favour of a requirement is that some rights to be violated presuppose the state has physical custody of an individual. For example, the right to be free from arbitrary arrest and detention can only be violated upon arrest.[106] However, other rights such as the right to life, which do not require state apprehension of an individual, easily refute this.[107] To the contrary, such rights may be significantly violated from afar. In practical terms, this would mean that state agents who shoot a person on sight are not required to observe human rights, whereas state agents who detain and then shoot a person are required to do so.[108] King describes this as simply an "absurdity".[109] The European Court of Human Rights in *Pad v Turkey*,[110] which concerned individuals, killed by helicopter gunfire of another state, clearly accepted the cause and effect idea as an accepted basis of jurisdiction. The Court did so by considering the exact location of the impugned events irrelevant given gunfire had already discharged, meaning that the actions of forces in helicopters over foreign territory still brought persons within jurisdiction for the purposes of the ECHR merely by virtue of affecting them.[111] Accordingly, the European Court of Human Rights has now acknowledged that a factual relationship may arise and trigger jurisdiction by virtue of a state causing violations in accordance with the broad cause and effect approach. However, this recognition is significantly inhibited given the abovementioned jurisprudence in favour of requiring full physical control to establish a factual link between an individual and the state.

C *The European Court of Human Rights and Al-Skeini*

In 2011, the much-anticipated decision by the European Court of Human Rights was issued in the judgment *Al-Skeini v United Kingdom*.[112] *Al-Skeini* concerned the maltreatment and killings of six Iraqi civilians inflicted by the British armed forces. This case provided the Court with a distinct and necessary opportunity to address the abovementioned issues arising out of extraterritorial jurisdiction jurisprudence and academia. The Court sought to reconcile these conflicting lines of authority and define with clarity what circumstances are "exceptional" as enunciated in *Banković* to justify an extension of a state's

[105] King, above n 3, 554.
[106] King, above n 3, 554.
[107] Ibid.
[108] Hurst Hannum, 'Bombing for Peace: Collateral Damage and Human Rights' (2002) 96 *American Society of International Law Proceedings* 95, 98.
[109] King, above n 3, 554.
[110] *Pad and others v Turkey* (European Court of Human Rights, Third Section Chamber, Application No 60167/00, 28 June 2007) [54]-[55].
[111] King, above n 3, 555.
[112] *Al-Skeini and others v The United Kingdom* (2011) 53 Eur Court HR 589.

jurisdiction extraterritorially. However, disappointingly it appears the Court's judgment has raised more questions than answers.

The Court reaffirmed that jurisdiction under the ECHR is territorial in nature, but acts occurring or producing effects outside territories may in exceptional circumstances constitute exercises of jurisdiction within the meaning of the convention.[113] Pursuant to this recognition, jurisdiction arising out of factual relationships and its correspondent triggers were considered. Regarding the effective control of a territory, it was stated that obvious territorial domination by a state clearly establishes effective control and thereby jurisdiction.[114] In doing so, the court swiftly avoided any consideration of degrees of control over a territory that are necessary to establish effective control. In discussing the trigger of authority over persons, the exceptional circumstance of extending jurisdiction in cases of diplomatic and consular agents where they "exert authority and control over others" was affirmed.[115] Falling within this category of exception, it was also affirmed that only physical custody and control over a person by military personnel abroad will suffice.[116] Interestingly, the court also asserted that extraterritorial jurisdiction may only be attracted under the convention where the state is lawfully capable to exercise the foreign state's governmental powers, a contention raised earlier in this paper.[117]

(a) *A hybrid test*

The Court made its ruling to extend jurisdiction based on the state exercising authority over the applicants as individuals.[118] Despite this, the Court emphasised that the situation was "exceptional" because the United Kingdom had exercised "public powers" in Iraq.[119] One can thereby draw an inference that had the United Kingdom not exercised public powers when brutalizing the civilians, jurisdiction would not be so extended.[120] Accordingly, the test to be applied in situations where a factual relationship between an individual and the state is being argued is one of public powers being exercised over the individuals and full physical custody of that individual, or the establishment of consular or diplomatic services.

Recall the proposition first raised in *Banković* that a state must have the capacity to exercise the public governmental powers of the foreign territory was

[113] Ibid 647.
[114] Ibid 647-8.
[115] Ibid 647.
[116] *Al-Skeini and others v The United Kingdom* (2011) 53 Eur Court HR 589, 648.
[117] Ibid 647.
[118] *Al-Skeini and others v The United Kingdom* (2011) 53 Eur Court HR 589, 651.
[119] Ibid.
[120] Marko Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 *The European Journal of International Law* 121, 131.

framed within the effective territorial control trigger for jurisdiction. Therefore, in reasoning the Court effectively transposed the *Banković* public powers notion into the individual factual relationship context. Thus, the result of the Court's assertion is that the two bases for jurisdiction have been hybridized, thereby blurring the once certain distinction between effective territorial control and control over persons triggers for extraterritorial jurisdiction.[121] The significance of this shift from the spatial to the personal model should be highlighted. This shift has meant that *Banković* is correct in its assertion that where a person is killed by a state by merely firing missiles from an aircraft without public power, that person is not within jurisdiction.[122] This is clearly irreconcilable with the abovementioned cases of *Issa v Turkey*, *Issak v Turkey* and *Pad v Turkey*, decisions made by the court itself.

(b) *The fate of cause and effect jurisdiction*

In addition, it may be inferred that the factual cause and effect jurisdiction notion does not trigger human rights obligations according to *Al-Skeini*. It was held that what is decisive in jurisdiction cases concerning individuals is physical custody or control over a person, or diplomatic and consular services.[123] Milanovic states that the question that arises from this holding is whether there is any reason to limit the personal conception of jurisdiction to physical custody.[124] Illustratively, Milanovic questions whether there is a difference between killing a person by rifle on the spot or detaining that person and then killing them.[125] This echoes King's sentiments mentioned earlier, that such a practical result is simply an "absurdity".[126] Miko argues this reflects the Court's underlying policy consideration not to "open the floodgates of litigation" under the control over persons basis by requiring consideration of every individual against whom force was used as falling under the protection of the convention in question.[127] Rather, the Court "did not want to micromanage the use of force in the field, especially when some of the killings in question may even have been justified".[128]

[121] Samantha Miko, '*Al-Skeini v United Kingdom* and Extraterritorial Jurisdiction under the European Convention for Human Rights' (2013) 35 *Boston College International and Comparative Law Review* 63, 77.
[122] Ibid.
[123] *Al-Skeini and others v The United Kingdom* (2011) 53 Eur Court HR 589, [136]-[137].
[124] Milanovic, above n 120, 129.
[125] Ibid.
[126] King, above n 3, 554.
[127] Miko, above n 121, 78.
[128] Milanovic, above n 120, 127.

(c) *Concept of espace juridique rendered irrelevant*

The Court reaffirmed the proposition that the ECHR, and by extension other international civil and political human rights conventions, are not limited in applicability to the convention's legal space or *espace jurisdique*.[129] It was noted that implementing the legal space notion would deprive the population of rights it previously enjoyed, resulting in a "vacuum" of protection within the convention's legal space.[130]

(d) *Aftermath*

The result of *Al-Skeini* is that both the effective territorial control and exertion of control over persons bases for jurisdiction were validated, and the contentious *espace juridique* argument was effectively rejected. However, ambiguity still exists regarding what constitutes effective territorial control by virtue of the Court not considering it as a basis for jurisdiction in the circumstances. Further, the control over persons basis has now been plagued significantly with ambiguity and the questionable additional requirement of public power, which as stated earlier, may not be appropriate in this human rights context.

D *A Tripartite Typology*

In light of the above issues, it should be uncontroversial to assert that the current law requires both clarification and amendment. A theory based on a tripartite typology proposed by King is notable. King argues that jurisdiction for the purposes of human rights law should be understood as arising at times through legal relationships, and at other times through factual relationships.[131] The essential idea is that the above theories acting in isolation do not adequately allow states to respect civil and political rights under international conventions. In recognising this, King seeks to preclude the abovementioned absurdities and gaps in human rights protection prevalent in the current law.[132] It is suggested that jurisdiction be broken down into three separate categories, each imposing contrasting obligations on the state with regard to the number of people such obligations are owed to; the number of relevant treaty rights applicable, and the extent of negative obligations and positive duties owed in respect of those rights.[133] King particularly emphasises that despite the abovementioned difficulties with basing extraterritorial jurisdiction purely on a legal relationship, basing such jurisdiction purely on a factual relationship is

[129] *Al-Skeini and others v The United Kingdom* (2011) 53 Eur Court HR 589, [142].
[130] Ibid.
[131] King, above n 3, 538.
[132] Ibid 521.
[133] Ibid 538.

equally disadvantageous as it overlooks the relevance of a state's lawful competence at international law that is important in certain cases (for example, in cases of diplomatic and consular services)[134] and fails to explain the extent of human rights obligations (for example, whether positive duties are owed under factual cause and effect jurisdiction).[135]

1 *Disposing of the indivisibility concept*

As stated, the House of Lords in *Al-Skeini* held that jurisdiction for human rights purposes is *indivisible* in the sense that where jurisdiction exists, the relevant human rights treaty necessarily applies in full.[136] The European Court of Human Rights in *Al-Skeini* notably rejected this reasoning for instances of individual factual relationships, holding that convention rights can be divided and tailored.[137] However, given this was not elaborated on, it is necessary still to refute this concept given each of King's categories of jurisdiction contemplates different levels of obligations.

Military occupation is an instance where the state's lawful competence to act flows from its factual control over the territory. Such control is said to be analogous to the control a state sovereignly exerts over its own territory,[138] and therefore it is appropriate in this circumstance that all convention rights should be respected and not divided.[139] However, as touched upon previously, there are instances where a state possesses extraterritorial legal competence only in certain situations, meaning it cannot exercise its powers unrestrainedly. The most notable case is diplomatic and consular agents whom have no relationship of control with the territory in question, thus the reasoning applied in cases of military occupation regarding sovereignty cannot be imported to justify the indivisibility concept.[140]

To further dissect the concept, some rights by their very nature require states to have control over territory, such as rights dependent on judicial institutions[141] and civil and political rights that on their terms require it.[142] Contrastingly, some rights require no territorial link and presuppose their

[134] *X v Federal Republic of Germany* (1965) 17 HRCD 42, 47.
[135] King, above n 3, 538.
[136] *Secretary of State for Defence v Al-Skeini & Ors* [2007] UKHL 26, [69].
[137] *Al-Skeini and others v The United Kingdom* (2011) 53 Eur Court HR 589, [136]-[137].
[138] King, above n 3, 540 citing Oxman, 'Jurisdiction of States' in Bernhardt (ed.), *Encyclopedia of Public International Law* (New York: Elsevier 1977) 57.
[139] King, above n 3, 543.
[140] Ibid 540.
[141] Ibid.
[142] For example, Article 13 of the ICCPR and Article 1 of the Additional Protocol No. 7 to the ECHR deal with protection of aliens against arbitration expulsion; also *M v Denmark* (1992) 73 DR 193, 196.

application is universal.[143] For example, the right to "leave any country, including his own" in Article 12(2) of the ICCPR does not depend on control over a territory.[144] In light of this, to assert that convention rights apply in total whenever a state has jurisdiction would mean that states without control over territory will be required to respect rights that necessarily require such control.

Accordingly, it is clear that the assertion that rights cannot be divided and tailored is clearly "far too rigid and divorced from both theory and practice".[145] This is a reiteration and certainly echoes earlier refutations regarding the concept above.

2 *The tripartite typology explained and critiqued*

(a) *Territorial-based jurisdiction*

Firstly, King suggests that the law should recognise jurisdiction arising from a state's lawful competence to act under international law by virtue of control over territory.[146] Such lawful competence may be acquired with regard to a foreign territory in the case of military occupation. In this instance, all those within the territory are within the state's jurisdiction, and the full scope of the substantive rights and obligations under the convention in question must be secured.[147]

King argues that it is the factual control over territory that results in the state acquiring a degree of legal, and the extent of that legal competence informs the level of human rights obligations owed.[148] Accordingly, problems of factual control can become relevant. Recall from earlier in this paper that, on balance, jurisprudence indicates that to establish effective territorial control under current law overall control over the foreign territory is required. Presuming the indivisibility concept is as fallible and inappropriate as suggested, it can be argued that any problems in factual control may simply be translated into a reduction of obligations under the convention that must be owed. The arguments advanced earlier in this paper in the context of effective control that holistically assert there is no reason in principle why jurisdiction arising from territorial legal competence, where there is a degree of factual incapacity, should render the ECHR in total inapplicable should be noted.[149] Recognising sovereignty as providing jurisdiction, and then reducing the extent of its obligations under conventions where it lacks the factual control to observe such

[143] King, above n 3, 541.
[144] *Lichtensztejn v* Uruguay, Communication No. 77/1980, UN Doc CCPR/C/OP/2 (1990) [6.1].
[145] Ben-Naftali and Shany, above n 8, 82.
[146] King, above n 3, 539.
[147] *Cyprus v Turkey* (2001) Eur Court HR 155, [77].
[148] King, above n 3, 544.
[149] King, above n 3, 545.

obligations, would likely displace the protection gaps that may arise where a territory is not entirely within the factual control of the state. If states exercising limited factual control over a territory were required to observe all obligations, it may be held responsible for positive duties it simply cannot meet. Thus, allowing a state to incur obligations under the convention that are directly proportional to its level of control is far more advantageous.

(b) *Jurisdiction based on non-territorial factors*

The second category of jurisdiction King argues should exist is jurisdiction arising from a state's lawful competence to act based on non-territorial factors. This seeks to recognise that a state may have lawful competence only for limited purposes, and in such instances that level of competence should equate to obligations owed.[150]

This category may be invoked in the case of consular officials who are able to act in respect of nationals for certain purposes such as protecting the national's interests; issuing passports and travel documents; and representing or arranging legal representation for the national.[151] In this sense, the national is only within the state's jurisdiction "in certain respects",[152] particularly because local laws and regulations often must be adhered to.[153] Consistent with the reasoning and justifications for category one, the rights applicable are only those that are potentially implicated by the lawful functions consular officials perform.[154] For example, in *Lichtensztejn* the implicated right was the right to leave any country in Article 12(2) ICCPR, and in *X v United Kingdom* it was the right to respect for private and family life, home and correspondence under Article 8 of the ECHR.[155] Thus, while all nationals abroad are within the state's jurisdiction, only those rights implicated by the consular officials' lawful functions are applicable. The focus is on substantive relations as opposed to territory, an inquiry which is far more relevant in this category of case.[156] Accordingly, the extent of what the state must do is limited according to its legal competence.[157]

Factoring legal competence into consular and diplomatic agents' jurisdiction is important. Under the current law, such officials are only recognised as having a factual relationship with an individual. However, in truth and practically the relationship also has a legal aspect that should be

[150] Ibid 548.
[151] King, above n 3, 545.
[152] *X v Federal Republic of Germany* (1965) 17 HRCD 42, 47.
[153] King, above n 3, 548.
[154] Ibid 549.
[155] *Lichtensztejn v* Uruguay, Communication No. 77/1980, UN Doc CCPR/C/OP/2 (1990) [6.1]; *X v United Kingdom* (1977) 12 DR 73, 74.
[156] Ben-Naftali and Shany, above n 8, 74.
[157] King, above n 3, 550.

recognised. Recognising that the legal and factual aspects coexist undoubtedly assists in understanding the limits of the roles, and the few obligations and rights respected in practice. This further supports the need to focus on substantive relations and accord obligations thereafter, as opposed to a narrow territory focus.

(c) *Jurisdiction based on a factual relationship*

The third and final category King argues for is jurisdiction based on state acts going beyond what is allowed by international law that ultimately affect an individual's person or property.[158] This undoubtedly endorses the factual cause and effect jurisdiction described earlier, and entirely disposes of the troublesome and arguably unjustified physical custody requirement most recently endorsed in *Al-Skeini*.

III Conclusion

The current law triggering human rights protection extraterritorially is inadequate and requires considerable reform. The areas of inadequacy of particular concern are the focus on effective or full control over a territory, and the requirement of physical custody to establish a personal connection between the state and individual. In order to redress and remedy such inadequacies, this paper has unequivocally and strongly supported an adoption of a tripartite classification of triggers approach, in particular the abolition of a physical custody requirement. This paper endorses King's abovementioned third category, which effectively rectifies the issues with regard to establishing a personal connection between state and individual. The adoption of this typology would lessen gaps in human rights protection and resolve the jurisprudential ambiguity that is prevalent in the current law. Accordingly, it can be surmised that amendments are required, and the categorisation approach proposed by King provides a significantly higher level of extraterritorial protection of human rights.

[158] King, above n 3, 551.