INTERNATIONAL LAW PERSPECTIVES REGARDING TERRITORIAL AND EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS IN DISPUTED TERRITORIES

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Abstract

This article explores the application of human rights obligations in territorial disputes, examining both legal (de jure) and factual (de facto) scenarios. Since the advent of the Universal Declaration of Human Rights in 1948, the global recognition of human rights has led to numerous treaties that, considering their territorial application, are typically confined to States' jurisdictions. However, it has become clearer with recent developments in international law that these obligations can extend beyond territorial boundaries, particularly when States exercise effective control over the areas under dispute.

Key legal principles from the Vienna Convention on the Law of Treaties are discussed, demonstrating their relevance in situations where human rights obligations persist in regions under contested control. In armed conflicts, even when effective control is uncertain, States might remain responsible for their agents' actions, regardless of where these occur.

The article concludes by underscoring the overall importance of protecting potentially affected populations to prevent them from becoming collateral victims of interstate conflicts. As human rights law and international case law continue to evolve, it is essential that international efforts—including

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not only those undertaken by States but also by international organizations, non-governmental organizations, the private sector, think tanks, and academia—remain focused on upholding the rights of innocent populations, even in the midst of ongoing broad, complex and devastating international disputes.

I. INTRODUCTION

Human rights have grown in importance over the decades since the Universal Declaration of Human Rights in 1948.[1] Numerous international treaties have since been concluded, regional courts established, and domestic and international recognition of the importance of human rights has steadily increased.[2]

In line with these developments, an ever-increasing number of States around the world have committed to the respect for human rights by negotiating and acceding to human rights treaties.[3] These treaties, by their wording, typically apply only to the jurisdiction of the state itself.[4] However, it has been progressively recognized from time to time that treaties may have effects beyond the territorial boundaries of a state party. The rules governing territoriality and extraterritoriality of treaties are all the most relevant when assessing human rights obligations in disputed territories. In the case of lands under dispute, human rights obligations may be extended beyond the territorial limits of the treaty, depending on the extent of control that a state exercises over an area of the globe.[5] In addition, the acts of state agents must also abide by human rights obligations, regardless of where they occur or produce effects.

This work aims to study the application of human rights obligations to situations of territorial disputes, whether the dispute is purely *de jure*, or whether there is a *de facto* dispute because of an armed conflict.

II. HUMAN RIGHTS OBLIGATIONS IN DISPUTED TERRITORIES

To structure the complex issues of human rights obligations in disputed territories, this section first establishes the general principle of territorial application of treaty obligations (Section A), the exception for extraterritorial application of treaty obligations (Section B), the territorial and extraterritorial

1. *See generally Universal Declaration of Human Rights: The Foundation of International Human Rights Law*, UNITED NATIONS, https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law.

2. *See id.*

3. *See id*.

4. *See, e.g.,* India-Australia Economic Cooperation and Trade Agreement, Austl.-India, art. 1.3(s) Dec. 29, 2022, https://www.dfat.gov.au/trade/agreements/in-force/australia-india-ecta/australia-india-ecta-official-text [hereinafter Ind-Aus ECTA] (stating that the treaty applies only to the jurisdictions of the States of India and Australia).

5. *See* Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. STATE L. J. 417, 420–21 (2011).

application of human rights treaties (Section C) and, finally, reviews human rights obligations in disputed areas (Section D).

A. The Principle of Territorial Application of Treaty Obligations

Under general international law rules, the obligations created by a treaty frequently extend to the entire territory of the parties, unless it is otherwise established, or a different intention is apparent in the treaty.[6] From a geographical perspective, four distinct types of regimes generally arise: *stricto sensu* territorial sovereignty, areas that are not under the sovereignty of any state but have a unique status (such as trust territories), *res nullius*, and *res communis* areas.[7]

Indeed, the principle of territoriality presupposes and implies a subjective right on the state, that is to say, the *ius excludendi alios*. As Max Huber[8] would consider, "[s]overeignty in the relations between States signifies independence" and, in turn, independence—in relation to a specific region of the globe—refers to the exclusive right of a state to exercise its functions within that area without interference from any other state.[9] Consequently, territorial sovereignty is broadly understood as a state's right to demand that the remaining States, as well as other entities, refrain from exercising state functions within its territory.[10] This exclusive right, which is enforceable *erga omnes*, stems from the effective control and authority a state holds within its borders.[11]

Before delving into the application of human rights obligations in disputed territories, it is appropriate to lay the foundations of territorial and extraterritorial application of treaties. This section explores the rule embodied in Article 29 of the Vienna Convention on the Law of Treaties (Section 1.),[12] to then venture into the scenarios of treaties which include

6. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 29 ("Unless a different intention appears from the treaty or it otherwise established, a treaty is binding upon each party in respect of its entire territory.").

7. *See* JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 191 (Oxford University Press ed., 2019).

8. Max Huber was the Arbitrator in case of Island of Palmas arbitration between the Netherlands and the United States. *See* Island of Palmas (Neth. v. U.S.), 1928 R.I.A.A. 829, 838 (Apr. 4, 1928).

9. *See id.* at 238.

10. *See id.*

11. *See* GIOVANNI DISTEFANO, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 134 (Malgosia Fitzmaurice & Sarah Singer eds., 2019).

12. *See generally* Vienna Convention on the Law of Treaties, *supra* note 6, at 339.

express provisions on territorial application (Section 2.) and, ultimately, treaties which lack express provisions on territorial application (Section 3.).

1. The Principle of Article 29 of the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (Vienna Convention) formulates the principle of territorial application in its Article 29, which provides that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory"—essentially reflecting the importance of ensuring that international obligations are consistently implemented throughout States' sovereign domains.[13] From a historical perspective, Article 29 of the Vienna Convention can be traced back to Article 25 of the Draft Articles on the Law of Treaties (Draft Articles), which was adopted by the International Law Commission (ILC) in 1966, three years before the signature of the Vienna Convention.[14] This drafting effort would lay the foundational principle nowadays reflected in the notion of territorial application, which is one of the default rules in international treaty law.[15]

Article 25 of the Draft Articles exhibited a strongly similar wording to Article 29 of the Vienna Convention, displaying that "[u]nless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party" alluding, thus, to the territorial scope that treaties should possess unless the instrument in question provides an alternative interpretation.[16]

Essentially, the main difference between these two texts revolves around the idea that, while Article 29 of the Vienna Convention appears to focus on the binding force of the treaty upon each party in its entire territory, the Draft Articles seemed to focus on the application of treaties, extending it to the entire territory of each party. Even though the linguistic perspectives may differ, both texts fundamentally embody the same rule: a party to a treaty is obliged by such instrument in respect of its entire territory unless otherwise agreed or established.

In turn, the term "*entire territory of each party*" is, according to the ILC, a comprehensive notion designed to embrace all land, appurtenant territorial

13. *Id.*

14. *See Report of the International Law Commission on the Work of its 18th Session*, [1966] 2 Y.B. Int'l L. Comm'n 220, U.N. Doc. A/CN.4/SER.A/1966/Add. 1 [hereinafter Draft Articles].

15. *See* Vienna Convention on the Law of Treaties, *supra* note 6, at 339.

16. Draft Articles, *supra* note 14, at 180.

waters, and air space which constitute the territory of the state.[17] This idea has been widely recognized by academia, understanding also that the territorial criteria is a necessary precondition to statehood.[18] Additionally, it has been correctly asserted that, unless a different intention is evident from the treaty, territorial references do not encompass the continental shelf, the exclusive economic zone, or other fishery zones, over which States merely hold particular sovereign rights in line with international law of the sea stipulations.[19]

The principle embodied in Article 29 of the Vienna Convention is also based on a long-standing state practice. The ILC found that the content of Article 25 of the Draft Articles was rooted in state practices, the jurisprudence of international tribunals, and the writings of jurists, which appeared to support the view that a treaty is to be presumed to apply to all the territory of each party unless it is otherwise implied by the source in question.[20] The ILC also noted that the territorial scope of treaties depends on the intention of the parties first; a general rule is only necessary in the absence of a specific provision in the treaty as to its territorial application.[21]

Therefore, consent is the guiding principle to establish a treaty's territorial application. Following that, in case consent cannot be revealed explicitly or implicitly, the default rule in Article 29 of the Vienna Convention mandates that the treaty will apply to the entire territory of the state party.[22] This means that the international agreement will be applicable

17. *See* Draft Articles, *supra* note 14, at 213.

18. *See, e.g.,* JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 21 (Irwin Law ed., 2008); ADDISON WESLEY LONGMAN LTD., OPPENHEIM'S INTERNATIONAL LAW 563 (Robert Jennings & Arthur Watts eds., 2008) ("State territory is that defined portion of the globe which is subjected to the sovereignty of a state."); GIDEON BOAS, THE PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 163 (Edward Elgar Publishing Ltd. ed., 2023) ("Exclusive control of territory remains a fundamental prerequisite for the competence and authority required by any state to administer and exercise its state functions both in fact and in law.").

19. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 178 (Cambridge University Press ed., 2013).

20. *See* Draft Articles, *supra* note 14, at 213 (first citing Treaty Section of the Office of Legal Affairs, *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*, ¶¶ 102–03, U.N. Doc. ST/LEG/7/Rev.1 (1994); and then citing *Succession of States in Relation to General Multilateral Treaties of Which the Secretary-General is Depositary*, [1962] Y.B. Int'l L. Comm'n 115, 123, U.N. Doc. A/CN.4/SER.A/1962/Add.1).

21. *Id.*

22. *See* Vienna Convention on the Law of Treaties, *supra* note 6, at 339.

to all land, appurtenant territorial waters, and air space that constitute the territory of the state, following the caveats mentioned beforehand.[23]

2. Treaties Containing Express Provisions on Territorial Application

As States' consent is the initial guiding criterion to determine the territorial application of treaties, ensuring that these written obligations only apply to the territories specifically agreed upon by the parties involved, legal provisions on the matter are of utmost relevance.[24] A significant number of treaties include stipulations governing their territorial application, and illustrations where the boundaries of legal obligations are clearly defined can be found, among many others, in international trade agreements,[25] investment agreements,[26] regional human rights treaties,[27] and international criminal law instruments.[28]

A vast number of these instruments, in consistency with the rule embodied in Article 29 of the Vienna Convention, contain precise exclusions for the application of the treaty to specific territories.[29] An example of this

23. *See Report of the International Law Commission on the Work of its 18th Session*, [1966] Y.B. Int'l Comm'n 213, U.N. Doc. A/CN.4/SER.A/1966/Add.1; *see generally* Vienna Convention on the Law of Treaties, *supra* note 6, at 339.

24. *See* Vienna Convention on the Law of Treaties, *supra* note 6, at 338 (discussing consent to be bound by the treaty).

25. *See, e.g.,* Agreement Between the United States of America, the United Mexican States, and Canada, ch. 1, sec. C, July 1, 2020, Off. of the U.S. Trade Rep., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited Nov. 29, 2024) (containing specific provisions for each state party as to the meaning of "territory" to be assigned to them by the treaty); Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Serbia, China-Serb., art. 2, Oct. 18, 2023, MINISTRY OF COM. OF CHINA, http://fta.mofcom.gov.cn/serbia/xieyi/sewy_xdzw_en.pdf (establishing the territorial application of the agreement for both parties to the treaty); Ind-Aus ECTA, *supra* note 4, ch. 1, art. 1.3(s), Dec. 29, 2022 (establishing the territorial application of the agreement for both parties to the treaty with special limitations on the application to Australia "excluding all external territories other than the Territory of Norfolk Island, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, the Territory of Ashmore and Cartier Islands, the Territory of Heard Island and McDonald Islands, and the Coral Sea Islands Territory").

26. *See, e.g.,* Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain, Mex.-Spain, ch. 1, art. 1(6), Oct. 10, 2006, 2553 U.N.T.S. 295.

27. *See, e.g.,* European Convention on Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter European Convention on Human Rights].

28. *See, e.g.,* Rome Statute of the International Criminal Court, art. 4(2), July 1, 2002, 2187 U.N.T.S. 92 (stating that "[t]he Court may exercise its powers, in this Statute on the territory of any State party and by special agreement, on the territory of any other State" without further specification) [hereinafter Rome Statute].

29. *See, e.g.,* Ind-Aus ECTA, *supra* note 4, ch.1, art. 1.3(s).

can be seen in the Australia-India Economic Cooperation and Trade Agreement:—under Article 1.3(s) of this agreement, Australia expressly limits the application of the treaty by "excluding all external territories other than the Territory of Norfolk Island, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, the Territory of Ashmore and Cartier Islands, the Territory of Heard Island and McDonald Islands, and the Coral Sea Islands Territory" reflecting the unambiguous intent of the State to omit the application of the treaty to the carved-out territories.[30]

Considering multilateral human rights treaties, territorial application rules can determine that States may extend the obligations derived from the application of these instruments to territories for which they are responsible, notifying it either at the time of ratification or at any later time.[31] This is the case for the European Convention on Human Rights in its Article 56, which suggests that "[a]ny State may at the time of its ratification or at any time thereafter declare by […] that the present Convention shall […] extend to all or any of the territories for whose international relations it is responsible" essentially outlining that the territorial boundaries identified at the time of the notification are the ones where the treaty's obligations will extend to.[32]

Interestingly, some treaties that regulate their territorial application contain provisions which may expressly mirror the default rule in Article 29 of the Vienna Convention on the Law of Treaties. An example of this can also be found in the previously examined Australia-India Economic Cooperation and Trade Agreement: while Australia expressly provided some territorial exclusions, India defined its territory as to include "its land territory, its territorial waters, and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights, and/or exclusive jurisdiction" in accordance with its laws and regulations in force, and international law.[33]

These types of provisions confirm the existence of the default rule embodied in Article 29 of the Vienna Convention, rather than cast doubt over it. The Permanent Court of International Justice has ruled in a comparable way regarding the temporal application of treaties in the *Mavrommatis*

30. *See id.*

31. *See* European Convention on Human Rights, *supra* note 27, at 250.

32. *Id.*

33. *See, e.g.,* Ind-Aus ECTA, *supra* note 4, art. 1.3(s)(ii).

Palestine Concessions Judgment.[34] In this case, the Permanent Court of International Justice ruled that when in doubt, jurisdiction based on an international agreement is considered to embrace all disputes referred to it after its establishment.[35] Noting that several jurisdictional agreements, especially regarding arbitration, explicitly excluded jurisdiction for pre-existing disputes, the ruling majority determined that such a reservation seemed to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule.[36] This conclusion, transposed to territorial application matters, means that clauses that are consistent with Article 29 of the Vienna Convention prove the validity of the rule.

Naturally, explicit provisions governing the territorial application of a treaty will be enforced as the intention of the parties. For instance, in the case of *Naftogaz and others v. Russia*, the claimants argued that their investment—made in Crimea before the events in 2014—constituted a foreign investment in Russia in the terms of the Encouragement and Mutual Protection of Investments Agreement (Russia/Ukraine BIT)—between the Russian government and the Cabinet of Ministers of Ukraine.[37] The claimants needed to prove their status as foreign investors in the Russian territory to be able to access the benefits of the treaty in question, and the term "territory" was defined in the Russia/Ukraine BIT in broad terms as: "the territory of the Russian Federation or the territory of Ukraine and also their respective exclusive economic zone and the continental shelf" all these as defined in conformity with international law.[38]

The majority of the tribunal, first took explicit note of Article 29 of the Vienna Convention.[39] Then, an interpretation was performed based on the ordinary meaning to be given to the terms, and it was concluded that it should not cut down or dilute the agreed-upon definition of "territory" by importing other terms or definitions of the treaty.[40] The ruling majority, thus, decided that where the parties had chosen to resort to the word "territory" without any

34. *See* Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.I.C.J. (ser. A) No. 2 (Aug. 30).

35. *Id.* at 35.

36. *Id.*

37. *See* Notice of Arbitration ¶¶ 2–5, NJSC Naftogaz of Ukraine v. The Russian Federation, Case No. 2017-16, (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/151/.

38. Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on Encouragement and Mutual Protection of Investments, Russia-Ukr., art. 1(4), Nov. 27, 1998, UN TRADE AND DEV., https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2233/download.

39. *See* NJSC Naftogaz of Ukraine v. The Russian Federation, Judgment of the Hague Court of Appeal, *supra* note 37, para. 5.4.1 (Perm. Ct. Arb. 2019).

40. *See id.*

such limitation, such choice should be respected.[41] On this basis, it was concluded that the investors were entitled to invoke the protections of the Russia/Ukraine BIT as their investment granted them a foreign character.[42] Cases such as *Naftogaz and others v. Russia* provide a compelling testimony of the relevance of party autonomy as the governing principle in territorial application; where the parties have agreed on the territorial application of the treaty under certain terms, that choice is to be respected. Undoubtedly, the burden of proof regarding both the existence as well as the precise content of such a particular intention will rest, in case of a dispute, on the state invoking it, as this claim would seek to deviate from the established general rule.[43]

In any event, the default rule in Article 29 of the Vienna Convention plays a crucial role in addressing cases where no voluntary choice has been made in explicit or implicit terms, acting as a safeguard to guarantee that treaties that lack territorial provisions are not left in a legal vacuum.

3. Treaties that Remain Silent on their Territorial Application

While some treaties contain express provisions which either reflect the default rule of Article 29 of the Vienna Convention on the Law of Treaties or provide exclusions consistent with such rule, other treaties do not expressly convey their territorial application under any particular provision. Examples of treaties which are silent on this matter and require a comprehensive review of other articles that may be indicative of the intention of the parties can also be found across different branches of international law.[44]

For instance, the American Convention on Human Rights stresses in its Article 75, that it "shall be subject to reservations only in conformity with the provisions of the Vienna Convention" while remaining silent on nuclear issues of territorial application.[45]

This omission implies that the default rules set forth by the Vienna Convention govern the territorial scope of the American Convention on Human Rights, suggesting that, unless explicitly stated otherwise, the treaty's

41. *See id.*

42. *See id.* para. 5.9.3.

43. DISTEFANO, *supra* note 11, at 450.

44. *See, e.g.,* Agreement concerning the Encouragement and Reciprocal Protection of Investments, China-Laos, Jan. 31, 1993, 1849 U.N.T.S. 109; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Dec. 8, 1949, 75 U.N.T.S. 31; African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights: "Pact of San Jose, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

45. American Convention on Human Rights, *supra* note 44, at 161.

obligations are understood to apply uniformly across all territories of the pertaining States.[46] Nevertheless, the territorial application of treaties, particularly those concerning human rights obligations, is often inferred from provisions related to jurisdictional matters, as illustrated by Article 1(1) of the American Convention on Human Rights, which will be further explored in Section III of this article.[47]

In turn, international case law regarding the territorial application of treaties confirms that, in scenarios in which treaties are silent, the default rule embodied in Article 29 of the Vienna Convention is applicable. For instance, in the case of *Sanum Investments v. Laos (I)*, an entity incorporated in the Macao Special Administrative Region of the People's Republic of China brought an investment claim against the State of Laos.[48] To qualify as a protected entity in accordance with the treaty, the entity needed to be deemed as a Chinese investor.[49] In this regard, the entity argued that it met the criteria to be considered as a Chinese investor under the Encouragement and Reciprocal Protection of Investments Agreement (the PRC/Laos BIT) between the governments of the People's Republic of China, and of the Lao People's Democratic Republic.[50] In order to meet the requirements as an investor, the claimant had to prove that the treaty, which was silent regarding its territorial application, applied to the Macao Special Administrative Region.[51]

The tribunal in *Sanum Investments v. Laos (I)* noted that "the PRC/Laos BIT does not contain an express provision stating that it applies to the Macao Special Administrative Region" but that the existence of this clause was not necessary as the principle of territorial extension of the state's legal order embodied in Article 29 of the Vienna Convention applied unless otherwise indicated.[52] The tribunal further noted that the treaty did not contain any express exclusion of the Macao Special Administrative Region, unlike other agreements that were presented as evidence.[53] Eventually, the tribunal

46. *See id.*

47. *See id.* at 145.

48. Sanum Invs. Ltd. v. Laos (China v. Laos), Case No. 2013-13, Award on Jurisdiction, (Perm. Ct. Arb. Dec. 13, 2013), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/489/sanum-investments-v-laos-i-.

49. *See id.* ¶ 43 (stating that the Preamble to the Treaty aims to "protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State").

50. *See id.* ¶ 218.

51. *See id.* ¶ 205.

52. *Id.* ¶ 270.

53. *See id.* ¶ 271 (citing Agreement between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of

concluded that the PRC/Laos BIT did apply to the Macao Special Administrative Region, thereby enforcing the default rule embodied in Article 29 of the Vienna Convention.[54] The case of *Sanum Investments v. Laos (I)* indicates the relevance of Article 29 of the Vienna Convention's default rule. Certainly, in the case where the treaty is silent regarding its territorial application, the States should expect that the default rule will make the agreement applicable to the entire territory of the state.[55]

B. The Exception to Territorial Application of Treaties

Having explored the application of treaties within the territories of States and their exceptions, this section evaluates the extraterritorial effects of treaties. Initially, the drafting history of the Vienna Convention is examined to note the lack of treaty provisions regarding the extraterritorial application of these sources (Section 1) to then review the extraterritorial application of treaties in practice (Section 2).

1. The Lack of Treaty Provisions on the Extraterritorial Application of Treaties

As has been established, the premise articulated in Article 29 of the Vienna Convention provides that treaties are, as a rule, applicable to the entire territory of the state involved.[56] At first glance, this might imply that treaties are restricted to their territorial boundaries, suggesting that the legal effects do not extend beyond the geographical limits of the state: if a treaty applies to the entire territory of a state, then, *a contrario sensu*, it is not applicable outside of the territory of said entity. In other words, if treaties are inherently tied to the territory of a state, they are therefore inapplicable outside those boundaries. This interpretation, however, could be subject to scrutiny, particularly in light of the commentaries on Article 25 of the Draft Articles, which seem to challenge this interpretation.[57]

Investments, Nov. 9, 2006, https://investmentpolicy.unctad.org/international-investment agreements/treaty-files/774/download).

54. *See id.* ¶ 300.

55. *See* Draft Articles, *supra* note 14, at 213 ("The Commission considered that the territorial scope of a treaty depends on the intention of the parties and that it is only necessary in the present article to formulate the general rule which should apply in the absence of any specific provision or indication in the treaty as to its territorial application.").

56. *See* Vienna Convention on the Law of Treaties, *supra* note 6 ("[T]reaty is binding upon each party in respect of its entire territory.").

57. *See* Draft Articles, *supra* note 14, at 213.

During the formulation of Article 25 of the Draft Articles, several States expressed in their observations that this clause was defective, as the provision's wording could be misinterpreted to mean that the application of a treaty was necessarily or exclusively confined to the territory of the parties.[58] These States feared that such narrow interpretation would ignore the complexities of international relations, where treaties often have implications that extend beyond national borders.[59]

As a result, proposals were made to address the issue of extraterritorial application within the text of Article 25 of the Draft Articles.[60] However, these proposals were not considered satisfactory and were eventually set aside.[61] The ILC then expressed the view that attempting to deal with all the delicate problems of extraterritorial competence within the framework of Article 25 of the Draft Articles would be inappropriate and inadvisable.[62] This is why, from a drafting history perspective, the previously mentioned wording and, consequently, Article 29 of the Vienna Convention, do not regulate the extraterritorial effects of treaties.[63] As it has been unveiled, this omission was not an oversight, but a deliberate decision rooted in the understanding that the scope of extraterritorial application could vary significantly depending both on the nature of the treaty and the intentions of the parties.[64]

By not explicitly addressing extraterritorial application, the Vienna Convention leaves room for interpretation and flexibility. This, in turn, allows States to negotiate the extent of a treaty's reach on a case-by-case basis, without being bound by an overarching rule.

2. The Extraterritorial Application of Treaties in Practice

By not governing the extraterritorial application of treaties, the Vienna Convention essentially left the matter to evolve under rules of customary international law. The lack of consensus around Article 25 of the Draft Articles reflected the fact that at least a subset of States recognized that treaties could have extraterritorial effects to some extent, albeit disagreements on how to regulate them.[65]

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58. *Id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.* at 214.
63. *See* Vienna Convention on the Law of Treaties, *supra* note 6, at 339; *see id.* at 213-14.
64. *See* Draft Articles, *supra* note 14, at 213–14.
65. *See id.*

In this line, the International Court of Justice (ICJ) has noted that state jurisdiction is primarily exercised in its own territory. However, the ICJ has also recognized that state jurisdiction may be exercised outside of the state's boundaries and that, at least in some of such cases, it would seem natural that state parties to specific treaties should be bound to comply with their provisions.[66] This observation will later come into play as an exceptionally pertinent criterion when analyzing the territorial and extraterritorial application of human rights treaties in Section III of this article.

International case law is, naturally, of significant guidance in determining the evolution of customary law and, specifically, in identifying the conditions under which treaties may be applicable outside the territory of a state. For instance, in the case of *Military and Paramilitary Activities in and against Nicaragua*, the ICJ was presented with the allegation that the United States had committed acts considered to be contrary to human rights and humanitarian law in Nicaraguan territory.[67]

The ICJ ruled in this regard that, for the United States conduct to give rise to legal responsibility, it would have to be proved that the United States had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[68]

Thus, the ruling majority conceded that human rights and humanitarian law obligations could be enforced against conduct taking place outside of the territory of the state, so long as the breaching state had effective control of such conduct.[69] In doing so, the ICJ developed the notion that some *de facto* control could trigger state responsibility in respect of treaty obligations which were traditionally reserved to the boundaries of the state.

This conclusion is consistent with the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the ICJ considered that obligations emerging from the International Covenant on Civil and Political Rights were applicable to cases where a state exercised its jurisdiction on foreign territory.[70] This lead to the belief that, in the presence of effective control over actions taking place outside of the territory of a state, a window for the extraterritorial application of treaty obligations can be opened.

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66. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 109 (July 9).

67. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 15 (June 27).

68. *Id.* ¶ 115.

69. *See id.* ¶ 116.

70. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *supra* note 66, ¶ 108–109.

C. Territorial and Extraterritorial Application of Human Rights Treaties

Based on the above general rules of territorial and extraterritorial application of treaties, this section explores the specific circumstances of human rights treaties. Initially, the territorial application of human rights treaties is addressed (Section 1), and then the extraterritorial application of human rights treaties is examined in light of relevant international case laws (Section 2).

1. Territorial Application of Human Rights Treaties

Typically, human rights treaties contain stipulations regarding the territorial application of the obligations contained therein.[71] As it has been mentioned, the European Convention on Human Rights contains an explicit provision determining that States may extend the obligations derived from the treaty to territories for which they are responsible,[72] to which it adds that States shall secure to everyone within their jurisdiction the rights and freedoms defined in said instrument.[73] Similarly, while the American Convention on Human Rights does not include a clause on territorial application comparable to Article 59 of the European Convention on Human Rights, it does underline that States ought to ensure that all persons subject to their jurisdiction have free and full exercise of rights and freedoms without discrimination for any reason.[74] Notably, the African Charter on Human and Peoples' Rights does not contain any clause governing its territorial application.[75]

Human Rights treaties' territorial application provisions, like those presented above, are drafted in broad terms and contain no explicit limitations. In the absence of a specific provision, as it has been hereby argued, the rule in Article 29 of the Vienna Convention would make human rights treaties applicable to the entire territory of State parties, excepting an agreement on the contrary, which is why human rights obligations are

71. *See* EDWARD ELGAR PUBLISHING, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS, *in* ELGAR ENCYCLOPEDIA OF HUMAN RIGHTS 180, para. 7 (Christina Binder et al. eds., 2022).

72. *See* European Convention on Human Rights, *supra* note 27, at 250 ("Any State may at the time of its ratification or at any time thereafter declare by notification . . . that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.").

73. *Id.* at 224 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.").

74. American Convention on Human Rights, *supra* note 44, at 145.

75. *See generally* African Charter on Human and Peoples' Rights, *supra* note 44.

typically enforceable in the territory in which the contracting States hold jurisdictional power.

2. Extraterritorial Application of Human Rights Treaties

Most international human rights disputes concern alleged violations that took place within the territory of a state. However, several cases have dealt with state acts that had allegedly occurred outside the territorial boundaries of the entity in question.[76] For instance, in the case of *Al-Skeini and others v. United Kingdom*, the European Court of Human Rights (ECtHR) was presented with alleged violations of the European Convention on Human Rights by the United Kingdom which had taken place in Iraq.[77] The ECtHR began recalling that a state's jurisdictional competence under Article 1 of the European Convention on Human Rights is primarily territorial.[78] However, the ruling majority also recognized that, in exceptional cases, state acts performed or producing effects outside of their territory may fall within the jurisdiction of such treaty.[79] The ECtHR then developed on the exceptional circumstances that would cause the obligations under the European Convention on Human Rights to have effect beyond the territory of the state party.[80]

First, the ECtHR referred to the case of state agents, their authority, and control.[81] Under this category, obligations arising from the European Convention on Human Rights were deemed applicable to acts of diplomatic and consular agents who are present in a foreign country;[82] acts of state agents that would amount to public powers of another state, which are exercised through the consent, invitation, or acquiescence of the state of that territory;[83] and the use of force by a state's agents operating outside its

76. *See, e.g.,* Al-Skeini v. United Kingdom, App. No. 55721/07, ¶ 79 (July 7, 2021), https://hudoc.echr.coe.int/fre?i=001-105606.

77. *See id.* ¶ 10.

78. *Id.* ¶ 109.

79. *Id.* ¶ 131 (citing Bankovic v. Belgium, App. No. 52207/99 (Dec. 12, 2001), https://hudoc.echr.coe.int/?i=001-22099).

80. *Id.* ¶ 133 (collecting cases).

81. *See id.* ¶ 137 ("It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored.'").

82. *See id.* ¶ 134 ("[I]t is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others." (collecting cases)).

83. *See id.* ¶ 135 (collecting cases).

territory.[84] The ruling majority concluded, under this category, that whenever a state exercises control and authority through its agents, it is the state's duty to secure the rights and freedoms derived from the European Convention on Human Rights.[85]

Secondly, the ECtHR found an exception to the principle of territoriality where a state exercised effective control of an area outside that national territory because of lawful or unlawful military action.[86] The obligation to secure, in such context—the rights and freedoms set out in the European Convention on Human Rights—derives from said control, whether exercised directly, through the contracting state's armed forces, or through a subordinate local administration.[87] In this case, the ECtHR concluded that, because the United Kingdom had assumed authority and responsibility for the maintenance of security in south-east Iraq during the time in which the events in question took place, the obligations of the European Convention of Human Rights were applicable to the United Kingdom.[88]

Following this line of thought, the ECtHR consistently underscored that the European Convention on Human Rights is a dynamic instrument which requires readings that reflect modern-day realities.[89] This interpretative approach extends not only to the substantive rights safeguarded by the treaty but also to the provisions that dictate the functioning of the treaty's enforcement mechanisms.[90] Accordingly, this tribunal has underscored that the responsibility of a state may thus arise when it exercises effective control or "effective overall control" of an area outside its national territory, regardless of the lawfulness of such control, whether conducted by the state's agents or by the acts of a subordinate local administration.[91]

In sum, it appears evident that human rights obligations may apply outside of the territory of a state party when that state is in effective control of another territory or to the extent that the state has control over a person or situation, even if it does not have control over the territory where the conduct

84. *Id.* ¶ 136.

85. *Id.* ¶ 137 ("It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention . . . .").

86. *See id.* ¶ 138.

87. Loizidou v. Turkey, App. No. 15318/89, ¶ 52 (Dec. 18, 1996), https://hudoc.echr.coe.int/eng?i=001-58007.

88. *See* Al-Skeini, App. No. 55721/07, ¶ 149.

89. *See id.* ¶ 128 (quoting Bankovic, App. No. 52207/99).

90. *See* Loizidou, App. No. 15318/89, ¶ 43.

91. Cyprus v. Turkey, App. No. 25781/94, ¶ 77 (May 10, 2001), https://hudoc.echr.coe.int/eng?i=001-59454.

takes place.[92] Nevertheless, it should still be taken into consideration that the ECtHR has stated that the recognition of the exercise of extraterritorial jurisdiction by a state is exceptional and that the European Convention on Human Rights's notion of jurisdiction is—as previously elaborated—essentially territorial.[93]

D. Human Rights Obligations in Disputed Territories

In principle, territorial sovereignty belongs always to one or, in exceptional circumstances, to several States and to the exclusion of all others.[94] However, in some circumstances, disputes may emerge as to which state can exercise sovereignty over a certain territory. This section will aspire to apply the rules developed above to two different situations regarding disputed territories: the application of human rights obligations regarding a purely *de jure* dispute over a territory (Section 1), and the application of human rights obligations regarding a *de facto* dispute over a territory (Section 2).

1. Application of Human Rights Obligations in *de Jure* Disputed Territories

Several territories in international law's history have been disputed by one state in a purely *de jure* manner while another state was effectively occupying the territory in question.[95] This has been the case, for instance, in the region of Crimea and eastern Ukraine after the 2014 incidents: Ukraine claimed sovereignty over the territory (*de jure*), but the region was effectively occupied by the Russian Federation.[96]

In such situations, the state effectively occupying the territory is inherently bound by its human rights obligations in the occupied territory. In this line, the ECtHR has ruled that, when the territory of one state is occupied by the armed forces of another, the occupying state should in principle be held accountable under the European Convention on Human Rights for breaches of human rights within the occupied territory because, to hold otherwise, would be to deprive the population of that territory of the rights

92. *See* Hathaway et al., *supra* note 5, at 417 (quoting Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 251 (2010)).

93. *See* Bankovic, App. No. 52207/99, 2001, ¶ 61 (citing COUNCIL OF EUROPE, *Extraterritorial Criminal Jurisdiction,* 3 CRIM. L. F. 441 (1992)).

94. Island of Palmas (Neth. V. U.S.), 1928 R.I.A.A. 829, 838 (Apr. 4, 1928).

95. *See, e.g., id.* at 846.

96. *See* U.S. DEPT. OF STATE, UKRAINE: CRIMEA REPORT (last visited Nov. 30, 2024), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/ukraine/crimea/.

and freedoms enjoyed and would result in a vacuum of protection.[97] According to the ECtHR, the obligation to secure—in the effectively controlled area—the rights and freedoms set out in the human rights treaty under question, openly derives from the fact of such control—whether it be exercised directly, through its armed forces, or through a subordinate local administration.[98]

The case of *Ukraine v. Russia (Re Crimea)* is an example of a pure *de jure* dispute. Ukraine presented the ECtHR with several claims from events that took place from February 2014 onwards.[99] The ruling majority considered that, starting from February 27, 2014, the Russian Federation had exercised extraterritorial jurisdiction over Crimea in the form of effective control over an area.[100] Under this understanding, the ECtHR rejected the jurisdictional objection raised by the Russian Federation on grounds of extraterritoriality and proceeded to assess the facts under dispute.[101]

In addition to the Crimea region, the ECtHR also considered that the Russian Federation exercised effective control over some areas of eastern Ukraine: "[…] Russia's military presence in eastern Ukraine and the decisive degree of influence and control it enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities"— in effect implying that those areas had been, since May 11, 2014, and subsequently, under the effective control of the Russian Federation.[102] Following this premise, the ECtHR also rejected jurisdictional objections over facts occurring in eastern Ukraine in the relevant period, thus maintaining that the Russian Federation was bound by its human rights obligations also in areas of eastern Ukraine.[103] This dispute arises as a clear example of the interplay that can exist between human rights obligations and *de jure* disputed territories: while Ukraine claimed that the Crimea and eastern Ukraine regions were *de jure* Ukrainian, the Russian

97. Al-Skeini, App. No. 55721/07, ¶ 142 (first citing Cyprus, App. No. 25781/94, ¶ 23; and then citing Bankovic, App. No. 52207/99, ¶ 61).

98. *See* Loizidou v. Turkey, App. No. 15318/89, ¶ 52 (Dec. 18, 1996), https://hudoc.echr.coe.int/eng?i=001-58007 ("The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.") (quoting Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89, ¶ 62 (Mar. 23, 1995), https://hudoc.echr.coe.int/eng?i=001-57920)).

99. *See* Ukraine v. Russia (Re Crimea), App. Nos. 20958/14, 38334/18, ¶¶ 5, 34, (June 25, 2024), https://hudoc.echr.coe.int/eng?i=002-14347.

100. *See id.* ¶ 869, 1267.

101. *See id.* ¶ 873.

102. *See id.* ¶ 875.

103. *See id.*

Federation became bound to respect its own human rights obligations from the time in which it exercised effective control.[104] At the time of the facts examined, there was no big-scale armed conflict in the region.

2. Application of Human Rights Obligations in *de Facto* Disputed Territories

In other scenarios, however, territorial disputes are not simply *de jure*, but also *de facto*. This is particularly evident in ongoing armed conflicts, in which forces of two or more States are actively disputing a territory. While this is an extremely factually dependent scenario, it should not come as a surprise that the notion of effective control might fall short of usefulness in conflicts in which, for certain intervals or cycles, a "controlling state" cannot be easily identified, as no party may successfully or altogether maintain continuous or at least stable control over the disputed area.

In these cases, first and foremost, the rules of extraterritorial application regarding state agents remain applicable. The ECtHR's rule regarding the notion that the responsibility of a state can be triggered by acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their territory, becomes pivotal.[105]

For instance, in the case of *Ukraine v. Russia (Re Crimea)*, the ECtHR was presented with a count of an individual of Ukrainian nationality who was allegedly detained by Russian agents in Gomel, Belarus, and later transferred to the Russian Federation.[106] The ECtHR noted in this regard that a state may be held accountable for violations of the European Convention of Human Rights' rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating, whether lawfully or unlawfully, in the latter state.[107] Undoubtedly, this dispute stands out as a critical example of how the ECtHR applies the concept of effective control in assessing jurisdiction, reinforcing the idea that States cannot evade their human rights obligations by operating outside their borders.

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104. *See id.* ¶ 869.

105. Drozd v. France, App. 12747/87, ¶ 91 (June 26, 1992), https://hudoc.echr.coe.int/eng?i=001-57774 (first citing X v. Fed. Republic of Germany, App. No. 1611/62, (Sept. 25, 1965), https://hudoc.echr.coe.int/?i=001-82912; then citing Hess v. United Kingdom, App. No. 6231/73, (May 28, 1975), https://hudoc.echr.coe.int/?i=001-73854; then citing Cyprus v. Turkey, App. Nos. 6780/74, 6950/75 (May 26, 1975), https://hudoc.echr.coe.int/?i=001-74811; X v. Switzerland, App. No. 7289/75, 7349/76 (July 14, 1977), https://hudoc.echr.coe.int/?i=001-74512; and then citing W v. United Kingdom, App. No. 9348/81 (Feb. 28, 1983), https://hudoc.echr.coe.int/?i=001-74066).

106. *See* Ukraine, App. Nos. 20958/14, 38334/18, ¶ 880.

107. *See id.* ¶ 883.

Thus, cases of *de facto* disputes, particularly in the context of ongoing armed conflicts, present complex challenges for the application of human rights obligations. In such scenarios, the traditional notion of "effective control" by a state over a territory or population may become blurred or even entirely absent, making it difficult to ascertain which state, if any, holds jurisdiction and responsibility. However, both international law as well as the evolution of case law on the matter suggest that States are still bound by their human rights obligations, even in these contested spaces, based on the actions of their agents.

III. CONCLUSION

Human rights obligations, following one of the core elements of general treaty obligations under international law, are primarily understood to be territorial in nature.[108] This means that the commitments made by States under human rights treaties are generally expected to apply within their own sovereign borders. Typically, human rights treaties define the territorial scope of these obligations, establishing boundaries for where the treaties' provisions should be implemented. These treaties do not often include carve-outs, reinforcing the idea that a state's responsibility to uphold human rights is geographically confined to its boundaries.

However, this territorial principle is not absolute. Particularly, acts of state agents in other territories and situations in which a state is in effective control of another territory, can trigger human rights obligations and make them applicable to those situations and territories.[109] Still, some degree of control needs to be proven.

These notions guide the application of human rights treaties to disputed territories. In cases in which a territorial dispute is purely *de jure*, the state which is effectively controlling the territory might remain bound to respect its human rights obligations in such area. The case of *de facto* disputes, especially in the context of armed conflicts, is even more challenging. While factually dependent, if a situation of effective control cannot be proven, States remain bound to respect their human rights obligations in *de facto* disputed territories by the acts of their agents.[110] The control that a state has over its agents can trigger human rights liability regardless of where the facts took place and where the effects were caused.[111]

108. *See, e.g., id.* ¶ 866.
109. *See, e.g., id.* ¶ 883.
110. *See, e.g., id.*
111. *See id.*

All these situations, despite their variations, are unified by a common guiding principle: it is crucial to uphold obligations that protect the potentially affected population whenever possible, ensuring that civilians do not become collateral victims of inter-state disputes. The focus must be, thus, on maintaining the dignity and safety of individuals, even in the most strenuous circumstances. While there are still significant factual and legal hurdles to navigate, the field of human rights law as well as the understandings of international human rights tribunals continue to evolve, striving to extend the greatest possible protection to those who bear the least responsibility for the conflicts and disputes that endanger them. There needs to be a continuous development that reflects the global commitment to prioritizing human rights and humanitarian principles, even in complex international disputes. This effort should involve not just state actions but also contributions from international organizations, non-governmental organizations, civil society groups, and the private sector. Academia and think tanks are also essential to research and advocate for human rights, while social media plays a prominent role in raising awareness. Ultimately, the aim must be to safeguard vulnerable populations during conflicts, prioritizing their rights and ensuring their safety.