July 22, 2015

The EU's Human Rights Obligations towards Distant Strangers

Aravind Ganesh

Available at: https://works.bepress.com/aravind_ganesh/5/
The EU has perfect human rights obligations towards distant strangers. My argument has two limbs: Firstly, in numerous policy areas, the EU asserts jurisdiction via ‘territorial extension’, which combines territorially limited enforcement jurisdiction with a claim of geographically unbounded prescriptive jurisdiction. Doctrinally, this resembles the Lotus principle, and viewed analytically, amounts to a claim not just of power but of political authority. Thus, the EU creates not just factual effects, but legal effects abroad. Secondly, assertions of political authority, even if only de facto, give rise to perfect human rights obligations. I illustrate this by reference to Strasbourg jurisprudence holding that the creation of legal effects extraterritorially suffices to give rise to extraterritorial human

*Research Fellow, Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg. LL.B. (King’s College, London), J.D. (Columbia), B.C.L. (Oxon). Earlier drafts of this paper were presented at the seminar series on “Obligations of States to Foreign Stakeholders” at the Buchmann Faculty of Law, Tel Aviv University, attended with support from the GlobalTrust Research Project and a Swiss National Science Foundation ‘Doc.Mobility’ grant. I would like to thank Professor Eyal Benvenisti, the seminar participants, and the members of the GlobalTrust Research Project for their invaluable comments and insights. All errors are my responsibility alone.
INTRODUCTION

In this paper, I argue that the EU has perfect, legally enforceable human rights obligations—not just competences or discretions—towards distant strangers, i.e. noncitizens far, far away. My special goal will be to show that the EU has ‘positive’ obligations to ‘protect’ and ‘fulfil’—that is, obligations to prevent third parties from causing human rights violations, and to establish mechanisms for the vindication of those rights—rather than just ‘negative’ obligations to ‘respect’. The argument has two limbs: (1) in order to achieve its goals in numerous policy areas, the EU asserts not just power extraterritorially, but authority; and (2) the entire spectrum of human rights duties potentially arise out of relationships of political authority and obedience.

Section I begins by setting out certain provisions added by the Lisbon Treaty requiring the EU to promote human rights, democracy, and the rule of law in all its ‘relations with the wider world.’ Section II then recapitulates a recent interpretation of the provisions which, by starting with the premise that they primarily mandate compliance with international law by the EU in all its actions, ends up largely denying any ‘extraterritorial’ human rights duties to protect. While the fundamentals of the ‘compliance’ reading are correct, I demonstrate in section III that the notion of ‘international law’ to be ‘complied with’ is a peculiar one knowing no geographical boundaries to prescriptive jurisdiction; i.e. to a political institution’s authority to prescribe rules binding conduct. Indeed, despite General Court precedent claiming otherwise, the EU regularly creates and has always created legal effects outside its
borders. This is reflected both in the jurisprudence of the Court of Justice of the European Union (CJEU), and in EU legislation, particularly in areas such as competition, financial, and environmental regulation, all of which have profound implications for the human rights of distant strangers. Section IV argues that human rights duties arise from and only from relations of political authority. By reference to Strasbourg case-law on extraterritorial human rights jurisdiction, I demonstrate that the creation of legal effects abroad is both necessary and sufficient to give rise to human rights duties there, and reject accounts of human rights jurisdiction based upon mere power, such as the ‘state control’ and ‘capability’ theories advanced by certain prominent scholars.

My legal arguments rely upon deeper commitments in political theory, chiefly a distinction between power and authority. There is a morally significant difference between affecting people—e.g. influencing, incentivizing, or manipulating them—and governing people—i.e. telling them what to do or how they must proceed in doing the things they want to do. If, as I argue, the EU regularly governs persons overseas, this raises the question of empire, which I touch upon in the conclusion.

I. THE PROVISIONS

The relevant provisions are scattered about the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Although

1 Note, the ordinary rules of treaty interpretation do not apply. EU treaties have from the very beginning been subjected to ‘dynamic’, ‘purposive’ or ‘teleological’ methods of interpretation aimed at ensuring their effet utile and effectiveness. See Miguel Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, 1 EUR. J. LEG. STUD. (2007); JAN KLABBERS, AN
initially dismissed as aspirational and “redolent of motherhood and apple pie”\textsuperscript{2}, this is no longer tenable since the seminal Air Transport Association of America (ATAA)\textsuperscript{3} judgment.

Article 3(5) TEU, the first provision of concern, provides that

“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

\textsuperscript{2} ALAN DASHWOOD, MICHAEL DOUGAN, BARRY RODGER, ELIZABETH SPAVENTA & DERRICK WYATT, WYATT AND DASHWOOD’S EUROPEAN UNION LAW 903 (2011).

(Describing Article 21(1) TEU.)

\textsuperscript{3} Case C-366/10, Air Transport Association of America v. Secretary of State for Energy and Climate Change, 2011 ECR I-02735.
Being situated in the ‘Common Provisions’ of Title I, this provision is of plenary application across all EU policy areas. The “values” in the first sentence are specified in Article 2 TEU as “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”.

Secondly, Article 21(1) TEU, situated in the chapter on external relations, provides that

“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”

Article 21(2) TEU—provides that the EU “shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to… consolidate and support democracy, the rule of law, human rights and the principles of international law”⁴, “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating

⁴ Article 21(2)(b) TEU.
Finally, Article 21(3) TEU provides that

“The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union’s external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for

---


6 Article 21(2)(h) TEU.
The first paragraph governs more than just the EU’s external policies, but not the *purely* internal: “external aspects of [the EU’s] other policies” refers to such things as the ‘external dimension’ of competition law, i.e. chapters on EU competition rules in bilateral agreements. The second paragraph, however, introduces a principle of consistency or coherence applicable across external policy and the EU’s ‘other’, i.e. *internal* policies, thus blurring the line between the internal and external. One objection should be dispatched at this point. Cannizzaro argues that Article 21 TEU is limited to the Common Security and Foreign Policy [CFSP] pillar on the basis that “Article 23 [TEU] assigns the pursuit of the political objectives laid down by Article 21(1) and (2) to the primary competence of the CFSP.” Bartels responds correctly that Article 23 TEU provides that the conduct of the CFSP “shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with” the general provisions on EU external relations (such as Article 21 TEU), and thus cannot be read to mean the CFSP is the *only* means by which the political objectives in Article 21 TEU are to be pursued.

---


What implications do these provisions have for legal relations between the EU and distant strangers? Consider two semi-hypothetical scenarios, both concerning the human right to food. Firstly, when formulating agricultural policy, does the EU have to ‘take into account’ the effects of subsidies upon developing country farmers? Secondly, imagine a merger planned between two supermarket chains. The merger will not affect consumer welfare within the EU, but will likely result in the creation of an entity with monopsony power in downstream markets for coffee, tea, and other commodities located in developing countries. Its monopsony power may be so great it deprives farmers of the ability to earn enough income to buy adequate food and health care, or to send their children to school. Should the Commission (the EU merger regulator) approve the

---


merger, or regulate it? What if one of these developing countries—Ruritania—champions the merger for its potential contributions to industrial development, despite its devastating effects upon rural communities? (Assume Ruritania is not party to any applicable human rights treaties.)

II. THE ‘COMPLIANCE’ READING

Bartels offers a comprehensive treatment of the EU’s ‘extraterritorial’ human rights obligations, in which he argues the provisions (1) render the human rights norms internally applicable in the EU into norms it must ‘respect’ in the conduct of the EU’s external action\(^\text{11}\); and (2) mandate compliance with international law by turning international human rights norms into norms of EU law binding upon EU institutions and actions.\(^\text{12}\) As such, the provisions regulate the EU’s own conduct, rather than its indirect effects; i.e. what third parties might be enabled to do as a result of it. Bartels thus concludes that (1) ‘negative’ obligations to ‘respect’ human rights apply universally, and (2) ‘positive’ obligations to protect and to fulfill are limited to EU territory.

The first limb of Bartels’s scheme is about EU law. Bartels argues that the provisions (particularly the first indent of Article 21(3) TEU) can be read to impose duties under EU law, prohibiting the EU, say, from imposing sanctions upon a third country if it would cause starvation, or from entering into an agreement with another country to spy on its citizens in violation of its human rights obligations towards them. However, regarding obligations to protect and fulfill, Bartels says the answer at EU law is


\(^{12}\) Id. 1078-1087.
“much more muted”\textsuperscript{13}. the Articles 3(5) and 21(1) TEU language requiring the EU contribute to human rights and its action on the international scene be guided by the principles of the universality and indivisibility of the same give rise to obligations to cooperate internationally; i.e. through intergovernmental and civil society engagement channels, and/or by establishing programs. Because the provisions do not specify any particular manner by which the EU is to achieve these ends, Bartels considers them legally unenforceable.\textsuperscript{14}

Bartels’ second limb is about international law: “the EU is also required to respect international human rights obligations to the extent these are binding on the EU under treaties or customary international law.”\textsuperscript{15} The theme of ‘compliance’ is emphasized in numerous EU official and judicial pronouncements. For instance, a December 2011 Joint Communication by the Commission and CFSP High Representative (henceforth “Joint Communication”), states that “EU external action has to comply with the rights contained in the EU Charter of Fundamental Rights which became binding EU law under the Lisbon Treaty, as well as with the rights guaranteed by the European Convention on Human Rights.”\textsuperscript{16} Moreover, the General Court in \textit{Kadi II} hinted impertinently at the idea when it cited Articles 3(5), 21(1) and 21(2) TEU, as well as

\textsuperscript{13} Id. 1074.
\textsuperscript{14} Id. 1075.
\textsuperscript{15} Id. 1078.
Declaration No. 13 annexed to the Lisbon Treaty in the course of observing that ‘some’ had expressed “certain doubts”\footnote{T-85/09, Kadi v. Commission, 2010 ECR II–5177, ¶115.} as to whether the CJEU’s \textit{Kadi I}\footnote{Joined Cases C-402/05 P and C-415/05 P Kadi & Al Barakaat v. Council of the EU & EC Commission, 2008 ECR I 6351.} judgment was in compliance with international law. However, by far the most important authority relied upon for the compliance reading is the ATAA decision, where the CJEU observed that “[u]nder Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law”, and relied upon this as grounds for finding that

```
“when it adopts an act, [the EU] is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.”\footnote{Case C-366/10, \textit{Air Transport Association of America}, ¶101. See also ¶123.}
```

From this premise, Bartels denies extraterritorial ‘positive’ human rights obligations, by reasoning as follows: if the provisions are about mandating compliance with international law and international human rights law, there can be no \textit{obligation} to protect human rights from violation by third parties extraterritorially, because neither international law nor international human rights law impose such a thing. Bartels tenders two arguments to this end, while I anticipate the third: (1) states do not have human rights obligations outside their human rights jurisdiction for mere extraterritorial \textit{effects} of their domestic policy; (2) actions of third parties cannot be attributed to states or international organizations (IOs) in the absence of \textit{intentional} assistance, direction,
control, or adoption; (3) any measures to protect the human rights of distant strangers may constitute interference with the sovereign rights of the states where the affected individuals are situated. Thus, while the provisions allow the EU to promote and advance its human rights agenda throughout the world, this is to be carried out multilaterally, through political channels. (4) Finally, Bartels raises the issue of standing for judicial review under EU law, which in his estimation closes off any opportunity for distant strangers to challenge measures infringing even the limited duties under the compliance reading.

This interpretation possesses considerable support in academic commentary and elsewhere. For instance, a piece written before the ATAA decision describes Article 21 TEU as espousing a “liberal institutionalist view of international relations” preferring international cooperation to approaches that may lead to conflict.20 Marise Cremona wrote in 2008 that the “substantive [external] mandate as expressed in Article 3(5) TEU is to be achieved by developing relations and building partnerships with third countries and international organisations which share the Union’s principles and values, and promoting multilateral solutions to common problems (Article 21(1) TEU).”21


In the following paragraphs, I canvas the four reasons against ‘positive’
extraterritorial human rights duties postulated by the compliance reading, some of which
I will later demonstrate to be mistaken.

A. *Human Rights Jurisdiction*

States bear responsibility only for the protection of human rights within their
‘human rights jurisdiction’, traditionally identified with territorial control on the basis of
the *Namibia* opinion. This applies equally between civil and political rights (as
contained in the International Covenant on Civil and Political Rights (ICCPR)) and socio-
economic rights: in the *Wall* opinion, the ICJ explained the unique lack of a
jurisdictional stipulation in the International Covenant on Economic, Social, and Cultural
Rights (ICESCR) as arising from “the fact that this Covenant guarantees rights which
are essentially territorial…” Even though the Court found that Israel had obligations
arising under the ICESCR for events occurring on the Occupied Territories, it
emphasized that extraterritorial application of the norms in the ICESCR, ICCPR, and the
Convention on the Rights of the Child (CRC) obtained only if the extraterritorial acts

---

22 Legal Consequences for States of the Continued Presence of South Africa in
Rights beyond Borders at the World Court: The Significance of the International Court
of Justice’s Jurisprudence on the Extraterritorial Application of International Human

23 Note, Article 14 ICESCR on the obligation of progressive implementation of a
plan of free compulsory education briefly mentions territorial jurisdiction.

24 Legal Consequences of the Construction of a Wall in the Occupied Palestinian
they pertained to were carried out “in the exercise of its jurisdiction outside of its own territory.”

Thus, human rights jurisdiction boils down to conduct on foreign territory, presumably meaning “boots on the ground.” The currently most prominent monograph on extraterritorial human rights jurisdiction maintains that most ‘positive’ human rights obligations cannot be imposed in the absence of territorial control, because they cannot be carried out effectively.

True, there are a number of pronouncements by the Committee on Economic, Social and Cultural Rights (CESR) stating that the creation of substantial and foreseeable effects gives rise to human rights jurisdiction. These pronouncements, however, suffer

25 *Id.* ¶111. *See also* CERD (Geo. v. Rus.) Provisional Measures, 2008 I.C.J. 353, ¶¶109, 149, (Oct. 15) (holding Convention on the Elimination on all Forms of Racial Discrimination applicable to extraterritorial state acts, and ordering Georgia and Russia to do “all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination.”); Armed Activities (DRC v. Uganda), 2005 I.C.J. 168, ¶219 (Dec. 19) (applying same reasoning with respect to the ICCPR and the CRC.)


from problems of content and status. Some CESR General Comments are couched in terms of an exhortatory “should” rather than a prescriptive “must”, a choice Bartels considers significant.\textsuperscript{29} Moreover, while they are invoked promiscuously by academics and human rights NGOs, courts and governments have always remained more skeptical.\textsuperscript{30}

Implementing this commitment [to take joint and separate action to achieve the full realization of the right to adequate food], States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”); ECOSOC, U.N. Comm. on Econ. Soc. and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR), 22d Sess., 51, U.N. Doc. E/C.12/2000/14, ¶39 (Aug. 11, 2000) (“States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.”); ECOSOC, U.N. Comm. on Econ. Soc. and Cultural Rights, General Comment No. 15: The right to water, U.N. Doc. E/C.12/2002/11, ¶31 (Jan. 20, 2003) (“(i)nternational cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.”)

\textsuperscript{29} Bartels, supra note 11, 1085-1086. Note, General Comment No. 14 on the right to health does not mention “should”.

\textsuperscript{30} GEORG NOLTE, Third Report for the International Law Commission Study Group on Treaties over Time, in TREATIES AND SUBSEQUENT PRACTICE 384, 384 (2013); REPORT OF THE STANDING SENATE COMMITTEE ON HUMAN RIGHTS, PROMISES TO KEEP:
They have almost never been cited by the ICJ: a rare instance was in Diallo, where the Court described HRC General Comment No. 15 as having “great weight”, only to emphasize immediately that it was “in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [ICCPR] on that of the [HRC]…”

The situation in domestic or regional tribunals is similar, if more dire: in Grootboom, the South African Constitutional Court paid lip service to the CESR’s General Comment No. 3 laying down the ‘minimum core’ doctrine, but then disparaged it significantly, eventually rejecting its approach to construing the right to adequate housing under the South African Constitution.

Other treaty bodies fare even worse. Speaking of the general comments issued by the UN Torture Committee, Lord Bingham noted that “the Committee is not an exclusively legal and not an adjudicative body; its power… is to

Implementing Canada’s Human Rights Obligation (2001) (Can.) (“the views and decisions of these treaty-monitoring bodies are not binding on Canada, either under international or domestic law.”),

http://www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm;

Norwegian Ministry of Foreign Affairs, Report No 21 to the Storting (1999-2000), Focus on Human Dignity-A Plan of Action for Human Rights, chapter 4, Box 4.2 (“the recommendations and criticism of the monitoring committees are not legally binding, but they are given great weight by the Norwegian authorities…”),


33 Government of the Republic of South Africa v. Grootboom and Others 2001 (1) SA 46 (CC) at ¶33 (S. Afr.).
make general comments… Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.”  

Lord Hoffman on the other hand, declared that “as an interpretation of article 14 (of the UN Torture Convention) or a statement of international law, I regard it as having no value.”

Crucially, the Strasbourg Court emphatically rejected a human rights ‘effects doctrine’ in Banković, holding that “from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial”, and “… the applicant’s submission [was] tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its actions felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.”

**B. Attribution and state/IO Responsibility**

Human rights abuses caused by private Nonstate Actors (NSAs) cannot be attributed to states or IOs unless they *knowingly* aided or abetted the NSA, directed or

---


35 *Id.* ¶56.


37 *Id.* ¶75.

controlled it, \(^{39}\) or coerced it to that end.\(^{40}\) None of these conditions obtain in either of the hypotheticals, so the EU cannot be held responsible under either the *Nicaragua*\(^{41}\) or the *Tadić*\(^{42}\) tests. The *Commentary to the Maastricht Principles* argues that the principle in *Trail Smelter*\(^{43}\) and *Corfu Channel*\(^{44}\)—under which states have a general duty not to act in a way that causes harm outside their territory—should be extended to provide for liability


\(^{39}\) *See* Article 17 ARS; Article 15 ARIO.

\(^{40}\) *See* Article 18 ARS; Article 16 ARIO.

\(^{41}\) Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (setting out two tests for state responsibility: (1) where the actor is an *alter ego* of the state, or (2) where a specific operation was carried out within the control and instruction of the state).


\(^{43}\) *Trail Smelter Arbitration* (US v. Can.), 3 R.I.A.A. 1905 (1941) (establishing ‘polluter pays’ principle in international environmental law). *See also* Loizidou v. Turkey, App No. 15318/89, 20 Eur. H.R. Rep. ¶62 (1995) (state may be responsible for a violation of international human rights treaty obligations where “acts of their authorities, whether performed within or outside national boundaries... produce effects outside their own territory”).

\(^{44}\) *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).
for extraterritorial human rights violations.\textsuperscript{45} For this to make sense however, there must be a ‘harm’ to complain of, and to say that that harm consists of a human rights violation, there must be a human rights relationship between a right-holder and a duty-bearer.\textsuperscript{46} That, however, is precisely the question at hand. The \textit{Maastricht Commentary} is premature, resulting in the human rights ‘effects’ doctrine rejected in \textit{Banković}. A better understanding of the \textit{Trail Smelter/Corfu Channel} doctrine is that it defines liability for tortious damage.\textsuperscript{47}

\textit{C. General Jurisdiction under International Law}

If compliance with international law is the heart of the matter, then measures to protect human rights ‘extraterritorially’ might be \textit{prohibited}, rather than just not required. The EU would not have the \textit{competence}—much less an obligation—to protect the human rights of distant strangers if it would interfere with the sovereignty of other states. International law requires all state action to have a jurisdictional basis in at least one of the classical grounds of territoriality, nationality, universality, or the protective principle. Short of a massive humanitarian disaster causing hordes of refugees to pour into the EU,

\textsuperscript{45} See commentary to Principle 3, ¶9, in Olivier De Schutter \textit{et al}, \textit{Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights}, 34 HUM. RTS. Q. 1084, 1095-96 (2012) (because “customary international law prohibits a state from allowing its territory to be used to cause damage on the territory of another state… [there is now] a duty for the state to respect and protect human rights extraterritorially.”)

\textsuperscript{46} Bartels, \textit{supra} note 11, 1082.

\textsuperscript{47} See Ahmadou Sadio Diallo (Guin. v. DRC), Compensation, 2012 I.C.J. 324, ¶¶13-14 (June 19).
it is difficult to imagine a situation where the universality, passive personality, or protective principles could allow for the assertion of jurisdiction over socio-economic rights like the right to food violations overseas.

This leaves territoriality and nationality. Regarding the former, there is the effects doctrine—a variant of objective territorial jurisdiction—whose seminal expression was in *Alcoa* where Judge Learned Hand deemed it “settled law… that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders which the State reprehends…” 48 This

48 United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir., 1945). The *Alcoa* doctrine has since been severely restricted by U.S. courts. *See e.g.* §6a of the Foreign Trade Antitrust Improvement Act (FTAIA) of 1982 (codified at 15 U.S.C. §6a) (territorial jurisdiction is established only where extraterritorial conduct has “direct, substantial and reasonably foreseeable effect” on trade or commerce in the US); Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) (limiting extraterritorial antitrust control to conduct that “was meant to produce and did in fact produce some *substantial* effect in the United States”, at 796); F. Hoffmann-La Roche Ltd v. Empagran S.A, 542 U.S. 155 (2004) (customers in the United States cannot claim under the Sherman Act where they are affected by extraterritorial anticompetitive conduct giving rise only to foreign effects completely independent of effects within the U.S.); Morrison v. National Australia Bank, 130 S.Ct. 2869, 561 U.S. 247 (2010) (restricting the application of U.S. securities law to securities traded on U.S. exchanges, and expanding the presumption against extraterritorial legislative intent); Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1673-1674 (2013) (presumption against extraterritorial legislation precludes claims under Alien Tort Statute lacking sufficient connections with the United States).
offers no help to distant strangers, because the reprehended consequences are felt outside the EU’s borders. As for nationality, §403(1) of the Third Restatement provides “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable”, and two of the eight factors to be taken into account are “the extent to which another state may have an interest in regulating the activity” and “the likelihood of conflict with regulation by another state.” Also relevant is the principle of nonintervention, enshrined at Article 2(7) UN Charter, and in the UN General Assembly declarations on Inadmissibility of Intervention in the Internal Affairs of States (1965) and Friendly Relations (1970). In Nicaragua, the ICJ invoked these instruments to hold that the principle of nonintervention “forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States”, explaining that a “prohibited intervention must accordingly be one bearing on matters in which each State is permitted... to decide freely… Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.” EU condemnation of


50 Id. §403(2)(h) (1987).


53 Nicaragua, I.C.J. 14, ¶205.
Ruritanian policy might restrict Ruritania’s scope of action, but it does not take away Ruritania’s ability to make choices. What would though, is if the Commission were to ‘sign it up’ to the ICESCR by regulating the merger for the benefit of Ruritanians.

D. Standing

Bartels includes a final, seemingly devastating point that severely curtails the meaningfulness of even the few limited duties under the compliance reading. Article 263 TFEU provides that individual standing to bring judicial review arises only against EU acts (1) addressed to the applicant or of direct and individual concern to them, and (2) against regulatory acts of direct concern to the applicant and not entailing implementing measures. Numerous Advocates General have opined that many socio-economic rights, and some civil and political rights, depend upon further specific implementation by states, and are therefore insufficiently unconditional and precise for direct effect.

---

54 Id. ¶244-245.

55 See e.g. Advocate General Trstenjak, Case C-282/10, Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la region Centre, EU:C:2011:559, ¶105 (Jan. 24, 2012), Joined Cases C-350/06, Gerhard Schultz-Hoff v. Deutsche Rentenversicherung Bund, and C-520/06, Stringer and others v. H.M. Revenue and Customs, 2009 ECR I-179, ¶37, 50 (the signatory EU member states had broad discretion with regard to the implementation of workers’ rights created by treaty, thereby precluding direct effect); Advocate General Lenz, Case 236/87, Bergemann v. Bundesanstalt für Arbeit, 1988 ECR 5132, ¶30 (Article 10 ICESCR “not sufficiently precise for it to be possible to deduce an from them an obligation on the public authorities to take specific and concrete measures”).
Article 263 TFEU also limits judicial review to legislative acts or acts “intended to produce legal effects vis-à-vis third parties.” Mere factual effects are not enough. In Commune de Champagne, the General Court invoked the principle of sovereign equality in Article 2(1) UN Charter and the then Article 299 TEC (now Article 355 TFEU) limiting the application of the EC Treaty to the territory of the European Community, to hold that “an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, cannot create rights and obligations outside the territory thus defined.”

This means distant strangers can never meet the standing requirements to review an EU unilateral act on the basis of violations of their human rights extraterritorially, but will instead have to repose their hopes in EU institutions or member states who as ‘privileged applicants’ are not fettered by normal standing requirements, but are unlikely to undertake litigation on behalf of distant strangers.

---

56 Case T-212/02, Commune de Champagne 2007 ECR II-2023 ¶¶89-90 (denying standing for individual Swiss applicants to challenge EU international agreement on basis of effects caused in Switzerland.) See also Joined Cases T108/07 and T354/08, Spira v. Commission, ECLI:EU:T:2013:367, ¶123 (July 11, 2013) (Commission requests for information do not create legal rights and duties outside EU.)

57 There have been a number of cases where Kurdish nationalist movements were held to have standing to challenge EU acts placing them on lists of terrorist organizations. Case T-253/04, Kongra-Gel v. Council, 2008 ECR II-46, and Case T-229/02, PKK v. Council, 2008 ECR II-45. These however, are arguably not unilateral EU acts, because they were carried out pursuant to UN Security Council Resolution 1373 (2001).

58 See Bartels, supra note 11, at fn 89, 1088.
III. AN UNUSUAL CONCEPTION OF INTERNATIONAL LAW

While much of the compliance reading is correct, my disagreements lie primarily with the ‘international law’ limb of Bartels’ argument.59 By focusing on what was done rather than said in ATAA, I demonstrate that according to established CJEU jurisprudence, the concept of ‘international law’ to be complied with is a peculiar one allowing for geographically unbounded prescriptive jurisdiction. I do this doctrinally—by showing that ATAA is similar to the theory of jurisdiction expressed in so-called ‘Lotus principle’, and analytically—by showing that ATAA relied upon a command rather than an inducement or threat. Thus, at least certain EU measures create not just effects, but legal effects overseas.

In ATAA, the CJEU upheld the legality of the EU Emissions Trading Scheme Directive60, which required all aircraft entering or leaving airports in the EU to offset their carbon emissions—even those made over foreign airspace or the high seas. The Court began by asserting the priority of international agreements over EU secondary legislation, that the EU was bound by norms of customary international law, such as the freedom of the high seas, of airspace belonging to the jurisdiction of the territorial state

59 I have but one mild criticism of the Bartels’ ‘EU law’ limb. Recall Bartels denies the existence of extraterritorial duties to ‘protect’ human rights on the grounds the language on promoting, advancing or contributing human rights does not specify how this is to be done. One could just as well argue that EU courts should fill in the interpretive gap through ‘purposive’ interpretation, especially where EU measures are clearly inimical to its stated human rights goals.

underneath, and the general obligation of the EU to exercise its competences in light of the international legal requirements.\textsuperscript{61} However, it proceeded to find the imposition of emissions fees over such airplanes in full accordance with treaty and customary international law.

The CJEU did not invoke nationality or the protective principle, nor could it have: the whole point was to subject foreign airplane operators to the same burdens as European operators, and no security interests were involved. Territoriality was the sole reed that could have justified the Emissions Trading Directive, and the Court invoked it in a singular fashion. Jurisdiction was not premised upon the effects doctrine as was advocated by Advocate General Kokott in her opinion:\textsuperscript{62} the effects doctrine is problematic in environmental law, because environmental effects are often neither territorially specific nor substantial enough to meet \textit{de minimis} thresholds. Indeed if effects upon the local environment alone could justify prescriptive jurisdiction, there would be no need for the planes to land in EU territory—the Commission could calculate each airline operator’s global emissions and bill it accordingly.\textsuperscript{63} Indeed, ATAA was not so much about avoiding reprehended effects as about advancing a policy goal; i.e. the

\begin{flushright}
\textsuperscript{61} Case C-366/10, \textit{Air Transport Association of America}, ¶¶50, 101, and 123.
\textsuperscript{62} Opinion of Advocate General Kokott, Case C-366/10, \textit{Air Transport Association of America}, ¶154.
\end{flushright}
EU’s “environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory…”\(^{64}\) While the judgment mentions that the airplanes’ extraterritorial conduct “contributed[ed] to the pollution of the air, sea or land territory of the Member States”, \(^{65}\) this appears almost as an afterthought—the only necessary grounds for establishing jurisdiction over the aircraft was their presence on EU territory. Instead, the Court held that the imposition of charges upon foreign airplanes for emissions made over the high seas or over third states offended neither the customary rules of territorial jurisdiction nor the sovereignty of third states over their airspace, because they were collected after the airplanes entered EU territory, \(^{66}\) at which point they became subject to the ‘unlimited’ jurisdiction of the EU and the relevant member state. In any event, the EU had the competence to specify the terms upon which commercial trade is carried on within EU territory, which could include a high level of protection for the environment.\(^{67}\)

The reasoning in ATAA is reminiscent of what Mann termed the ‘application of legislation to a matter’, whereby a regulating state maintains it is not in any way regulating matters extraterritorially but merely pronouncing upon the effect of foreign conduct domestically. Considering a hypothetical statute prohibiting marriages between persons below sixteen years of age intended to apply irrespective of nationality, domicile, domicile,

\(^{64}\) Case C-366/10, Air Transport Association of America, ¶128. The international agreement in question here is the Framework Convention and the Kyoto Protocol.

\(^{65}\) Id. ¶129.

\(^{66}\) Id. ¶¶124-126.

\(^{67}\) Id. ¶128, citing Article 191(2) TFEU.
or residence, Mann declared that “(s)uch legislation doubtless constitute(d) an excess of jurisdiction.”68 In an earlier piece, Bartels developed on Mann’s insight to advocate the following test for extraterritoriality: “The first step is to define legislation as ‘extraterritorial’ according to the legal connection between the legislation and the extraterritorial subject-matter; the second is to ask whether this amounts to a ‘denial of opportunities normally open to the person against whom enforcement is directed.’”69 Note that Bartels’ “legal connection” is not the same thing as legal effects abroad: “a measure defined by something located or occurring abroad should be considered just as extraterritorial as a measure specifically mandating or forbidding conduct abroad.”70 It suffices for the measure to be ‘directed’ at, or “made applicable to conduct abroad in a relevant sense.” Thus, tariffs and subsidies are territorial, while PPMs—Bartels calls them “ecological trade measures”—are extraterritorial.71 The Emissions Trading Directive was directed at foreign airplane operators because it turned on conduct abroad, and, had it come into effect, would have resulted in a reduction of the opportunities those operators had enjoyed before. As such, the supposed authority for interpreting the Article


70 Id. 381, citing Lepre v. Lepre [1963] 2 WLR 735 (Eng.) (disregarding for excess of jurisdiction a Maltese decree voiding all marriages by Roman Catholic Maltese citizens not conducted in accordance with the Catholic rites), discussed by Mann, supra note 68, 12.

71 Bartels, supra note 69, 382.
A. Lotus and the spatial scope of EU law

De Baere and Ryngaert consider the reference to Poulsen and Diva Navigation (involving the application on the high seas of Regulation 3094/86, prohibiting the fishing of salmon and sea trout), rather than the language about ‘unlimited’ jurisdiction over airplanes in EU territory, as revealing the Court’s ‘real’ rationale behind the justification for the extraterritorial emissions charges. In Poulsen, the ECJ upheld the application of that environmental protection measure over the high seas through a similar

72 See Eyal Benvenisti, Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare? (GlobalTrust Working Paper Series No. 02/2013, 13, 2013), http://globaltrust.tau.ac.il/wp-content/uploads/2013/03/Legislating_for_Humanity_WPS-2-13-ISSN.pdf (CJEU’s notion of sovereignty “which does not recognize any limits to the prescriptive jurisdiction of the European states is incompatible with basic principles of international law on state jurisdiction.”)


74 1986 O.J. (L 288/1).
expansive claim of prescriptive jurisdiction.\textsuperscript{75} Accordingly, De Baere and Ryngaert suggest the CJEU in \textit{ATAA} was proposing a “novel ground of jurisdiction that aims at the protection of global public goods that are insufficiently protected by international solutions”, whereby

\begin{quote}
“\textit{when international agreements are not forthcoming, because some nations drag their feet... individual States or regional groupings such as the EU should be allowed to ‘go it alone’, provided that the global public goods which they protect are laid down in international instruments with a global reach (whether or not they are binding, such as the Kyoto Protocol), and provided that a territorial link with the regulator can be discerned.”}\textsuperscript{76}
\end{quote}

There is much more taking place than just compliance. That said, De Baere and Ryngaert perhaps track the facts of \textit{ATAA} too closely. By including the phrase “in particular”, the Court implies that the global public goods sought to be protected need not necessarily be the subject of ongoing negotiations for an international agreement. The EU has enforced purportedly universal rules “before the relevant international standards have entered into

\textsuperscript{75} Case C-286/90, Poulsen and Diva Navigation, 1992 ECR I-06019, ¶¶28-29, 34.

force, when the international standards are in a form that is not binding, and when they have been ratified by only a small number of states.”

Nor is the ATAA theory of jurisdiction restricted to furthering benign purposes, such as environmental protection or human rights. Scott claims that ATAA expresses a new theory of territorial jurisdiction she terms ‘territorial extension’, which she distinguishes from ‘extraterritoriality.’ On her definition, a measure is extraterritorial if it “imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state”, while territorial extension obtains when “application (depends) upon the existence of a relevant territorial connection, but where the relevant regulatory

77 Joanne Scott, Extraterritoriality and Territorial Extension in EU Law, 62 AM. J. COMP. L. 87, 112 (2014), citing Regulation 391/2009, 2009 O.J. (L 131/11) (hereinafter “Class Societies Regulation”), regulating Ship Inspection and Survey Organizations engaged in ensuring the safety of maritime transport by providing certificates attesting to a particular vessel’s seaworthiness and general compliance with relevant international maritime safety and marine pollution conventions. Such bodies can operate in the EU only if they have been recognized by the EU and authorized by a member state. The EU’s grant of recognition is conditional upon compliance worldwide with EU standards on ship safety and environmental protection, even on non-EU flagged ships outside of EU territory. However, the standards contained in the regulation and their scope of application exceed those set out in international instruments such as the Code on Recognized Organizations currently being negotiated within the framework of the International Maritime Organization. See id. 101-102, and 111-113.
determination will be shaped as a matter of law, by conduct or circumstances abroad.” \(^{78}\)

She argues that the EU only rarely asserts ‘extraterritorial jurisdiction’, but that it often resorts to territorial extension, finding examples in the regulatory domains of climate change, environment, maritime transport, air transport, financial services, and competition. \(^{79}\)

While De Baere, Ryngaert and Scott all consider ATAA as something totally new, it is actually reminiscent of the ‘Lotus principle’ enunciated in certain dicta by the Permanent Court of International Justice (PCIJ) in Lotus, the oldest and perhaps only full exposition of the concept of jurisdiction by an international court. \(^{80}\)

As is well known, the PCIJ held in Lotus that Turkey could exercise criminal jurisdiction over a French national in connection with a collision between a French steamship and a Turkish vessel in the high seas resulting in the deaths of eight Turkish nationals. The official grounds of the PCIJ decision relied upon the technical reason that a vessel constitutes part of the territory of its flag state. However, in an obiter discussion, the PCIJ laid out for the first time the distinction between enforcement and prescriptive jurisdiction, observing that whereas sovereign states were prohibited from exercising their enforcement jurisdiction upon the territory of any other state absent an affirmative rule of international law, the

\(^{78}\) Id. 89-90. Scott’s phrase “imposes obligations” is problematic. As will be demonstrated in section III(B), the examples she characterizes as extraterritorial often never actually impose obligations overseas per se.

\(^{79}\) Id. 95-96.

opposite applied for prescriptive jurisdiction—sovereign states are free to assert

prescriptive jurisdiction outside their territory in the absence of a prohibitive rule.\textsuperscript{81} As is well-known, however, the \textit{Lotus} principle is very widely disparaged. Mann deemed it “a most unfortunate and retrograde theory… (which) cannot claim to be good law”\textsuperscript{82}, while Judge Fitzmaurice in \textit{Barcelona Traction} read \textit{Lotus} down as stating a presumption in

\begin{quote}
\textit{Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.}

\textit{It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.”}
\end{quote}

\textsuperscript{81} The Case of S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, 18-19 (Sep. 27):

favor of the validity of claims of prescriptive jurisdiction.\textsuperscript{83} Ryngaert points to how jurisdictional principles in comparative criminal law have evolved to recognize a prohibition on extending a state’s prescriptive jurisdiction beyond its physical borders, in a “scathing indictment” of “the Lotus-like jurisdictional merry-go-round with States doing whatever they like…”\textsuperscript{84} Instead, “(u)nder the customary international law of jurisdiction, as historically developed, extraterritorial prescriptive jurisdiction is arguably prohibited in the absence of a permissive rule.”\textsuperscript{85}

Given the intensely controversial nature of Lotus-style assertions of prescriptive authority, one cannot expect it to be admitted openly.\textsuperscript{86} The CJEU is assisted in this regard by the fact that its judgments are written by committee in an oracular fashion masking each judge’s individual views. However, some clues to what transpires in at least some of the judges’ minds might be discerned from the opinions of the Advocates General, whose goal is to convince a majority of the bench. In this light, consider the recent opinion by Advocate General Jääskinen in \textit{UK v. Parliament and Council}, in which the United Kingdom sought the annulment of the cap on bankers bonuses imposed by Directive (EU) 2013/36. In its application, the UK urged the ‘compliance’ reading of Article 3(5) TEU, arguing that to “the extent that Article 94(1)(g) [of the Directive] is

\begin{itemize}
\item \textsuperscript{83} Separate Opinion of Judge Fitzmaurice, \textit{in} Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 105 (Feb. 5).
\item \textsuperscript{85} Ryngaert, \textit{supra} note 84, 35.
\item \textsuperscript{86} Benvenisti, \textit{supra} note 72, 12.
\end{itemize}
required to be applied to employees of institutions outside the EEA, it infringes Article 3(5) TEU and the principle of territoriality found in customary international law.”

Advocate General Jääskinen opined that the UK “would simply be wrong if it sought to claim that only territorial jurisdiction to legislate is permitted under international law”, because

“customary international law [does] not contain a general prohibition on extending legislative jurisdiction of a State (‘jurisdiction to prescribe’) beyond its own territory. In this respect the Opinion of Advocate General Darmon in Wood Pulp remains current today. There he noted that ‘even though, for other reasons, the question has been asked ‘is the Lotus still sailing’’, that judgment can be relied on in the determination of a State’s or other comparable subject’s jurisdiction to prescribe, in other words to subject facts and conduct to the scope of application of its legislation, in contradistinction with the jurisdiction to enforce its power in any form in the territory of another State.”

87 Case C-507/13, United Kingdom v. Parliament and Council, Application of United Kingdom, 6th plea (Sep. 20, 2013). The UK withdrew its application before the CJEU rendered judgment.


Advocate General Jääskinen then dismissed the UK’s argument saying “there can be no violation of Article 3(5) TEU because no such principle of international law against extraterritoriality… exists.” Thus, the compliance reading might indeed be correct in understanding the provisions as primarily mandating compliance with international law. The catch, however, is that the notion of ‘international law’ to be complied with is a unique one that might strike even its proponents as slightly preposterous.90

There is however one way the CJEU’s claim of a geographically unbounded prescriptive jurisdiction differs from Lotus. The Lotus principle implies a singularly positivistic vision of international law, where states are by default free to assert prescriptive jurisdiction outside their territory because as creators of international law, restrictions on their freedom of action cannot be presumed. The law is not a seamless web so States can do as they like where there are holes. The PCIJ emphasized that the lack of a general prohibition against the assertion of prescriptive jurisdiction outside state territory was only a contingent feature of the then state of affairs at international law which could and indeed should be limited by the creation of new rules, either by treaty or custom.91 However, because it lacks any claim to an organic existence of its own, however, the EU cannot create law, but is itself a creature of law. Instead, the prescriptive jurisdiction claimed in ATAA is not so much a residue of the primordial soup

90 Both Advocates General Darmon and Jääskinen betray some half-heartedness by even asking whether Lotus was ‘still sailing’, and the CJEU in ATAA cited Lotus only in support of a technical point about the law of the sea. Case 366/10, Air Transport Association of America, ¶104.

91 Lotus, 9.
of powers existing prior to international law, but an entitlement itself created and recognized under it.

In this light, consider the opinion by Advocate General Cruz Villalón in *Salemink*, issued three months before the ATAA decision, which went out of its way to present an unnecessary argument about sovereignty. *Salemink* involved a Dutch worker on an oil rig in the continental shelf adjacent to the Netherlands, who had moved his primary address to Spain. Upon returning to dry land, he discovered his lack of residence in the Netherlands rendered him no longer eligible for Dutch invalidity benefits, and therefore brought suit alleging a violation of his EU freedom of establishment. The issue was whether EU fundamental freedoms applied on an oil rig located on the Dutch continental shelf. The Advocate General presented the Court with two options: (1) an ‘easy’ option, holding under established rules of EU law that EU fundamental freedoms apply even if that work was carried out outside member state territory if it had a sufficiently close connection to the member state; and (2) an “innovative” option, offering the Court an opportunity to explain whether the continental shelf counted as member state territory, and the scope of the member state’s EU law obligations there.92

He proceeded to make the following arguments, which merit close reading:

“44. As a physical space under the sovereignty of a State, the concept of territory covers territorial space as such and also airspace and maritime space. In all cases it consists of areas, recognised by international law, where each State exercises exclusive sovereignty, although these areas do

---

not represent the full extent of the domain in which States can exercise their sovereign powers, since international law also recognises the existence of extraterritorial State powers.

45. Just as the area in which State sovereignty can be exercised does not necessarily coincide exactly with the extent of its territory, neither do the competences of a State which derive from sovereignty always exhibit the exclusivity and absolute nature which are characteristic of sovereign power. On the contrary, precisely as a result of the progressive legal regulation of the international community, the exercise of sovereignty is subject to variations in intensity, becoming less pronounced as the connection between the area of exercise and the territorial base of the State becomes weaker.

…

47. If State sovereignty over territorial sea is already restricted in the way I have indicated, the characteristic powers of a sovereign State diminish progressively the further one travels, so to speak, from ‘dry land’, such powers becoming reduced in the case of the continental shelf, as we shall go on to see in more detail, to a collection of ‘sovereign rights’ intended to be used for particular purposes, and diluted to the mere exercise of certain freedoms upon reaching the high seas, where any claim to sovereignty is quite simply invalid.”
Advocate General Cruz Villalón then deduced that since EU competences are conferred by the member states, “EU law will apply to whatever extent the Member States exercise official authority in the areas of competence conferred on the Union”, subject to limitations specified in the Treaties.93

In the subsequent judgment, the CJEU chose the ‘innovative’ route, ruling that “(s)ince a Member State has sovereignty over the continental shelf adjacent to it—albeit functional and limited sovereignty—work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU law.”94 This makes sense of the ATAA judgment, which, as I argued, claims a right rather than a mere ability to prescribe rules in a territorially unbounded fashion.95 Moreover, note the subtle sleight of hand: whereas EU member states have certain dissipating powers to do things on the high seas, the EU claims a similarly dissipating authority there—it governs those member states actions.

B. Power, authority, and the nature of ‘territorial extension’

In this subsection, I explore analytically the difference between power and authority to demonstrate that territorial extension entails not just the exercise of power extraterritorially, but a claim of authority to make rules governing conduct overseas. The nature of authority is the most intractable controversy in all political philosophy, so I

93 Id. ¶¶54-55.

94 Id. ¶35.

95 Six of the judges in Salemink also sat in ATAA: Skouris, Tizzano, Cunha Rodriguez, Lenaerts, Bonichot, and Silva de la Puerta.
cannot hope but to scratch the surface here. However, something of it is captured in the famous distinction between being ‘obliged’ to hand over one’s money when threatened by a gunman, and being ‘obligated’ to do so when commanded by an official.96 This distinction is important because the subsequent step in my argument is to say that claims of political authority potentially give rise to the full spectrum of perfect human rights duties, including obligations to protect and fulfil. The notion of authority concerned here is political authority, in turn a species of practical authority, or “authority with power to require action.”97 Perforce, authority is a kind of power—“a kind of capability to do something.”98 However, authority also has a normative element—it is a “normative power to change another’s normative relations.”99

96 See H.L.A. HART, THE CONCEPT OF LAW, 2nd ed., Ch. 2 (1994). For a similar strategy for illustrating the difference between power and authority, see EVAN FOX-DECENT, SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY 3 (2011). For the purposes of this paper, I will use the term ‘power’ to include both legitimate and illegitimate forms of coercion. See c.f. HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 93 (1968) (arguing for distinctions between ‘authority’, ‘coercion by force’, and ‘persuasion through arguments’.) While these distinctions are indeed important, nothing turns upon it for the purposes of this paper.

97 Joseph Raz, Authority and Justification, 14 PHIL. & PUB. AFF. 3, 3 (1985).


99 Scott J. Shapiro, Authority, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 398 (Jules Coleman, Kenneth Einar Himma, & Scott J. Shapiro eds., 2002), cited at Roughan, supra note 98, 19. See also JOSEPH RAZ, THE AUTHORITY OF LAW 17-18 (1979) (defining normative power as the ability to change “protected
In this regard, political authority differs from ‘soft power’ (wielded, say, by private corporations and standard-setting organizations) on the one hand, and nonpractical forms of authority such as ‘epistemic’ authority wielded by experts, on the other. Although there is significant overlap in practice (experts may be appointed to high office, or private standards given force of law by legislation), the pronouncements, standards, and recommendations of the latter categories cannot in and of themselves amount to practical, much less political authority, because no one is obligated to act accordingly.\(^\text{100}\) An exercise of ordinary power, be it influence, manipulation, or outright coercion, does not include a claim that the subject has a moral duty to obey. In contrast, an assertion of practical, or political authority does.\(^\text{101}\) Compliance with standards set by reasons”, comprising “both a reason for an action and an (exclusionary) reason for disregarding reasons against it.” The homely example Raz uses for illustrating this point is of a father overruling a mother’s instruction to their son to wear a certain coat when going out at night. The fact the father is able to do so, means he has authority.)


\(^{101}\) See Raz, \textit{supra} note 97, 5 (“The exercise of coercive or any other form of power is no exercise of authority unless it includes an appeal to compliance by the persons subject to the authority.”) and 6 (“Having de facto authority is not just having an ability to influence people. It is coupled with a claim that those people are bound to obey.”) See generally Roughan, \textit{supra} note 98, chapter 2,\textit{ citing} Robert Paul Wolff, \textit{The
informal or private organizations can only be for prudential reasons: one may lose access to certain markets if one declines to comply. Thus, one may be ‘obliged’, but never ‘obligated’ to follow those standards. As for epistemic authority, there may be good reason to follow expert advice. However, the expected response to epistemic authority is deference, implying choice, and therefore an equality of status between the giver and the recipient. As Roughan notes, “my doctor knows far more about medicine than I do, but decisions about my treatment are ultimately mine to make, not hers.”

The imperatives of epistemic authority are of belief—an expert’s credentials provide reasons to believe her advice is wise. In contrast, subjects of practical authorities (e.g. children vis-à-vis their parents) are expected not to defer, but obey. Of course, the making of commands is only one aspect of governing—authorities also create/modify legal rights and duties, i.e. by making rules governing the drafting of contracts, wills, etc. Authority is therefore

\*

Conflict between Authority and Autonomy, in Joseph Raz, Authority 20 (1990)

(authority as “the right command and correlatively the right to be obeyed.”); G.E.M. Anscombe, On the Source of the Authority of the State, 20 Ratio 1 (1978) (“a regular right to be obeyed in a domain of decision.”)

102 Roughan, supra note 98, 20.

103 Id. 109 (“Authority relationships exist where one institution or person is subject to the authority of another, while relations of deference can arise between institutions and persons who are not in authority relations, not indeed in any sort of hierarchical relationship. Deference entails that an agent who defers has the capacity and the normative power to decide for herself; she simply chooses not to. This seems to be a necessary characteristic of deference to distinguish it from obedience: if you have legitimate authority over me, my obligation is to obey, not to defer.”)
the *entitlement* not just to tell you what to do, but also how you must go about in order to do the things you want to do.

With this definition in mind, it is beyond doubt that the EU as the world’s largest trading bloc wields considerable power in the wider world. Bradford describes a “Brussels Effect” whereby EU regulatory regimes set global standards in a way resulting in a ‘race to the top’ rather than to the bottom.104 There are extensive political science literatures on ‘Normative Power Europe’105 and ‘Market Power Europe’,106 both of which agree the EU wields tremendous power in the world even as they disagree about the kinds of power and the motivations behind it. The question at hand, however, is whether something more than power is involved. Contrast the EU’s method of asserting jurisdiction with the WTO Appellate Body’s jurisprudence on Process and Production Methods (‘PPM’) measures, which have been upheld in principle by the Appellate Body, even if the actual measures so far have been struck down for lack of consultation with

---


other WTO Members.\textsuperscript{107} PPMs raise the issue of extraterritoriality because by focusing on the manufacturing process, they purportedly regulate production in the exporting state rather than the effects of products in the importing state.\textsuperscript{108} Scott asserts that the technique of ‘territorial extension’ is supported by the PPM jurisprudence of the WTO Appellate Body, thereby suggesting it is either an accepted theory of territorial jurisdiction, or one on the way to acceptance.\textsuperscript{109}

I disagree. There is a subtle but crucial difference between PPMs and territorial extension. The typical PPM aims to achieve its objective by placing conditions upon the entry of the product into the jurisdiction; e.g. by banning it, taxing it, excluding it from


\textsuperscript{108} See Bartels, supra note 69, 381-86; Laurens Ankersmit, Jessica Lawrence, and Gareth Davies, \textit{Diverging EU and WTO perspectives on extraterritorial process regulation}, 21 \textsc{Minn. J. Int’l L.} 14, 14 (2012).

\textsuperscript{109} Scott, supra note 77, 115-16, citing \textit{Shrimp/Turtle}. See also Ryngaert, supra note 84, 97-98.
public procurement schemes, *etc.*

It therefore never actually *demands* any specific conduct outside the regulating state: all it does is to regulate conduct within the borders in a manner incentivizing, inducing, or manipulating individuals into certain behavior overseas. As an importer, such measures may interfere—perhaps severely—in your individual *purposes*, but they do not affect your *purposiveness*; i.e. your ability to set your own ends. By all means carry on as you please, if you think yourself ‘tough enough’ to survive despite being subjected to additional tariffs or denied access to the regulating state’s markets, *etc*. Thus, such measures never take anything away from you—they merely “change the world in which you act”, rendering your means unsuitable for the purposes you originally intended.

Whereas the regulating state wields *power* over the producer extraterritorially *via* the PPM, it does so by exercising its *authority*—i.e. its entitlement to create legal rights and duties—only within its borders, as it is unquestionably entitled to do in the absence of contrary agreement. The same logic inspires the effects doctrine. As a producer, you can do whatever you want outside the borders—you are perfectly entitled to your pound of flesh. The only objection is to direct, substantial, and reasonably foreseeable effects within the borders. You are thus obliged, rather than obligated to amend your conduct overseas.

---

110 Gareth Davies, *International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism*, 13 GERMAN L.J. 1203, 1208 (2012). Note, it is entirely possible a PPM might be devised directly mandating conduct abroad.

111 *ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 41 (2010).
Territorial extension, exemplified by ATAA, is different. The emissions trading scheme did not incentivize, manipulate or induce the foreign airplanes to offset their overseas carbon emissions—it demanded it. Of course, the Emissions Trading Directive was not enforced while the airplanes were overflying foreign territories or the high seas; it was entirely possible for the airplane operators to avoid application of the directive by choosing not to enter the EU. However, that is where the similarities with PPMs end.

The standard PPM assumes the form “If you x overseas, don’t come here.” In contrast, the Emissions Trading Directive, says “Now you’re here, you must x overseas.” Unlike PPMs, the jurisdictional hook in territorial extension is not activity within the EU’s borders, but presence. In ATAA, the airplanes were subject to the emissions trading scheme purely because they were located on EU territory. While the EU legislator is free to set the terms upon which commercial activity is carried on within EU borders, these ‘terms’ span the entire world.

Whereas the rationale behind PPMs is one of exclusion from territory—exclusion from selling within the borders or from participating in public procurement, etc—‘territorial extension’ includes extraterritorial conduct within the scope of the application of law. The directive was not an exclusionary tool like a tariff or a denial of benefits such as would induce noncomplying producers to leave the market—the emissions trading scheme applied to foreign airplanes leaving the EU as well. This issue was specifically litigated and rejected by in ATAA: the Court dismissed the argument that the scheme was an exclusionary fuel tax in violation of the Open Skies Agreement,\(^\text{112}\) holding that by its very nature, the emissions trading scheme was not a tax, duty, fee or

charge imposed on the fuel load, but a ‘market-based measure’ which if used prudently might even turn a profit for the airline operators. In short, territorial extension (at least as applied in ATAA) implies a command, enforceable upon establishing presence in the EU, which obligates individuals, foreign and domestic, regardless of borders.

An early and perceptive discussion of comparative US and EU ‘paradigms’ of jurisdiction to adjudicate in private disputes observes that “in the domestic U.S. paradigm, the role of boundaries is one of delimitation. The power of a court goes to the state’s boundaries, not beyond them… By contrast, the role of state boundaries in the international European paradigm is one of allocation: the locus of an event or a party defines the place that has jurisdiction in a multilateral fashion.” The archetype of ‘American’ extraterritoriality is the effects doctrine, so called because one need not set foot within the jurisdiction in order to produce effects in it. However, precisely this is anathema to the CJEU, whose ‘allocation’ paradigm does not allow prescriptive jurisdiction unless one is present within the territory.

113 Case C-366/10, Air Transport Association, ¶¶142-45.


115 See e.g. United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interest Bill, Nov. 27, 1979, 21 ILM 847, 849-50 (“… U.S. courts claim subject matter jurisdiction over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations.”).
The most striking examples of this are found in the CJEU’s jurisprudence on extraterritorial competition control. Unlike the General Court, the CJEU has never relied upon the effects doctrine in competition cases. The leading case is Wood Pulp I, which involved an international cartel coordinating the prices of wood pulp being sold into the EU. The Court rejected pleas by both the Commission and the Advocate General for the adoption of the effects doctrine, holding instead that the “decisive factor… is the place where the [anti-competitive agreement] is implemented.”

This contradicts the rule in Commune de Champagne—if the EU’s ability to create legal effects really stopped at its borders, the appropriate response in Wood Pulp I would have been to regulate the quarterly price announcements occurring inside EU territory, not the cartel activity outside. To reiterate, the implementation test is about presence, not activity: the activity of announcing prices is of no concern to the regulator, but the presence established in order to implement such activity is: presence qua implementation is enough to control behavior all over the world. A clear example of this was ICI v. Commission, where the CJEU adopted the ‘single economic entity’ test whereby the presence of one undertaking in the EU sufficed to extend jurisdiction over affiliates and subsidiaries all over the world, such that conduct restricting competition within the

---


117 Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, Ahlström Osakeyhtiö and Others v. Commission, 1988 ECR 5193, ¶16 (Wood Pulp I). See generally ¶¶11-18. Note, the prohibition against anticompetitive agreements requires such agreements to have as its object or effect the restriction of competition within the Common Market. However, effects are a necessary criterion for merger regulation, not a basis for jurisdiction. Id. ¶2.

common market because of the activities of subsidiaries could be imputed to the parent companies. Again, the logic of the assertion of jurisdiction in these cases is of transitory presence in EU giving rise to authority to prescribe rules for conduct all over the world.

All this may have something to do with the EU’s unique history and structure. Beginning with *Van Gend en Loos*¹¹⁹, where the CJEU held the member states had “limited their sovereign rights, albeit within limited fields” thereby giving rise to a new order of international law, the running theme behind the development of EU law—direct effect and supremacy, harmonization,¹²⁰ *etc*—has been the breaking down of borders and the ‘pooling of sovereignty’ in favor of transnational legal solutions.¹²¹ Perhaps the “EU’s purposive, explicitly evangelical, and law-based identity… gives it an institutional bias towards substantive policy goals, and away from respect for constitutional boundaries, which more traditionally constituted states, and their representatives in the WTO adjudicatory bodies, may not entirely welcome or entirely comprehend.”¹²²


¹²⁰ *See respectively Case 26/62, Van Gend en Loos; Case 6/64, Costa v. ENEL, 1964 ECR 585; Case 8/74, Procureur du Roi v. Dassonville, 1974 ECR 837; Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 ECR 649.*

¹²¹ *See Opinion of Advocate General Wahl, Case C-270/13, Haralambidis v. Calogero Casili, ECLI:EU:C:2014:1358, ¶49 (June 5, 2014) (“… the Communities were founded with the very aim of overcoming the times of ‘Blut und Boden’.”)*

¹²² *Ankersmit et al, supra note 108, 94.*
These considerations reveal a unique dimension to ‘territorial extension.’ Whereas territorial states induce events in the external world through influence or manipulation, territorial extension (as I define it\textsuperscript{123}) involves direct government. For this reason, I modify Scott’s definition to one involving not just an exercise of power, but a claim of authority. The Emissions Trading Directive changed the legal position of the airline operators regarding the emission of carbon over foreign territory and the high seas. The airlines were commanded to offset them, and although they could wait until they entered EU territory for the obedience to be enforced, it was expected they would obey. Territorial extension doesn’t just affect conduct abroad: it governs it.

This redefinition invalidates Scott’s claim that territorial extension measures are not ‘extraterritorial’ on the basis that there is some territorial connection with the regulating state. For a measure to be ‘extraterritorial’, what matters is not whether there is some territorial connection, whether it is ‘defined by something located or occurring abroad’ per Bartels, or even whether it is intended to affect persons or conduct overseas.\textsuperscript{124} PPMs or sanctions bills explicitly defined by conduct or events overseas are in principle identical to agricultural subsidies for domestic farmers—they simply affect people abroad. They cannot be distinguished on the basis of their ‘focus’ or ‘solicitude’—an agricultural subsidies bill is carefully calculated by teams of government economists and statisticians to erode the comparative advantage of foreign farmers. The

\textsuperscript{123} Numerous of the examples provided by Scott would operate on the same ‘exclusionary’ power-based logic of the typical PPM. \textit{See } e.g. the Class Societies Regulation discussed \textit{supra} note 76.

\textsuperscript{124} \textit{See} \textsc{Werner Meng, Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht} 86 (1995).
real controversy about PPMs is not whether they regulate extraterritorial activity,\textsuperscript{125} but whether they upset a bargain where state parties agreed to open up their domestic markets to each other except in certain specified instances.\textsuperscript{126}

\textsuperscript{125} Ankersmit \textit{et al}, supra note 108, 24 (because PPMs merely “incentivize, but do not mandate, certain behavior in other states, it is not clear to what extent they should be considered truly extraterritorial.”); \textsc{Jason Potts}, \textsc{The Legality of PPMs Under the GATT}, 5-6 (2008) (“… it is unclear how a PPM measure (or any other measure implemented through a government’s legitimate authority) can be said to “infringe” upon the national sovereignty of its trading partners. If the implementation of PPM-based policy restricts access to a particular market, then it remains within the authority of the foreign jurisdiction to decide whether or not it wants to access that market. Policies that restrict market access are viable instruments under international law precisely because they don’t infringe upon national sovereignty.”), https://www.iisd.org/pdf/2008/ppms_gatt.pdf.

\textsuperscript{126} \textit{Shrimp/Turtle}, ¶159 (“The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members… so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.”) \textit{Nicaragua}, I.C.J. 14, ¶138 (“A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation.”), and ¶253 (“Trade is not a duty of a State under general international law but may only be a duty imposed by a treaty.”) (Judge Oda, dissenting opinion).
PLEASE DO NOT CITE OR CIRCULATE

Instead, for a measure to be properly extraterritorial, it must govern persons abroad by creating or modifying their legal rights and duties.\textsuperscript{127} By this token, the Emissions Trading Directive is emphatically extraterritorial, as is much of the EU’s competition and financial regulation. This also means the rule in Commune de Champagne—that the EU cannot create legal effects outside the territory of the EU—is simply wrong.

IV. AUTHORITY AND HUMAN RIGHTS DUTIES

If EU law claims a geographically unbounded authority to prescribe rules, then it has perfect and enforceable duties to protect the human rights of distant strangers affected thereby. Human rights both constrain and justify political authority. This might be uncontroversial on its own, but it is also important to my argument that human rights duties arise only from relations of authority, and never from relations of mere power, no matter how overwhelming. Such an account might strike readers as incredibly austere and restrictive of human rights protections. I disagree about the latter charge. It is much easier for a political institution to find itself claiming authority than one might think, while power-based theories either unjustifiably curtail the scope of extraterritorial human rights duties by making them contingent on capability, or by restricting most ‘positive duties’ to controlled territory.

\textsuperscript{127} See Mann, supra note 68, 13 (“Jurisdiction is concerned with the State’s right of regulation or, in the incomparably pithy language of Mr. Justice Holmes, with the right “to apply the law to the acts of men.””), citing Wedding v. Mayler, 192 U.S. 573, 584 (1904); Central Railroad v. Jersey City, 209 U.S. 473, 479 (1908).
My argument takes two possible routes. The first, which I mention in passing, is an EU law argument proceeding from the principle of consistency and coherence in Article 21(3) TEU. The second, my main concern, proceeds directly from international human rights law, and claims that human rights jurisdiction arises wherever a political institution asserts political authority.

A. The Article 21(3) TEU principle of consistency/coherence

To recall section I, the principle of consistency or coherence blurs the line between the EU’s external and internal policies: the Lisbon Treaty “[singles] out consistency as the guiding principle for EU action abroad and at home”, and “consistency of EU action is as important internally as externally.”128 Consistency is understood as the mere “absence of contradictions, whereas coherence refers to positive connections”129,

128 Ester Herlin-Karnell, The EU as a Promoter of Values and the European Global Project, in THE EUROPEAN UNION’S SHAPING OF THE INTERNATIONAL LEGAL ORDER 89, 97 (Dmitry Kochenov & Fabian Amtenbrink eds., 2014). See also Marise Cremona, Coherence in European Union foreign relations Law, in EUROPEAN FOREIGN POLICY: LEGAL AND POLITICAL PERSPECTIVES 55, 77 (Panos Koutrakos ed., 2011). Note, ‘coherence’ does not appear in the English language version of the Treaty of Lisbon, which speaks only of ‘consistency’. However, the same concept is rendered in German as Kohärenz, in French as cohérence, and in Spanish as coherencia. The Dutch, Swedish and Danish versions use samenhang, samstämmighet, and samenhæng. See Leonhard den Hertog & Simon Stroß, Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term, 18 EUR. FOREIGN AFF. REV. 373, 375 (2013).

129 GEERT DE BAERE, CONSTITUTIONAL PRINCIPLES OF EU EXTERNAL RELATIONS 251 (2008). See also Cremona, supra note 128, 77; Christian Tietje, The
such that ‘consistency’ is about not tripping over each other’s toes, while ‘coherence’
evokes the idea of ‘joined-up governance’.

Hertog and Stroß find it the principle of consistency/coherence not “well
substantiated [as a] constitutional principle of EU law”, and that the “case law of the
[CJEU] explicitly dealing with the principle is scarce and lacks concretization.” In a
discussion of the CJEU’s jurisprudence on ‘vertical’ consistency—i.e. between member
states and the EU—Herlin-Karnell and Konstantinidis try to identify why this might be the case. In their estimation, the CJEU’s consistency jurisprudence is neither

“value-driven, nor does it forge a constitutional interpretative tool in the
Dworkinian sense of consistency as integrity. It is instead tilting towards
a ‘constitutional diktat’ based on the methodical application of coercive
cstitutional principles to justify EU competence and ensure the
maximum effectiveness of EU law... It is thus argued that the CJEU’s
notion of consistency may sometimes rely on an abstract reasoning which
itself lacks consistency of strategy. In conclusion, the CJEU’s
interpretation of consistency requires adherence to a line of judgment and

---

Concept of Coherence in the TEU and the CFSP, 2 EUR. FOREIGN AFF. REV. 211, 212
(1997); Pascal Gauttier, Horizontal Coherence and the External Competences of the

130 Hertog & Stroß, supra note 128, 378.
A thin, pragmatic conception about efficiency maximization is indeed incapable of giving much legal guidance. However, realizing that the EU asserts not just power but also authority in the wider world requires consistency/coherence to be seen in a different light. Given that EU law is founded upon political values\textsuperscript{132} rather than an imagined community, whatever reasons animate and justify the authority of EU acts within EU territory should govern its exercise outside it. One may object that exercises of EU authority outside EU territory cannot be subject to the same conditions as those taking place within EU territory. Article 3(1) TEU specifies the EU’s purpose as to “promote peace, its values and the well-being of its peoples”, thereby presumably committing it to EU citizens in a way it isn’t to distant strangers. This objection is unsupportable. Everything turns upon the meaning of “its peoples.” If and to the extent the EU asserts authority over distant strangers, those distant strangers become part of the EU’s legal community.

B. An authority-based theory of human rights jurisdiction

As described in section II(A), states/IOs bear responsibility only for the protection of human rights within their ‘state jurisdiction.’ In the following paragraphs I argue this term cannot be understood in terms of capability or control over territory, but


\textsuperscript{132} Article 2 TEU.
only in terms of a political institution’s claims of political authority over persons. The best interpretation of human rights practice—also accounting for the law on state/IO responsibility, and general jurisdiction as listed at section II(B)-(C)—is provided by understanding human rights jurisdiction as arising from authority, rather than as a manifestation of power. Once again, the difference is between affecting and governing individuals—human rights jurisdiction over (and thus duties towards) individuals obtains only if the political institution concerned can be described as governing them. I rely for three reasons upon the case-law of the Strasbourg Court, rather than of other bodies. Firstly, because Article 6(2) TEU requires the EU to accede to the ECHR, and Article 6(3) TEU provides the ECHR will constitute general principles of EU law alongside the “constitutional traditions common to the Member States”, the ECHR jurisprudence will be influential as a manner of thinking of the scope of the EU provisions. There is, I submit, a distinctly European human rights tradition. Secondly, the ECHR jurisprudence is far more developed than any of its counterparts. Finally, the ECHR jurisprudence is essentially right.

It is important to note that the following argument proceeds from de facto, as opposed to de jure authority. A serial confusion of these two undermines much of the current scholarship on extraterritorial human rights duties. De jure authority pertains to the sense in which one says that acts by officials belonging to institutions governed by a legal framework are carried out with authority. It is therefore is a combination of two analytically separate issues: ‘authority to perform acts’, and ‘authority over persons’.  

133 Bartels, supra note 11, 1077.

134 Raz, supra note 99, 3, 19. See also Fox-Decent, supra note 96, 90-91 (defining ‘de facto sovereignty’ as the “brute ability to govern through effective
In contrast, *de facto* authority consists solely of authority over persons—it need not be *valid* in terms of its pedigree. A judge who issues an injunction improperly does so without legal authorization, but nonetheless exercises authority over you—you are bound by it until it is discharged. However, despite having no legal authorization, she acts *as if she does*. It is in this sense we say *ultra vires* acts are nevertheless carried out ‘under color of law.’ As Raz notes,

“... the notion of a mere *de facto* authority (i.e., one that exercises power over its subjects, but lacks the right to it) involves that of legitimacy. What makes mere *de facto* authorities different from people or groups who exert naked power (e.g. through terrorizing a population or manipulating it) is that mere *de facto* authorities claim, and those who have naked power do not, to have a right to rule those subject to their power. They act, as I say, under the guise of legitimacy.”

135

1. Human rights duties and authority

---

135 Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1005 (2006) (internal citations omitted). *See* Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 168 (Jul. 20) (“… it is an established principle in the field of the law of international organisations that, but for the possibility of an act being *ultra vires*, the decision of an organ carries with it a *prima facie* presumption of validity.”)
Samantha Besson sets out an ‘authority-based’ theory of human rights jurisdiction, in that it relies upon a definition of human rights that “ties them to the exercise of political and legal authority.” For human rights duties, and therefore jurisdiction to obtain, “state agents [must] exercise some normative power with a claim to legitimacy, even if that claim ends up not being justified.” While Besson posits an interest-based theory of human rights, I prefer a choice-based account whose founding premise is that as rational persons, human beings have an innate right to set their own ends. They must never be made entirely subject to the choice of another, in the manner of things. Besson’s approach and mine produce identical results, with one difference: the choice-based approach provides a more robust, nonconsequentialist defense of self-determination.

According to the authority-based theory, human rights are above all a set of claim-rights held by all human beings, implying the designation of corresponding duties on the part of others. (Under an interest-based theory, the purpose of such duties would

136 Besson, supra note 26, 861.

137 Id. 866.

138 Although Besson’s theory of human rights is ‘interest’-, rather than ‘protected choice’-based, it is “modified or complemented by reference to considerations of equal moral-political status in a given political community.” Samantha Besson, Human rights and democracy in a global context: decoupling and recoupling, 4 ETHICS & GLOBAL POLITICS 19, 22 (2011). For further discussion see text to notes 191-92.

139 See generally Arthur Ripstein, Authority and Coercion, 32 PHIL. & PUB. AFFS. 2 (2004), developed in Ripstein, supra note 111, chapter 2 on the “The Innate Right of Humanity”.
be to prevent standard threats to basic human interests to security and subsistence.140 Under a choice-based variant, such duties arise from the imperative of individual autonomy.) I have a moral obligation not to assault you, and you have a moral obligation not to defraud me, etc. The securing of these rights however, cannot be done privately141 but requires the setting up of civil government to enforce them in a systematic fashion by creating positive law on the basis of each individual’s equal political status within the political community.142 Civil government administers our moral rights and duties for us

140 Samantha Besson, The allocation of anti-poverty rights duties, in POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM 408, 413-14 (Krista Nadakavukaren Schefer ed., 2014). See Henry Shue’s definition of basic rights as “(1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats.” HENRY SHUE, BASIC RIGHTS 1 (2d ed. 1980).

141 Besson, supra note 140, 420. Under Grotian, Hobbesian, and Lockean interest-based accounts of rights, private enforcement of justice is impossible or inconvenient in the state of nature because difficult to coordinate—human beings from time to time act incompetently or in bad faith. Under Kantian choice-based theories, the problem is deeper, because “(e)ach person is entitled to act on his own judgment… not in the sense that each can act in bad faith, but because there is nothing else on which anyone could act.” Ripstein, supra note 139, 29. See generally Ripstein, supra note 111, chapter 6 “Three Defects in the State of Nature”.

142 Besson, supra note 140, 414.
and on our behalf, akin to a trustee administering property for a beneficiary with the beneficiary’s interests in mind.\(^\text{143}\)

An account of the fiduciary nature of political authority proceeding from a choice-based conception of rights is found in Ripstein’s authoritative exposition of the *Doctrine of Right*, where Kant theorized the Roman private law categories of tort/property, contract, and status. Because humans as rational beings have the right to choose their own ends, all human interactions can be assimilated under three kinds of rights: (1) innate rights to one’s body and acquired rights to the things necessary to pursue your ends unilaterally (sounding in delict and property remedies), (2) rights to the deeds of others you agree to do for each other in collaborative pursuit of your ends (sounding in contractual remedies), and (3) rights to persons ‘akin’ to things (sounding in fiduciary remedies). But, because each individual has the right to set their own ends, anyone who claims status to decide for others under the third category of interactions must do so to advance the principal’s ends, not their own. Thus, one may legitimately be subject to the decisions of others, but never to their *choices*. The same fiduciary principles govern political authority and differentiate it from domination,\(^\text{144}\) and human

\(^{143}\) *See e.g.* JOSEPH RAZ, MORALITY OF FREEDOM 5 (1986) ([Governments] do not have a legitimate interest of their own. The only interest a government is entitled to pursue is that of its subjects.”)

\(^{144}\) *See* Ripstein, *supra* note 139, 17-18; Ripstein, *supra* note 111, chapter 7 “Public Right I: Giving Laws to Ourselves”. Note there is a very important difference between a private fiduciary and the state as a ‘public’ fiduciary. The state cannot act through individual unilateral decisions, but only through law made, interpreted, and enforced publicly as an expression of an ‘omnilateral’ will.
rights ground these principles in law. As such, individuals have only “residual or subsidiary duties.”\textsuperscript{145} The corollary implication is that we are morally obligated to comply with the orders of authorities, because they are, in a sense, laws we give ourselves.\textsuperscript{146}

My depiction of human rights as grounds of impeachment is reminiscent of Christian Reus-Smit’s characterization of them as “power mediators”, which “materially weak actors can invoke to alter the power relationship between themselves and materially preponderant political agents or institutions, usually sovereign states.”\textsuperscript{147} However, my

---

\textsuperscript{145} Besson, \textit{supra} note 140, 417. \textit{See also} Charles R. Beitz, \textit{The Idea of Human Rights} 13-15, 109 (2009) (arguing that ‘(h)uman rights apply in the first instance to the political institutions of states…’); James W. Nickel, \textit{Making Sense of Human Rights} 38 (2d ed. 2007.) (arguing that the primary addressees of human rights are the world’s governments.)

\textsuperscript{146} This argument is developed in Fox-Decent, \textit{supra} note 96, chapter 5: “The Duty to Obey the Law”, particularly at 128-35 (arguing that a fiduciary conception of political authority avoids the commitment to anarchy that follows from contractarianism). For prominent examples of contractual theories of authority leading to anarchy, see A. John Simmons, \textit{Moral Principles and Political Obligations} (1979); Raz, \textit{supra} note 99, chapter 12: “The Obligation to Obey the Law” (arguing that no general obligation to obey the law exists); Joseph Raz, \textit{The Obligation to Obey: Revision and Tradition}, 1 Notre Dame J.L. Ethics & Pub. Pol’y 139 (1984) (arguing that the obligation to obey the law can arise only if voluntarily undertaken).

\textsuperscript{147} Christian Reus-Smit, \textit{Human rights in a global ecumene}, 87 Int’l Aff. 1205, 1210 (2011) (observing that while the conception of human rights as power mediators is
emphasis on authority rather than power, and use of the language of trusteeship also emphasizes that human rights *justify* political authority, and that they are different from other rights. Human rights do not *directly* govern private relations like causes of action in tort or contract. Whereas ‘ordinary’ moral rights give rise to corresponding duties on the part of other individuals in their capacity as individuals, human rights give rise to corresponding duties on the part of other individuals only in their collective capacity as the community. Such duties therefore belong to political institutions *in their own right*, and not derivatively on behalf of individuals in the manner of a mediating predominant in the international relations literature, it has generally been ignored in philosophical studies of human rights.)

148 Reus-Smit agrees on this point. *Id.*, at 1211.

149 Besson, *supra* note 26, 867. For an argument regarding extraterritorial human rights obligations conflating them with ordinary moral rights, see Vassilis P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 Mich. J. Int’l L. 129 (2014) (the concept of ‘effective control’ over territory with respect to extraterritorial human rights jurisdiction, pertains (1) to illegal conduct directly attributable to the state outside its territory, and (2) to state fault in failing to demonstrate ‘due diligence’ in preventing and punishing wrongdoing by third parties outside the state.) Tzevelekos’s suggestions are problematic because (1) the Strasbourg Court is adamant that its test for jurisdiction is not and has never been one of attribution or state responsibility (*see* text at notes 203-08), and (2) because Tzevelekos ties ‘due diligence’ to negligence, a tortious obligation. *See id.* 155.
mechanism. Recall how it perennially has to be explained that the right to food is not a right to be fed, but that food be available and accessible? The same is true of civil and political rights. The human right against torture is not a right not to be tortured per se—it is a right to a reasonable social guarantee against being tortured. If your neighbor should take you into her dungeon and waterboard you, that will not in and of itself constitute a human rights violation. Instead, it is a crime or a tort, and should be posited, interpreted, and enforced accordingly—a human rights violation obtains only if this does not happen. Human rights do not respond to private moral failures—to be a victim of human rights violation, your entire community must fail you.

Such an account of human rights is not uncontroversial, its main rivals being those by John Rawls and Charles Beitz depicting human rights as reasons for interference in other political communities. In characterizing human rights thus, these theories tend to limit ‘true’ human rights to rights against the most egregious conduct such as genocide, and deny socio-economic rights, women’s rights, rights to political participation, and ‘minor’ civil and political rights (e.g. the right against self-

---


151 See e.g. JOHN RAWLS, LAW OF PEOPLES: WITH, THE IDEA OF PUBLIC REASON REVISITED 79 (2001) (§10.2: “Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy.”); Beitz, supra note 145, 8 (human rights practice “consists of a set of norms that regulate the behavior of states together with a set of modes or strategies of action for which violations of the norms may count as reasons.”)
incrimination) constitute ‘human rights’ proper, even though they make up a great deal of the practice. In contrast, the authority-based theory avoids these difficulties by designating the protection of equal status within political communities as the primary point and purpose of human rights. “Human rights protect those interests tied to equal political membership and whose disrespect would be tantamount to treating them as outsiders… [they] work as political irritants and mechanisms of gradual inclusion that lead to the extension of the political franchise and in some cases of citizenship itself to new subjects in the community.” Moreover, while the Beitz/Rawls accounts focus on international relations and thereby paint human rights primarily as tools of international politics, the authority-based theory illuminates their importance at the domestic level as law, itself tremendously valuable. Human rights forbid political institutions from

---


153 Besson, supra note 138, 23.


treated the human beings they assert *de facto* political authority over as *de jure* outsiders. They may not be heard to disclaim their responsibility on municipal law grounds. The ‘supply-side’ of authority is irrelevant.

An easy mistake is to think the authority-based theory allows political institutions to perpetrate human rights violations as long as they do so under the radar of the law. The misconception confuses ‘authority over persons’ with ‘authority to perform actions.’ As stated earlier, it is the former that constitutes a necessary and sufficient condition for human rights jurisdiction and duties. The British government, for instance, cannot evade its human rights duties by operating a secret extra-legal torture chamber under the Palace of Westminster. If the role of government is to coordinate each individual’s moral rights and duties vis-à-vis each other, then a violation of these rights by the public trustee is itself a public failure, for which human rights provide legal grounds of impeachment.

The authority-based account therefore situates human rights neatly within the liberal trinity of the rule of law and democracy, as expressed in Article 21 TEU. More appealingly, it provides a picture of these three values as part of an integrated, self-supporting whole, rather than as incompatible goods to be traded off against each other. Great discomfort, however, lies in that it rejects a central tenet of the human rights substance, has a certain authority and normative force… the critical leverage provided by legal authority can be of real significance, especially in the long run.”
movement: that individuals have human rights purely by virtue of being human.\textsuperscript{156}

Instead, human rights do depend upon the possession of a particular status—of being a subject of authority. Both Besson and I rely heavily on Hannah Arendt’s famous essay\textsuperscript{157} where she argued that membership of a political community gives individuals the crucial right to have rights, and that human beings are ‘naked’ outside of the state.\textsuperscript{158} As we shall see, this is a central tenet of the European human rights tradition.\textsuperscript{159} What I call ‘Arendt’s loophole’ obtains when the individual never came within the scope of a duty-bearer’s authority in the first place.

2. The practice of human rights

The substantial correctness of the authority-based theory can be demonstrated by comparing how well its claims fit with the actual practice of human rights. Its rejection of private human rights duties is reflected in the vast bulk of constitutional rights practice denying direct horizontality of human rights against private, nonpolitical actors,


\textsuperscript{157} See Besson, \textit{supra} note 140, 418; generally Besson, \textit{supra} note 138.


\textsuperscript{159} For a magisterial exposition of the importance of Arendtian themes throughout the history of the ECHR, see Ed Bates, \textit{The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights} 171-389 (2010) (detailing the ECHR’s origins in a ‘collective pact against totalitarianism.’)
preferring instead ‘indirect’ application through the private or criminal law.\textsuperscript{160} An instructive case is South Africa, where the Interim Constitution of 1996 was initially interpreted to prohibit direct horizontality in \textit{Du Plessis v. De Klerk}.\textsuperscript{161} Section 8(2) of the final Constitution was intended to overrule this decision, providing for direct horizontal effect by stipulating that a “provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” The Constitutional Court at first relied upon this provision to find certain rights directly horizontally effective,\textsuperscript{162} but has since returned almost exclusively to the model of indirect effect, using instead

\textsuperscript{160} See e.g. Shelley v. Kraemer, 334 U.S. 1 (1948) (although private individuals are free to include racially restrictive covenants in property deeds, Fourteenth Amendment Equal Protection clause forbids governments from enforcing them); New York Times v. Sullivan, 376 U.S. 254 (1964) (First Amendment protects newspapers from being sued for libel in state courts for making false defamatory statements about official conduct of public officials, unless made with malice or reckless disregard for truth.); Retail, Wholesale, & Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 33 D.L.R. 174 (Can.) (rights in Canadian Charter of Fundamental Rights and Freedoms do not invalidate rules of judge-made common law at issue in private litigation. Courts must nevertheless to apply and develop the principles of the common law in a manner consistent with Charter values, thereby leaving some room for the indirect horizontal effect of Charter rights.)

\textsuperscript{161} 1996 (3) SA (CC) 850 (S. Afr.).

\textsuperscript{162} See Khumalo v. Holomisa 2002 (5) SA 401 (CC), ¶33 (S. Afr.) (“the right to freedom of expression is of direct horizontal application.”)
Section 39(2) to interpret legislation and the common law in “the spirit, purport and objects of the Bill of Rights.”

The authority-based theory also explains the failure of the argument for extraterritorial obligations to protect based on the *Trail Smelter/Corfu Channel* principle. The harms regulated by that principle are tortious in nature—they pertain to ordinary moral rights and duties. Human rights duties, on the other hand, are *political* duties arising only from relationships of authority and obedience. The distinction between the two categories of duties is reflected in the profound difference in the remedies awarded. Tortious remedies, under which a defendant is *liable* to a plaintiff in damages, are meant to represent the fact that though the plaintiff may have lost something, she never lost her *right* to it. The plaintiff and the defendant were strangers to one another, and would have remained strangers, had it not been for the defendant’s tort. A damages award seeks to restore this original estrangement. In contrast, remedies for breaches of fiduciary obligations presume a profound identity between the trustee and the beneficiary, such


that the trustee is also *accountable*, and not just *liable* as if to a stranger. This reasoning animates Article 41 ECHR, which provides for ‘just satisfaction’ to victims of human rights violation only if the internal law of the defendant state concerned allows only for partial reparation, and even then, only “if necessary.” Human rights are not like causes of action in tort—they are not, and cannot be remedied in the same way. This point was perhaps best illustrated by Nugent JA, who, speaking in the context of South African constitutional law, held that

> “Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights in my view the norm of accountability

(“…on general principles a trustee ought to conduct the business of the trust in the same manner than an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation to the trustee.”), *aff’d* (1883) 9 App. Cas. 1 (HL) 19 (appeal taken from Eng.) (U.K.).

166 *See* Golder v. United Kingdom (Merits and Just Satisfaction), 1 Eur. H.R. Rep. 524 (1979), ¶46 (holding it “not necessary to afford the applicant any just satisfaction other than that resulting from the finding of a violation of his rights.”); Dudgeon v. United Kingdom (Art. 50), App. No. 7525/76, 5 Eur. H.R. Rep. 573 (1983), ¶18 (holding that changes in Northern Irish legislation prompted by the merits decision constituted sufficient remedy, obviating the need for pecuniary damages); Case of OAO Neftyanaya Kompaniya YUKOS v. Russia (Just Satisfaction), App. No. 14902/04, July 31, 2014 (awarding EUR 1.9 billion for pecuniary damages, but holding unanimously that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company).
If human rights duties arise from relations of political authority and obedience, it follows that the fundamental criterion for human rights jurisdiction—the threshold to be met before a state/IO can have human rights obligations with respect to an individual—is a relationship of authority between the state/IO and the putative rights-bearer. Seeing it this way explains both the gap between general jurisdiction and human rights jurisdiction the Strasbourg Court failed to grasp in Banković, and the primary identification of human rights jurisdiction with territory in the Namibia and Wall opinions, mirrored in the Strasbourg Court’s continuing insistence that Article 1 ECHR ‘jurisdiction’ is primarily territorial, with extraterritorial application obtaining in exceptional cases.\(^{169}\) Ideally,

\[^{167}\] Minister of Safety and Security v. Van Duivenboden, 2002 (6) SA (SCA) 431, ¶21 (S. Afr.). \*See also Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (constitutional damages unavailable where “any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages”, and even if so, if there are “any special factors counseling hesitation before authorizing a new kind of federal litigation.”)

\[^{168}\] For trenchant criticism of this holding, \*see Milanovic, supra note 27, 21-34.

governments make law only for their own citizens and residents—for which ‘territory’ serves merely as shorthand. Thus, their human rights jurisdiction normally covers only their territory. However, states/IOs obviously from time to time exceed these bounds, for instance when they assert authority pursuant to a Lotus-style exercise of prescriptive jurisdiction, or when they illegally occupy and administer foreign countries. Such de facto authority may be illegal and therefore lacking authorization, but must nevertheless be justified in the same way because it too is made under the guise of legitimacy. In such ‘exceptional’ situations, their human rights jurisdiction expands accordingly. Thus, the true measure of human rights jurisdiction is not the state/IO’s scope of authority under the rules of general jurisdiction at international law, but that claimed by the municipal legal order.

In the following paragraphs, I demonstrate that the authority-based theory of human rights jurisdiction is preferable to rival power-based ‘capability’ and ‘control’ theories advocated by other prominent scholars, both in terms of explanatory power, as well as its implications for the scope of human rights protections.

3. Capability

As is well known, Strasbourg jurisprudence on human rights jurisdiction took many turns after Banković, culminating in Al-Skeini, where the Court discarded many of the underpinnings of Banković; i.e. for Article 1 ECHR jurisdiction to obtain, (1) the

---

170 Besson, supra note 26, 875-77.

171 Id. 870. See also Cannizzaro, supra note 8, 1095; MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 56-57 (2009).
state party had to be able to protect all the rights specified in the Convention, rather than a “divided and tailored”\textsuperscript{172} version of it, and (2) the ECHR applied only within the \textit{espace juridique} of the Council of Europe because the Convention was intended by its drafters to benefit only Europeans.\textsuperscript{173} Instead, the Court held that human rights jurisdiction could obtain upon a showing of (1) state agent authority and control\textsuperscript{174} or (2) effective control over territory.\textsuperscript{175} It then went on to find, within category (1), that

“…following the removal from power of the Ba’ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.”\textsuperscript{176}

\textsuperscript{172} \textit{Id.} \textsuperscript{¶}137.

\textsuperscript{173} \textit{Id.} \textsuperscript{¶}142.

\textsuperscript{174} \textit{Id.} \textsuperscript{¶¶}133-37.

\textsuperscript{175} \textit{Id.} \textsuperscript{¶¶}138-40.

\textsuperscript{176} \textit{Id.} \textsuperscript{¶}149.
A prominent argument in favor of a ‘capability’ approach to human rights jurisdiction has been put forward by Yuval Shany, a member of the HRC, on grounds of an apparent mirroring of the HRC’s jurisprudence on human rights jurisdiction by the Strasbourg Court. In *Lopez Burgos v. Uruguay*, the HRC found “it would be unconscionable to… interpret responsibility under [the ICCPR] as to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.” This formula was adopted by the Strasbourg Court in the *Issa, Pad*, and *Isaak* line of cases, where it held (albeit *obiter
citation needed*

---


in *Issa*), that “article I of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”\textsuperscript{180} Finally, Shany invokes *General Comment No. 31*—the “most authoritative summary to date of the HRC’s position on extraterritorial application”\textsuperscript{181}—where the HRC held that

“[A] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”\textsuperscript{182}

According to Shany, the abovementioned passage in *Al-Skeini* incorporates this HRC principle into ECHR jurisprudence. In reading that passage, he observes that “(i)t is perhaps interesting to note that the Court did not explicitly base its decision in this dispositive paragraph on the belligerent occupation of Basra by the Coalition forces… or on the legal obligations that ensued from this particular state of affairs. It did, instead,

\begin{itemize}
\item \textsuperscript{180} *Issa*, ¶71.
\item \textsuperscript{181} Shany, supra note 177, 53.
\end{itemize}
emphasize that the UK substituted in a functional sense the authority of the local Iraqi
government. Put differently, the Court found that the UK was both capable and
particularly well situated to assume government responsibilities vis-à-vis the population
of Basra, including its obligations to protect their human rights.“183 (emphasis added)

If British governance in Southern Iraq was ‘capable’ or ‘well-suited’, one may
wonder if it is ever possible to be ‘incapable’ or ‘ill-suited.’ In the English Court of
Appeal, Brooke LJ described that proposition as “utterly unreal.”184 A better reading of
the passage indicates that uppermost in the Court’s mind was not the fact the Coalition
forces were ‘capable’ or ‘well-situated’ to exercise governmental powers, but that they
had actually done so: they ‘assumed’ public powers, and ‘exercised’ authority and
control over the victims. It was irrelevant whether they had the potential to do it well.
More obviously, the Al-Skeini formula is not the HRC’s “power and effective control”,
but “authority and control.”

Regarding theory, Shany denies the usual criticism that the capability approach
imposes human rights duties just because they can be imposed,185 countering instead that
feasibility is just the first criterion. In addition to being in a position where they are able
to do so, it must either be shown that (1) the impact of the obligation not being imposed
must be “direct, significant and foreseeable”, or (2) there must be a “legitimate
expectation” that the state in question will intervene, arising from “special legal

183 Shany, supra note 177, 60.

184 Al-Skeini and Ors, R (on the application of) v. Secretary of State for Defence
[2005] EWCA (Civ) 1609, ¶124, [2007] Q.B. 140 (Eng.).

185 Shany, supra note 177, 70.
relations” between the state and the individual involved.186 Additional criterion (1) is a requirement of urgency, which does indeed address the concern that human rights duties are imposed too lightly. Unfortunately, it does rather too well—the requirements of directness and significance reduces human rights obligations to humanitarian obligations, precluding less spectacular violations from redress. The capability theory is prone to wild fluctuations between too much and too little intervention.

The ‘special legal relationship’ in Shany’s additional criterion (2) is not a normative relationship, but one where the state is “particularly well-suited to protect that said individual.”187 It is, in effect, a higher capability threshold—a state must not only be capable of bearing extraterritorial human rights duties, but ‘particularly well-suited’. If it weren’t for Shany’s peculiar notion thereof, this might once again raise the concern that the amendments to the ‘capability’ theory were unduly restrictive of a state’s extraterritorial human rights duties. Moreover, Shany’s notion of ‘legitimate’ consists only of efficiency or ‘output’ legitimacy. As demonstrated earlier, human rights are deeply linked to political institutions and processes: a “key dimension of human rights and human rights duties that tends to be downplayed by overlooking their supply-side is the political dimension of human rights and the importance of egalitarian and hence democratic decision-making on those complex moral issues of allocation of human rights duties and responsibilities for human rights.”188 This then undermines output legitimacy, because reforms imposed from on high are unlikely to be internalized and may be abandoned lightly. Intervening purely on the basis of capability, even in urgent cases,

186 Id. 69-70.

187 Id. 69.

188 Besson, supra note 140, 430.
would ride roughshod over the self-determination of distant strangers. This does not mean such interventions are never permissible or even obligatory—all it means is that something more than capability is necessary. Thus, the quality of ‘legitimacy’ requires an account of normativity—it collapses into the authority-based theory.

In this regard, the ‘choice’-based theory of rights provides a more robust and nonconsequentialist justification of the importance of self-determination than interest-based theories. If the point of political authority is to help individuals comply better with their moral duties to one another, and thereby protect their rights qua important interests in security and subsistence, then self-determination can be overridden if the intervening institution really does provide better protection against standard threats to the urgent interests supposedly grounding rights. This, however, is contrary to our intuitions: few would consider another to have the right to make decisions for them purely on the basis of their being capable or well-suited to do so. Moreover, it is a central tenet of the law of occupation that sovereignty can never be alienated by military force, no matter how competent the occupant or incompetent the ousted government. 189 ‘Interest’ theories may attempt to account for this by postulating that successful interferences are highly unlikely, and ought therefore to be prohibited on a rule-utilitarian basis. 190 This,


190 An instrumentalist argument may be extrapolated from Raz’s ‘normal justification thesis’, postulating that the “normal way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him… if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.” Raz, supra note
however, sounds like a rationalization and may be empirically doubtful. Some occupying forces might genuinely be better at maintaining law and order than the indigenous government.

Besson tries to avoid this problem by constructing an interest in “equal political status” threatened by being treated as an outsider.¹⁹¹ It is unclear whether Besson intends the interest in equal political status to be a ‘basic’ right; i.e. fundamental and axiomatic. If she does, then her theory collapses into a choice-based theory. An interest in equal status is an interest in not being subject to the choice of another; i.e. a right to choose one’s own ends. The thing being protected is choice. This reading, however, is

¹⁹¹ Besson, supra note 138, 23. See Samantha Besson, The Morality of Conflict: Reasonable Disagreement and the Law 421-24 (2005). Besson sets out three schools of thought on the nature of rights as deriving from choice or ‘will’, interests, and status. She criticises choice theory because (1) “it does not allow discussion about rights in advance of determining who exactly is under the relevant duty”, and (2) it is unable to account for inalienability, because right-holders may ‘choose’ to waive their rights. Point (1) is not a problem but an advantage, because it explains why we take such trouble in assigning corresponding duties to specific persons rather than randomly, and actually bolsters our shared claim that human rights are inescapably relational. Regarding point (2), autonomy cannot be waived without self-contradiction. See Ripstein, supra note 111, 135-38 (slave contracts are incoherent because persons cannot by choice assume a duty to become a thing which, by definition, cannot have duties.) To this extent, autonomy is inalienable.
implausible: individuals are ‘interested’ in political equality because it ensures other material interests like security and subsistence.\textsuperscript{192} If so, the question remains—what if an occupying force is just better at providing security and subsistence?

This intuition can accounted for if rights are understood as guarantees of autonomy: “(a)lien control renders a people vulnerable to the will of another state or agency and undermines the ability of the dominated people’s institutions to govern and represent their members… Ultimately, alien control of a nation dominates the nation’s members as well as the nation’s collective legal personality.”\textsuperscript{193} An occupier who does not harm, or perhaps even advances the material interests of the inhabitants, nonetheless wrongs them formally. Its title remains forever defective.

\textit{4. Control}

In an exhaustive study of numerous human rights treaties (albeit with an emphasis on the ECHR and civil and political rights treaties), Marko Milanovic concludes that the term “jurisdiction” in human rights treaties is best understood as

\textsuperscript{192} Besson, \textit{supra} note 191, 423 (“Rights are founded on interests. Only interests of ultimate value can found rights; they are interests which are regarded as fundamental for the wellbeing of a person.”) She then argues such ‘interests of ultimate value’ can “extend to others’ interests and even to the common good in some cases” requiring “a lot of weighing and balancing… to be done before a right is identified…” This loosens the definition of ‘interest’ beyond usefulness.

\textsuperscript{193} Evan Fox-Decent \& Evan J. Criddle, \textit{The Fiduciary Constitution of Human Rights}, 15 LEG. THEORY 301, 333.
meaning “state control over territory, and perhaps individuals.” On this basis, Milanovic constructs a rule mirroring Bartels’ compliance reading: it deems ‘negative’ duties to respect to be territorially unlimited, while ‘positive’ duties to protect and fulfil are “limited to those areas that are under the state’s effective control.” The logic appears simple and elegant: Ought implies can. Human rights are ‘universal’, and it does not take much not to violate them. However, their protections must also be ‘effective’, which is difficult in the case of ‘positive’ obligations if one does not have a physical presence on the territory involved, or perhaps control over relevant persons.

Anticipating the authority-based theory of human rights jurisdiction, Milanovic argues that limiting human rights jurisdiction only to those instances where states act pursuant to some legal authorization “would open the door to abuse” by allowing them to get away with clandestine violations committed solely through brute power. Thus, while “an exercise of a legal power or authority by a state over an individual outside its territory would suffice to satisfy the jurisdictional threshold… limiting the personal model to such purported exercises of legal power… would be entirely arbitrary, and would only serve to undermine the rule of law by creating a perverse incentive for states to act outside their own legal system if they wish to violate human rights.” This is precisely the misunderstanding warned about earlier, of equating ‘authority’ with ‘authority to perform actions’. To reiterate, the normative ‘authority’-based theory of

---

194 Milanovic, supra note 27, 262.
195 Id. 263. See generally 209-227.
196 Id. 206-207.
197 Id. 207.
human rights jurisdiction relies solely upon ‘authority over persons’, not ‘authority to perform actions.’

A bigger problem however, concerns Milanovic’s distinction between the treatment of negative and positive duties. Milanovic mitigates this problem by claiming he is “not advocating a strict separation between negative and positive obligations… [but] a separation between those positive obligations which require control over territory in order to be effective… and those obligations whose effectiveness depends only on the State’s control over its own agents.”\(^{198}\) The prime example of such ‘exceptional’ positive duties are “prophylactic and procedural obligations” to investigate killings, justified on the grounds that (1) such obligations are closely connected to universally applicable negative duties, and (2) all that is required of the duty-bearer is control and knowledge of the actions of its own agents.\(^{199}\) A state “would not [have] an obligation with regard to an extraterritorial human rights violation in which its own agents did not participate at all, unless the act was committed in a territory under its effective control.”\(^{200}\) Attribution therefore becomes crucial—while Milanovic distinguishes between attribution and human rights jurisdiction and criticizes early Strasbourg cases for conflating them, prophylactic and procedural obligations to investigate constitute an exception where attribution is a prerequisite for jurisdiction.\(^{201}\)

\(^{198}\) Id. 215.

\(^{199}\) Id. 212-16.

\(^{200}\) Id. 217.

\(^{201}\) Id. 51-52. See generally 41-52 for discussion about the difference between human rights jurisdiction and state responsibility.
The untenability of this position is demonstrated by considering the recent Jaloud case, which involved a fatal shooting of an Iraqi by a Dutch soldier at a checkpoint manned by a Dutch battalion participating in the US- and UK-led military coalition, assisted by Iraqi troops under their command. As in Al-Skeini, it was not the shooting that was complained of, but the subsequent failure to investigate it. Human rights jurisdiction was made out by the fact the shooting occurred at a checkpoint operating under the authority and control of Dutch forces. It was acknowledged there were severe obstacles to being able to carry out such an investigation, with one concurring opinion criticizing the majority for not emphasizing that the problem was not the conduct of the Dutch soldiers, but that of the Dutch military courts.\textsuperscript{202}

The Court held “that the test for establishing the existence of ‘jurisdiction’ under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under general international law.”\textsuperscript{203} The point was driven home in Judge Spielmann’s concurring opinion, which castigated the majority for even mentioning the subject. Milanovic challenges this, stating that “attribution is an issue in every single case, Jaloud included. For a state to be responsible for any violation of the Convention, some conduct of a living, breathing human being has


Because control is the touchstone of his theory of human rights jurisdiction, Dutch jurisdiction could not have been activated if the acts were attributable to the UK, under whose orders its soldiers operated. True, the Court concluded they were not placed “at the disposal” of the UK or any other power, but what if it hadn’t? Could the Netherlands have been heard to say its soldiers were only following orders?

Once again, the pedigree, or chain or authorization is irrelevant—the ‘responsibility’ involved here is not causal, but managerial. It has nothing to do with the possible agency of the Netherlands, but everything to do with its role as an entity claiming public powers. It could legitimately have been expected of the Netherlands that a shooting occurring under its nose not go uninvestigated.


205 *Jaloud*, ¶151.

206 This was indeed the approach taken in *Behrami*, where France successfully denied jurisdiction because its actions in Kosovo were ultimately attributable to NATO. *Behrami v. France*, App. Nos. 71412/01, 78166/01, 45 Eur. H.R. Rep. 85 (2007). Milanovic rightly castigates this decision. See Marko Milanović & Tatjana Papić, *As Bad as it Gets: The European Court of Human Rights’s Behrami and Saramati Decision and General International Law*, 58 INT’L & COMP. L. Q. 267 (2009).

had indeed been at the disposal of the UK, the proper solution would have been to find that both the Netherlands’ and the UK’s human rights jurisdiction had arisen. The authority-based theory explains Jaloud without having to claim the Strasbourg judges were engaging in attribution analysis despite vehemently denying it.

Finally, Milanovic’s proposed rule is not just a suggestion but a prediction of how the Strasbourg Court will come to rule—it is “the only model of state jurisdiction and extraterritorial application that is stable in the long run.” Accordingly, we ought to find ECHR jurisprudence trending in two directions: (1) reversing the Banković result, and (2) refusing to find positive extraterritorial duties. Prediction (1) is wrong: Banković would still be decided the same way today, and this is unlikely to change. While there conception, whereby responsibility is understood in terms of norms governing what people are entitled to expect of each other. While the agency conception has an “ineliminable place in moral life”, it is “out of place in coercive social institutions”, which must adopt the reciprocity conception."

208 Human rights duties may obtain if it could be shown a state/ IO procured or abetted another state/IO’s human rights violations. See Special Rapporteur on the Right to Food, Addendum — Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Hum. Rts. Comm’n, UN Doc A/HRC/19/59/Add.5, ¶2.6 (Dec. 19, 2011), cited at Bartels, supra note 11, 1081. However, Article 18 ARS and Article 16 ARIO require an element of knowledge on the part of the coercing state not met by a mere failure to carry out due diligence.

209 Milanovic, supra note 27, 263.

was some reason to believe otherwise in the wake of the Issa, Pad, and Isaak line of cases, Al-Skeini, Behrami and Jaloud disavow them. Note in this regard the discussion of Issa in Al-Skeini: the Court suggested the Iraqi victims would have come under Turkey’s human rights jurisdiction if they had been taken by Turkish forces to a nearby cave before they were shot. This would be absurd under the control model: it makes no sense as a compromise between universality and effectiveness. It is eminently within one’s power not to shoot someone, regardless of where they are. However, the authority-based theory can explain it, because for the brief duration the individuals are being transported to the cave, one can say they were being governed.

Despite claiming to provide a principled account, Milanovic’s scheme is actually a deeply pragmatic compromise between competing policies of ‘universality’ and ‘effectiveness.’ ‘Universality’ is to be cherished because in a utopian world, human rights protections would be universally available. However, this good is limited by being balanced against the competing good of effectiveness, as an apology to

---


212 Al-Skeini, ¶136.

213 See id. chapter 2: “From Compromise to Principle.”

214 Id. 263 (describing his rule as providing “the benefit of clarity and predictability, [and] the best balance among its competitors between the conflicting demands of universality and effectiveness.”) and chapter 3: “Policy Behind the Rule”.

84
reality. Why universality must mean the extraterritorial application of human rights protections is not self-evident, but remains unexplained. Ultimately, the problem with Milanovic’s ‘control’ approach is that it has no theory of human rights. Although Milanovic conducts painstaking examinations of the object and purpose of various human rights treaties, this tends to involve mainly a discussion of ‘policy considerations’ of individual human rights treaties or the original intent of their particular drafters. In holding that no principles can be discerned except on a treaty-by-treaty basis, Milanovic’s approach resembles Beitz’s ‘practical’ conception of human rights, which makes “no assumption of a prior or independent layer of fundamental rights whose nature and content can be discovered independently of a consideration of the place of human rights in the international realm and its normative discourse and then used to interpret and

215 Id. 56.

216 Besson, supra note 26, 859-60.

217 See e.g. Milanovic, supra note 27, 5, 54, 119, 223, and 262. He sometimes refers to “the inherent dignity of all human beings and the universal nature of human rights”, but without elaboration. Id. 223. Compare with RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1978) (“I call a ‘policy’ that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community… I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.”)

criticize international doctrine.”219 A truly ‘principled’ approach would search for the point revealed by the entire practice itself and work from within it, rather than construct a new practice by importing one’s own intuitions. However, that is precisely what Milanovic’s ‘control’ theory ends up doing.220 Contrary to Milanovic, ‘negative’ duties to respect are not universal, but are subject to exactly the same jurisdictional rules as so-called ‘positive’ duties to protect and fulfil. It is untrue that negative duties are universal.221 Conversely, the automatic limitation of the ‘positive’ duty to protect to territory under effective control is also unwarranted. The specification of human rights duties can be done only in the concrete circumstances of each case; i.e. at the merits. Positive duties cannot be knocked out as a rule at the admissibility stage.

219 Beitz, supra note 145, 102-103.

220 See Cristina Lafont, Spinoza Lecture: Global Governance and Human Rights 15-16 (2012) (criticizing Beitz’s ‘practical’ theory of human rights by observing that “(s)ince the theoretical strategy consists in determining what human rights are through the indirect method of figuring out that they are for within a given practice, nothing can have a deeper impact on the answer to that question than the specific answer given to the prior question of what the overall practice is for… it is by understanding the point of the practice of human rights that we understand what human rights actually are.”)

221 Monica Hakimi, Toward a Legal Theory on the Responsibility to Protect, 39 Yale J. Int’l L. 247, 268-69 (2014) (explaining this legal fact by observing that duties to respect “balance the interest in protecting people from state intrusions against countervailing interests that justify such intrusion. The duty not to kill permits killings to protect innocents…”).
**5. Arendt’s loophole**

If the touchstone of human rights is authority, this implies that a state/IO has no human rights duties if it controls a foreign territory without any pretense of it. Besson acknowledges this when she observes that “military occupation with effective control over a territory need not imply jurisdiction, because it may lack the normative element of reason-giving and appeal for compliance. Another example may be effective personal control by troops without, however, any normative appeal besides the use of coercion.”

This fear may be overstated in light of the recent *Hassan* judgment, where the Strasbourg Court held that an Iraqi individual taken into British custody fell within the UK’s human rights jurisdiction, notwithstanding that this took place during the active hostilities phase of an international conflict. As demonstrated by *Hassan* and *Jaloud*, the Strasbourg Court has shown itself willing to take a generous yet principled view of what constitutes authority. Despite the events in the aforementioned cases occurring during active conflicts, the requirement of ‘authority over persons’ was fulfilled because the state party concerned did ‘tell the victims what to do’. Moreover, the reformulation of *Issa* in *Al-Skeini* should suffice to cover the problem of ‘black sites’ and the treatment of civilians during armed conflicts.

The ECHR jurisprudence shows a clear trend of attenuating the concept territorial control and sublimating it into personal control, starting with a requirement of effective control over a considerable tract of territory in *Loizidou*, and ending with

---

222 Besson, *supra* note 26, 877.

control over mere buildings in *Al-Jeddah* (a prison), *Jaloud* (a checkpoint), and *Medvedyev* (a ship). Discussing Öcalan, Issa, Al-Saddoon and Medvedyev, the Court observed in *Al-Skeini* that it “does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive is the exercise of physical power and control over the person in question.”

Besson interprets this as the Court realizing that “there is no such thing as ‘territorial jurisdiction’ strictly speaking… [but] merely personal control exercised through overall effective control over a given territory, whether on that state’s official territory or outside that official territory.” Indeed, it might be that it is not effective control that is necessary for authority, but authority that is necessary for effective control: controlling an area through brute power alone is impossibly exhausting, and a political institution greatly lightens its burden by claiming a moral obligation of compliance.

Nevertheless, the authority-based theory would not cover situations where it is impossible to locate even a scintilla of *de facto* authority: i.e. a pure Issa or Lopez Burgos situation, drone strikes, or the poisoning of an exiled ex-secret agent. As unsettling as this is, it is in perfect accordance with the result in *Banković*, which, to reiterate, would be decided the same way even today. As Arendt noted, the “paradox” of human rights is that the precise instant one becomes “a human being in general…

---

224 See *Al-Skeini*, ¶136.

225 Besson, supra note 26, 875-77. See also Milanovic, supra note 27, 127-28 (discussing the “collapse” of the “spatial” model of extraterritorial control into control over persons.)

226 See Raz, supra note 143, 26, 75-76.
representing nothing but [one’s] own absolutely unique individuality,” one loses all protections.\textsuperscript{227}

Perhaps we should ask what would be the use of proceeding under human rights in such a situation. A state engaging in Lopez Burgos-like conduct is unlikely to be dissuaded by a stern letter from a Special Rapporteur: “International reporting and monitoring mechanisms have to rely on the good will, self-criticism and cooperation of the states they scrutinise and the committees lack the capacity to sanction state parties for failing their reporting obligations; hence, the procedures function poorly as an accountability mechanism.”\textsuperscript{228} Perhaps ‘pragmatic jurisdiction’ over such cases might serve the useful purpose of publicizing and shaming the perpetrator. Then again, a regime which poisons ex-agents with radioactive sushi probably welcomes the salutary effect of such publicity upon others contemplating defection.

These are of course mere empirical speculations. Perhaps nothing \textit{material} is lost by calling a state a human rights violator if its agents murder foreign shepherds on the other side of the border. There is, however, the \textit{formal} objection that the language of human rights is insufficient. We ought not to call such atrocities human rights violations—as if they were on par with issuing parking tickets in disregard of the right against self-incrimination—but something much, much worse: crimes. The reason for the difference in the way we redress crimes and torts lies in the fact that crimes reflect not just isolated wrongful acts, but the \textit{making of a choice} to exempt oneself unilaterally from

\textsuperscript{227} Arendt, \textit{supra} note 158, 302.

\textsuperscript{228} Schaffer, \textit{supra} note 152, 15.
the law. However, law is not just compatible with, but necessary for freedom. Therefore, by choosing thus, the criminal makes “such a crime his rule,” and selects himself for punishment. Likewise, a state which acts without any guise of legitimacy manifests a will to exempt itself from the law. This is why the ‘effective control of territory’ grounds of jurisdiction should be understood as setting up a presumption that the putative duty-bearer exercises not just power but also authority over individuals there, which the state cannot be heard to deny. This “normative pull” is not for reasons of

229 ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 134 (“The criminal law serves primarily to protect and vindicate fair terms of interaction. Tort liability is appropriate when someone takes a risk with the security of others; criminal liability is reserved for the narrower class of cases in which someone chooses a risk (or result).”) See generally chapter 5 “Punishment and the Tort/Crime Distinction”. Strict liability crimes are very problematic under this theory.


232 Al-Skeini, ¶138-39 (“Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration.”) See Tzevelkos, supra note 149, 150 (2014) (“Although the factual element of effectiveness recedes, the question of control remains intact. The sole difference is that it now depends on a presumption that does not need to be tested…”)

233 Milanovic, supra note 27, 171, 263.
PLEASE DO NOT CITE OR CIRCULATE

a policy of expanding human rights protections as much as possible—there is no such policy. Instead, it is because a state which openly uses violence to dominate persons cannot is not progressing toward a rightful condition, but regressing into organized barbarism. Such relations are beyond salvage and the law must abolish them immediately. They therefore fall to be dealt with under the laws of war and international criminal law.

C. Territorial extension and human rights jurisdiction

Is EU territorial extension functionally equivalent to occupying and administering those foreign territories, including over individuals? In this section, I argue the answer is ‘yes’, but first canvas possible objections.

1. The objections

Arguments that it cannot can be formulated on Besson’s own terms. Alongside a relationship of de facto authority, she argues that the putative duty-bearer must exercise (1) “effective power” and “overall control” which (2) “should be effective and exercised, and not merely claimed”, as well as (3) “exercised over a large number of interdependent stakes, and not one time only and over a single matter only.”234 At first sight, these appear to preclude ‘territorial extension’ from giving rise to human rights jurisdiction. As demonstrated by the aftermath of the ATAA judgment itself, the EU’s pursuit of policy under territorial extension is sometimes humiliatingly ineffective.235 Secondly, territorial

234 Besson, supra note 26, 873.

235 Following the ATAA judgment in February 2012, 23 countries threatened retaliation such as litigation under the Chicago Convention, countermeasures such as reviewing or cancellation of air transport service agreements, etc. That year, President
extension is not a general mode of legislation, but limited to specific policy areas. Finally, human rights obligations must be limited by a criterion of feasibility in that the fulfillment of an obligation “has to be possible before it can be required (by reference to the ‘ought implies can’ principle).”\textsuperscript{236} One may argue that the imposition of human rights obligations upon the EU for the protection of the human rights of distant strangers is unreasonable, because leading to ‘obligation overload’, uninformed or incompetent decision-making, and the exacerbation of the original human rights violation.

Feasibility analysis pertains not to the question of human rights jurisdiction—i.e. to the \textit{existence} of human rights duties—but to whether there has been a meaningful


\textsuperscript{236} Besson, \textit{supra} note 26, 863. \textit{Also see} 869.
attempt to comply with them.\footnote{Id. 869. \textit{See} Lord Dyson MR, Essex Lecture 2014: The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One? 23 (Jan. 1, 2014) (“The question that the Court should ask is whether [the contracting state] is in a relationship of effective and purportedly legitimate authority over the individual (which is a threshold question). If it is, jurisdiction is engaged \textit{because} the state has constrained its freedom to act in the context of such relationships. The extent to which the state’s freedom is constrained by the Convention is \textit{then} determined by the degree to which the state can perform the functions identified by Judge Bonello [in his concurring opinion in \textit{Al-Skeini}].’’}, \footnote{\textit{Al-Skeini}, ¶166.} Under Strasbourg case-law, compliance with positive duties is an obligation of means rather than result, meaning the duty-bearer must demonstrate due diligence.\footnote{See Dyson, \textit{supra} note 233, 20.} It thus belongs at the merits, after both human rights jurisdiction and the scope of duties have been established. Feasibility may not be plead to deny the existence of human rights duties—be they ‘negative’ or ‘positive’—in advance of jurisdictional analysis. As Lord Dyson notes extrajudicially, “(i)f a Contracting State has taken over control of the civil administration of the foreign territory then its inability to control the situation is not a ticket out of the Convention.’’\footnote{239 See Dyson, \textit{supra} note 233, 20.} At the jurisdictional stage, ‘can’t’ implies ‘oughtn’t’: to the extent the putative duty-bearer can’t fulfill its human rights obligations, it oughtn’t have pretended to authority, and is precluded from complaining about the onerousness of its obligations. It may be excused if it really cannot fulfill its duties, but it bears the burden of proving it tried.

237 Id. 869. \textit{See} Lord Dyson MR, Essex Lecture 2014: The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One? 23 (Jan. 1, 2014) (“The question that the Court should ask is whether [the contracting state] is in a relationship of effective and purportedly legitimate authority over the individual (which is a threshold question). If it is, jurisdiction is engaged \textit{because} the state has constrained its freedom to act in the context of such relationships. The extent to which the state’s freedom is constrained by the Convention is \textit{then} determined by the degree to which the state can perform the functions identified by Judge Bonello [in his concurring opinion in \textit{Al-Skeini}].’’), https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf.
To be clear, I do not claim authority has nothing to do with power—it is, to reiterate, a kind of capability to do something. Some ability to achieve purposes is a necessary element of authority. \(^{240}\) While this is a matter for empirical study, it appears that a significant number of the EU’s claims of territorial extension achieve their intended results. It would be grossly premature to write off the EU’s ‘effective power’ on the basis of the aviation emissions debacle, which may be a result of factors peculiar to environmental regulation. \(^{241}\)

As discussed in section IV(B)(5), territorial control is but a metaphor for control over people: “Jurisdiction has territorial, temporal, and personal dimensions… but those are mere consequences of jurisdiction. When territorial jurisdiction is mentioned, it should not therefore be understood to mean that jurisdiction is territorial in nature, but only that territory is used as shorthand for the function of jurisdiction.” \(^{242}\) The aptness of the metaphor lies in the fact that it is not sporadic, but extends over an entire political community, in which its members have “equal and interdependent stakes.” \(^{243}\) It is not necessary to control all the stakes to have human rights duties—recall that Al-Skeini reversed the Banković rule that the ECHR could not be ‘divided and tailored’, holding instead that states had obligations to secure “the rights and freedoms… that are relevant to the situation of that individual.” \(^{244}\) All that is required is that the institution must wield


\(^{241}\) See Krisch, supra note 76, 15-20.

\(^{242}\) Besson, supra note 26, 864.

\(^{243}\) Id. 867.

\(^{244}\) Al-Skeini, ¶137.
authority and control over at least some aspect of the life of a political community. Accordingly, human rights jurisdiction over distant strangers may arise simply by creating legal effects upon them. It is instructive to remember that while the word ‘jurisdiction’ has come to be used interchangeably with ‘territory’ both in legal and in common parlance, it really means ‘speaking the law.’

2. Territorial extension in ECHR jurisprudence

There have so far been two cases before the Strasbourg Court where a violation of a human right was alleged purely on the basis of intangible extraterritorial ‘effects’: Ben El Mahi and Kovačić. Several authors remark that they seem irreconcilable.


246 Kovačić v. Slovenia (Admissibility Decision), Eur. Ct. H.R., App. Nos. 44574/98, 45133/98 and 48316/99 (Apr. 1, 2004). The applicants were eventually unsuccessful at the merits due to new information coming before the Court. I ignore White v. Sweden, Eur. Ct. H.R., App. No. 42435/02 (Sept. 19, 2006) and Von Hannover v. Germany, Eur. Ct. H.R., App. No. 42435/02 (June 24, 2006) because these were defamation cases where the libel arguably took place in the territory of the ECHR contracting party, even if the claimant was located in Mozambique or Monaco and Paris respectively. Moreover, the court did not consider the issue of jurisdiction in either of these cases.

If one bears in mind the distinctions between (1) power and authority, and (2) effects and legal effects, the confusion disappears.\textsuperscript{248}

\textit{Bel El Mahi} was brought by Moroccan citizens challenging the publication in Denmark of a book caricaturing the prophet Muhammad, while \textit{Kovačić} was brought by Croatian foreign currency depositors at a Zagreb branch of a Slovenian bank (the Ljubljana Bank) who were prevented from withdrawing their funds by certain Slovenian measures. In the former case, the Court denied jurisdiction by repeating the \textit{Banković} formula—i.e. Article 1 ECHR jurisdiction is the same as jurisdiction at international law, and outside of state territory, it obtained only in exceptional circumstances, namely, effective control of territory or authority and control over persons by state agents operating in that territory. In \textit{Kovačić}, however, the Court held that the matter fell within Slovenia’s human rights jurisdiction in terms of time, location, and person.

Regarding jurisdiction over location and time, it found the Slovenian legislation provided that

\begin{flushright}
\textsuperscript{248} See Maarten den Heijer and Rick Lawson, \textit{Extraterritorial Human Rights and the Concept of ‘Jurisdiction’}, in \textit{GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW} 153, 179 (Malcolm Langford \textit{et al.} eds., 2013) (examining a group of post-Banković cases including \textit{Kovačić}, concluding that “the factual exercise of authority appeared decisive in enlightening the State’s human rights obligations”, instead of ‘effective control.’)
\end{flushright}
“the Ljubljana Bank should retain, inter alia, liability in respect of the foreign-currency accounts that were not guaranteed by the Republic of Slovenia..., that is those not held with the banks on Slovenian territory. Moreover, it specified that the Ljubljana Bank was to maintain its links with its branches and subsidiaries based in the other Republics of the SFRY, while retaining the corresponding share of claims against the [former National Bank of Yugoslavia].

That provision also governed foreign-currency accounts opened with the Ljubljana Bank’s branches situated outside Slovenian territory, such as those held by the three applicants.”

Regarding jurisdiction *ratione personae*, it held that

“the Slovenian National Assembly introduced legislation addressing the issue of foreign-currency savings deposited with branches of Slovenian banks outside Slovenian territory... The applicants’ position as regards their foreign-currency savings deposited with the Zagreb Main Branch was and continues to be affected by that legislative measure. This being so, the Court finds that the acts of the Slovenian authorities continue to

---

249 The Ljubljana Bank had transferred its foreign currency accounts to the National Bank of Yugoslavia, upon which they were guaranteed by the Yugoslavian government. Beginning in 1998, those accounts were steadily frozen due to increasing hyperinflation.

250 Kovačić, ¶4(c).
*produce effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged.*”

Note that while the Court and the applicants appear to conflate the language of responsibility with jurisdiction, neither they nor the Court relied upon the principles of state responsibility and attribution. It was never claimed by the applicants or by the Court that the Ljubljana Bank was either controlled by, or acting upon the instruction of Slovenia, such that the freezing of the funds was somehow an act of the Slovenian state. Instead, the applicants’ complaint was that “Slovenia had chosen to interfere in [the Ljubljana Bank’s] private-law relationship to the detriment of non-Slovenian savers.”

Thus, the Slovenian legislation gave rise to human rights jurisdiction over persons in Croatia because it created *legal effects* there. The measures were examples of

---

251 *Id.* ¶5(c).

252 *Id.* ¶5(b).

253 See *c.f.* Daniel Augenstein and David Kinley, *When human rights responsibilities become duties: the extra-territorial obligations of states that bind corporations*, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Surya Deva & David Bilchitz eds., 2013) 271, 287-88. Augenstein and Kinley understand *Kovačić* to mean “what is decisive for the determination of extra-territorial human rights obligations to protect against corporate violations is not the state’s exercise of *de jure* authority, but its assertion of *de facto* power over the individual rights-holder. More specifically, it is an act or omission of the state in relation to a corporate actor that brings the individual under the power of the state and triggers corresponding obligations to protect his or her human rights against
territorial extension *par excellence*, in that they modified the legal rights and duties of persons in Croatia in a way that could only have been accomplished by a geographically unbounded claim of prescriptive jurisdiction. This distinguishes Kovačić from *Ben El Mahi*—the Moroccan applicants could not have claimed that Denmark, in allowing the publication of the offending material, had altered their legal situation. In contrast, the Slovenian legislation did not merely affect the claimants, but governed them. It regulated not just the Ljubljana Bank, but a number of other stakes in that political community—the Croatian depositors were legally barred from reclaiming their deposits *exactly as if* the measures had been enacted by Croatia. Slovenia therefore had positive duties towards them to prevent their rights from violation by the Ljubljana Bank, and its dereliction of them constituted a failure of its role as a public authority.

*Kovačić* is not the only example of the Court finding extraterritorial human rights jurisdiction despite a lack of boots on the ground concerned—in *Ilaşcu*, the Court held that despite having lost control over a portion of its territory to the Russian-supported Transdniestrian puppet government, Moldova still retained positive obligations to use all diplomatic, economic, judicial, and other measures within its ability to secure the ECHR rights of individuals held in the breakaway region. Again, the crucial factor

---

254 This fulfils the alternative standing requirement of ‘direct concern’ for judicial review.

was that Moldova claimed authority over the inhabitants of Transdniestria. To be sure, it is unclear whether the court would rule the same way today, in the light of the Al-Skeini formula of ‘effective control over territory’ or ‘authority and control over persons’.

There might not be much point in finding human rights jurisdiction where the state party is incapable of making good its claim to tell people what to do. On the other hand, a state claiming to be ‘in charge’ of certain persons ought to act like it—its pretensions, however risible, have to be justified nonetheless. To this extent, we must qualify Besson’s argument the authority must be actually exercised rather than merely claimed.

The projection of physical force overseas appears qualitatively different from projections of mere economic power, because it is difficult to control territory without making some claim to de facto authority over persons. The opposite is generally the case with projections of economic power. However, as demonstrated by Banković, physical power can be projected without any pretension to authority. Conversely, the EU asserts authority alongside its economic power through the method of territorial extension, without ever needing agents to set foot in foreign territory. One does not need boots on

paper: “‘jurisdiction’ means actual authority, that is to say the possibility of imposing the will of the state upon any person, whether exercised within the territory of the High Contracting Party or outside that territory.” However, he then adds that authority can come “in the form of the exercise of domination or effective influence through political, financial, military or other substantial support of a government of another State.” Cited approvingly by Gondek, supra note 171, 375-76. I agree if he means that authority can be wielded through puppets. However, if he means to equate authority with influence or support, I disagree.
foreign ground in order to create legal effects there. Distinctions between the various instrumentalities of authority are irrelevant. All that matters is that authority is asserted successfully.

In conclusion, where the EU asserts authority over the rest of the world, even if only by nonphysical methods, it acquires human rights duties to distant strangers who become the subjects of its authority, and therefore “its people.” The rule in Commune de Champagne should be overruled for the same reasons as the espace juridique doctrine. The EU’s human rights duties cover the entire complement of positive and negative obligations, their specific scope being determined by the particular facts of each case at the merits. The EU has obligations to protect the human rights of distant strangers, which the provisions anchor in EU law.

CONCLUSION

I have argued that the EU has perfect legal human rights obligations towards distant strangers, including obligations to protect. I did so by examining the obligation at EU law of compliance with international law, and demonstrating that it presupposes a notion of international law that allows for geographically unbounded prescriptive authority. I then relied upon international human rights law to argue that such authority to prescribe rules for distant strangers gives rise to human rights duties, from which

256 See Mann, supra note 68, 14 (while “the mere exercise of prescriptive jurisdiction, without any attempt at enforcement, will not normally have to pass the test of international law… it is not difficult to visualize circumstances in which the exercise of legislative jurisdiction plainly implies the likelihood of enforcement that foreign States are entitled to challenge its presence on the statute book.”)
positive duties to protect cannot be excluded \textit{a priori}. The provisions contain not just a compliance principle, but a “missionary principle”\textsuperscript{257} requiring the EU to advance its values, and indeed live them out in its doings in the wider world.

The ‘compliance’ reading of the provisions we began by examining, is reminiscent of Kagan’s infamous portrayal of the EU as particularly committed to consensus and multilateralism, while the US remained “mired in history, exercising power in the anarchic Hobbesian world where international laws and rules are unreliable and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might.”\textsuperscript{258} International law, according to Kagan’s caricature, is something invented by Europeans to make up for their lack of an army. As section III demonstrated, this is pure fantasy: the EU has a long tradition of unilateralism that can be reconciled with international law only with great difficulty. In another sense, however, Kagan was prescient in speculating that the “transmission of the European miracle to the rest of the world has become Europe’s new \textit{mission civilisatrice}”\textsuperscript{259}, and

\begin{flushleft}
\textsuperscript{257} This felicitous phrase was coined by Morten Broberg. \textit{See} Morten Broberg, \textit{What is the Direction for the EU’s Development Cooperation After Lisbon?—A Legal Examination}, 16 EUR. FOREIGN AFF. REV. 539, 539 (2011); Morten Broberg, \textit{Don’t Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union’s Development Policy}, in EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA, 181-198 (Paul James Cardwell ed., 2012).
\end{flushleft}

\begin{flushleft}
\textsuperscript{258} \textsc{Robert Kagan}, \textit{Power and Paradise: America and Europe in the New World Order} 3 (2003).
\end{flushleft}

\begin{flushleft}
\textsuperscript{259} \textit{Id.} 61.
\end{flushleft}
that “what many Europeans believe they have to offer the world [is] not power, but the transcendence of power.” Indeed, it offers not power, but authority.

This raises the issue of imperialism, a charge quickly dismissed even by those who acknowledge the EU’s unilateral promotion of its values in the world. Broberg remarks that “the EU’s promotion of its values is not merely aimed at the [African, Caribbean, and Pacific (‘ACP’)] countries, but at the outside world in general. Indeed, the countries that arguably have been under the strongest pressure to comply with the so-called European values are not the former colonies, but rather the EU’s Eastern European neighbours, which have been required to meet the so-called Copenhagen criteria (setting the political, economic and administrative standards for EU membership applicants) when applying for accession.” Manners similarly “dismiss(es) the accusation that the EU’s ‘norms’ are really cultural imperialism in disguise [because] the EU often finds itself at odds with other developed OECD states, such as the US and Japan, as in the case of the abolition of the death penalty.” Bradford for her part concludes that the “EU’s external regulatory agenda has… emerged as an inadvertent by-product of [an] internal goal rather than as a result of some conscious effort to engage in ‘regulatory imperialism’.” Broberg’s and Manners’ ‘its-not-imperialism-if-they’re-white’ argument is unsatisfying, while Bradford’s defense of a lack of specific intent ignores the

---

260 Id. 59-60.

261 Morten Broberg, From colonial power to human rights promoter: on the legal regulation of the European Union’s relations with the developing countries, 26 CAMBRIDGE REV. INT’L AFF. 675, 685 (2012).

262 Manners, supra note 105, 253.

263 Bradford, supra note 104, 6.
old chestnut about the British Empire having been acquired in “a fit of absence of mind.”264 They offer no answer to the challenge as to why “the EU [should] assume the role of legislator, fee collector, and lastly exclusive beneficiary of the revenues [of the emissions trading scheme], for the sake of the entire world.”265

In this light, recall the Salemink conception of EU authority as not territorially bounded, but spreading potentially all over the world in waves becoming weaker the further out one goes. This is a fair description of EU territorial extension, but a very peculiar one of sovereignty.266 Instead of borders, the world of Salemink has frontiers—


265 Andrea Gattini, Between Splendid Isolation and Tentative Imperialism: The EU’s Extension of its Emission Trading Scheme to International Aviation and the ECJ’s Judgment in the ATA Case, 61 INT’L & COMP. L. Q. 977, 983 (2012). Gattini believes the EU emissions trading scheme “can be understood only if one posits himself (sic) on a universal plane, in a supposed civitas mundi.”

266 Compare, say, Justice Story’s classic formulation in The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824).

“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.”
i.e. lines on the other side of which one claims authority that one cannot enforce (yet). It is actually a description of Empire, where the logic of power is “ordered in accordance with a system of circles and ellipses that radiate outwards from the centre to the periphery. The manner and the degree of self-obligation of imperial power also vary with these circles and ellipses. It is strongest in the centre, in the heartland of the empire, where it approximates to what it holds for the self-obligation of power in states. Towards the periphery, by contrast, it diminishes progressively, without thereby violating the functional principles of imperial order.”

This observation is mirrored by Ulrich Beck and Edgar Grande, who conceives of a state as “a permanent political association based directly on the formal power of command over those subject to it”, while an empire is a mode of exercising power that “permanently strives for control over non-subjects.”

Specifically, while a state “seeks to solve its security and welfare problems by

---


268 Beck & Grande, supra note 262, 56. See also JAN ZIELOŃKA, EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION, 2-3 (2006) (“the Union is anything but a state. It has no effective monopoly over the legitimate means of coercion. It has no clearly defined centre of authority. Its territory is not fixed. Its geographical, administrative, economic, and cultural borders diverge.”); MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 167 (2000) (the “fundamental characteristic of imperial sovereignty is that its space is always open...”).
establishing fixed borders,” an empire “solves them through variable borders and external expansion.”269 ‘Territorial extension’ indeed!

As discussed above, territorial extension obtains only in certain policy areas, outside of which the EU acts in the ordinary ‘sovereign’ style,270 indeed sometimes unconscionably so.271 This distinction then provides a principled basis for elaborating the law governing the EU’s role as a global human rights actor. In situations where only power is asserted extraterritorially, the EU’s legal obligations will be those of justice (i.e.

---

269 Beck & Grande, supra note 262, 57. See also Jan Zielonka, America and Europe: two contrasting or parallel empires? 4 J. POL. POWER 337, 345 (2011).

270 Scott, supra note 77, 95-96. Scott notes that Regulation (EU) 648/2012, 2012 O.J. (L 201/1) or the European Market Infrastructure Regulation (EMIR), in a rare instance among EU legislation, relies upon the effects doctrine theory of objective territorial jurisdiction. See Articles 4(1)(a)(iv) and 11(4) EMIR, imposing obligations upon parties to a derivatives contract that has direct, substantial, and foreseeable effects within the EU. See also Joanne Scott, The New EU “Extraterritoriality”, 51 COMM. MKT. L. REV. 1343 (2014) (exploring assertions of effects-based jurisdiction in recent EU financial legislation).

271 Consider the Frontex agency, which patrols the EU’s Mediterranean border. See Patrick Kingsley & Ian Traynor, EU borders chief says saving migrants' lives 'shouldn't be priority' for patrols, Guardian (Apr. 22, 2015), http://www.theguardian.com/world/2015/apr/22/eu-borders-chief-says-saving-migrants-lives-cannot-be-priority-for-patrols. This statement was made days after 800 refugees drowned in the Mediterranean while trying to reach Europe.
tort and contract) rather than human rights. In this regard, consider Benvenisti’s argument that sovereigns have other-regarding duties to distant strangers affected by their policies on the basis that the right to exclude such strangers from their land, resources and government is justifiable only if those individuals have “enough and as good left in common.” Fulfilment of such duties of justice may be ensured by the EU legal order

272 See Raz, supra note 143, 5 (“In its relations to those not subject to its authority, a government is in the same position as you or I or any corporation: that is, its actions must respect moral bounds which impose on us all certain responsibilities to others. But its duties to its subjects are more extensive.”); Lea Raible, Global Justice and Socio-Economic Rights in an Extraterritorial Context: Differences and Why They Matter, 21 (Social Justice Conference Paper No. 53, 2014) (“Analysing the removal of structural impediments in terms of global justice rather than human rights has several advantages. Importantly, it does not stretch the meaning of human rights and socioeconomic rights in particular so wide as to make them a useless category. Instead, it realigns socioeconomic rights with their background as relationships between right-holders and duty-bearing states. Utilising global justice thus removes pressure on the concept of human rights.”), http://www.socialjustice2014.org/wp-content/uploads/2013/12/53-Lea-Raible-%E2%80%98Global-Justice-and-Socioeconomic-Rights-in-an-Extraterritorial-Context-Differences-and-Why-They-Matter%E2%80%99.pdf.

273 Eyal Benvenisti, Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders, 107 AM. J. INT’L L. 295, at fn 87, 311 (2013), citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, §33 (C. B. Macpherson ed., 1980) (1690). Benvenisti characterizes these other-regarding duties are fiduciary in nature, on Grotian/Lockean modern natural law interest-based theories, while I suspect they are
by internal administrative procedures. Where the EU asserts authority however, it acquires direct human rights duties towards the distant strangers subjected to it. So, here are at last my answers to the two hypothetical situations: In the first scenario concerning agricultural subsidies, there are no human rights obligations toward affected distant farmers—only justice-duties in tort (by possible extension of the Trail Smelter/Corfu Channel principle) or contract (if there are any applicable trade agreements.) In the second supermarket merger scenario however, there may well be enforceable human

merely tortious. See also Evan J. Criddle, Standing for Human Rights Abroad, 100 CORNELL L.R. 269 (2015) (arguing, from Grotius’s theory of sovereigns as fiduciaries of humanity, that states have standing as ‘fiduciaries of necessity’ to take action to protect human rights from violations abroad, such competence being constrained and regulated by fiduciary principles).

rights obligations towards the distant farmers, because EU competition law possibly creates legal effects upon them.275

This raises the following question: is there a necessary and unavoidable connection between human rights and (particularly European) imperialism?276 On one hand, the imposition of human rights obligations, and socio-economic rights obligations in particular, might serve as a deterrent against imperial misadventures. The Netherlands might have been more circumspect had it known it would be accountable for events arising out of its manning a checkpoint in Iraq. On the other hand, human rights may obviously advance imperial agendas. In my example of the hypothetical merger, the imposition of human rights duties upon the EU towards Ruritanian farmers does not cure, but only exacerbates the infringement of Ruritania’s sovereignty/purposiveness.277 Then again, unilateral assertions of authority might be the only way to solve the coordination problems plaguing the provision of global public goods such as environmental

275 I say ‘might’, because both the Commission and the General Court use the effects doctrine to assert jurisdiction in extraterritorial competition cases, rather than the CJEU’s implementation doctrine.

276 See ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500-C. 1800, 200 (1995) (“We all internalize our own histories. The history of European empires in America is one of the reformulation of a constitutive element in European cultural and political thinking: the belief in the possibility of a universal human code of conduct.”)

277 Martti Koskenniemi, What Use for Sovereignty Today? 1 ASIAN J. INT’L L. 61, 70 (2011) (“Sovereignty articulates the hope of experiencing the thrill of having one’s life in one’s own hands.”)
protection. Is there then an obligation, however limited, to obey the commands of a de facto authority that I argued in section IV(B)(3) was forever defective?

For the most part, I have avoided these questions because they arise mainly when dealing with the EU’s competences to promote and advance human rights. My limited brief was to argue for the EU’s human rights obligations towards distant strangers, and for this reason, I consider the objections from sovereignty and self-determination inappropriate because interposed too late. While it would indeed trench upon Ruritanian sovereignty for the Commission to block a supermarket merger on the basis of violations of the human rights of Ruritanian coffee farmers, that objection should have been made before the EU assumed the role of competition regulator for the world. Of course, it is wildly impossible to imagine the Commission would ever block or even place conditions upon a merger for the sake of distant strangers. The most obvious

278 See Krisch, supra note 76, 3-5; Daniel Bodansky, What’s So Bad about Unilateral Action to Protect the Environment? 11 EUR. J. INT’L L. 339 (2000). For an interesting analogy from the private law, consider the Roman negotiorum gestio, governing situations where a person, completely unbidden, takes charge of and administers certain property or even mere affairs of another. While she is accountable to the principal for any losses (actio negotiorum gestorum directa), she is entitled to reasonable payment if her administration of the property results in a windfall (actio negotiorum gestorum contraria). REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 440-45 (1996).

hurdles lie in (1) the *Commune de Champagne* rule, and (2) the Commission’s and the General Court’s reliance upon the effects doctrine rather than the CJEU’s ‘implementation’ test. The Commission and General Court’s scrupulous adherence to the ‘sovereign’ model not only does not cure the problems of territorial extension, but exacerbates them. It is hypocritical for the EU effectively to govern distant strangers, but then deny any human rights obligations towards them, either by rationalizing measures on incorrect jurisdictional bases, or by imposing excessively onerous standing requirements. The burden is squarely upon the EU to demonstrate by what right it presumes to prescribe law for the entire world.