
SEPARATIST REGIMES AND POSITIVE HUMAN RIGHTS OBLIGATIONS[†]

*Amal Sethi**

Human rights are every human being's
entitlement by virtue of his humanity.

Mother Teresa¹

I. INTRODUCTION

In July 2000, somewhere in the Caucasus town of Tyrnauz, Russia failed to prevent the death of Vladimir Budayeva from a mudslide.² In the consequent hearing that took place, the European Court of Human Rights (European Court) held that Russia was in violation of the *European Convention of Human Rights* (ECHR) by failing to accord to its citizen the positive human right obligation, the right to life, which is protected by article 2 of ECHR.³

While the above incident happened in Tyrnauz,⁴ the debate that arises is whether Russia would still be in violation of the ECHR had this incident taken place in Chechnya or would Ukraine be liable for a parallel incident in 2014 Crimea.

The last couple of decades have seen a number of separatist movements be it in Kosovo, Serbia, Chechnya, South Sudan or Crimea. In many instances during a particular stage of the conflict, despite still being the *de jure* sovereign, States lose *de-facto* control over a certain part of

[†] This article reflects the position of the law as on 30 September 2016.

^{*} The author is an alumnus of Government Law College, Mumbai. He is currently a doctoral candidate at the University of Pennsylvania Law School. He can be contacted at amalsethi@outlook.com.

¹ Mother Teresa's Letter to the US Supreme Court on *Roe v. Wade*, *MIT Computer Science and Artificial Intelligence Laboratory*, available at http://groups.csail.mit.edu/mac/users/rauch/nvp/roe/mothertheresa_roe.html (last visited 30 September 2016).

² *Budayeva v. Russia* [2008] 15339/02 Council of Europe: European Court of Human Rights, paras 159 and 160.

³ *Ibid.*

⁴ *Budayeva v. Russia*, para 3.

their territory (henceforth for the sake of convenience such a situation will be referred to as the hypothetical situation). An example of the above would be – Country A has a part called X. X demands for independence and wants to separate from A. The result of this demand for independence is an intense separatist movement. In this separatist movement, A, despite being the *de jure* sovereign, has lost *de facto* control over X. At this moment the legal status of X *vis-à-vis* its recognition, membership of international organisations etc remains in a limbo. Given the increase in the number of such situations in the recent years, there exists a high probability of a situation where a State fails to satisfy the positive human rights obligations that it ought to accord to individuals in its territory, owing to its inability to exercise control over a portion of its territory. In these situations, when a State is not capable of meeting its responsibilities, fascinating issues for human rights law arise. The dilemma that we face is – Who is to be blamed?

In attempting to solve this dilemma, this article aims to delve into principles that run into the underlying tenets of international law such as jurisdiction, statehood and sovereignty. Part II of this article discusses the nature, scope and extent of States' positive human rights obligations. Part III of this article attempts to resolve the question- 'Who is to be blamed?' by proposing two theories. Part IV discusses the possibility of any extraterritorial liability for States in the hypothetical situation. Part V tests the proposed theories using the examples of Crimea and Guantanamo Bay. The article ends with concluding statements and this article's implications for the law of statehood and human rights.

II. OPERATION OF POSITIVE HUMAN RIGHTS OBLIGATIONS UNDER TREATIES⁵

A. *Human Rights and Positive Obligations*

Human rights are rights that are characterised by universality available to everyone and applicable everywhere.⁶ The primary responsibility for upholding them rests with the States, which extends over their whole territory.⁷ These human rights responsibilities of states are frequently characterised as negative and positive obligations.⁸ Negative obligations are those obligations that prohibit certain acts on the part of the State such as torture, genocide, slavery, etc.⁹ In contrast to negative obligations, which are ‘obligations to refrain from doing something’, the positive obligations are ‘obligations to do something’.¹⁰ These are obligations where States are compelled to act and to take suitable and reasonable steps to guarantee the people in their territory the effective

⁵ Even though it is a widely accepted opinion that all human rights fall within the umbrella of customary international law (*see* United Nations Human Rights: Office of the High Commissioner for Human Rights Official Statement, at <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx> (last visited 30 September 2016)) this article will consider it otherwise and confine itself to human rights guaranteed under treaties. The reason for this is that this article deals with positive human rights obligations which many critics believe are not a part of customary international law (*see* David Brown, Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles, (2010) 31 *Michigan Journal of International Law*, 821-853) as well as are not applicable in the absence of binding obligations (*see* Individual Rights, *Ayn Rand Lexicon*, available at http://aynrandlexicon.com/lexicon/individual_rights.html (last visited 30 September 2016)).

⁶ United Nations Human Rights: Office of the High Commissioner for Human Rights, ‘Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation’ (2006)1-31, available at <http://www.ohchr.org/Documents/Publications/FAQen.pdf> (last visited 30 September 2016).

⁷ General Assembly, ‘Report of Special Rapporteur on the Right to Food, Olivier De Schutter: Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements’ (A/HRC/19/59/Add.5, December 2011).

⁸ Francis G Jacobs and CA Whete, *The European Convention On Human Rights* (2nd edn Oxford University Press USA 1996) 126.

⁹ Joint Committee on Human Rights, ‘Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest’ (Vol 1 7th Report United Kingdom 2009), available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47i.pdf> (last visited 30 September 2016).

¹⁰ *Belgian Linguistic case* (No. 2) (1968) 1 EHRR 252.

realisation of particular human rights.¹¹ These steps may be either judicial, legislative or administrative.¹² Positive obligations protected by international instruments such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and ECHR extend to protection of life and physical integrity, private and family life, pluralism, the guarantee of economic, social and cultural right, promotion of equality and, the positive obligations arising from the procedural safeguards.¹³ The illustration of Vladimir Budayeva mentioned above is a perfect example of how States have a duty to provide positive human rights obligations (in this case protection of right to life) and a corresponding liability in cases of failure to provide or protect them.

*B. Scope of Application of Positive Obligations under Human Right Treaties*¹⁴

A characteristic of treaties in international law is that they generally provide for the scope of their applications without making a distinction between positive and negative human rights obligations. As a result, most human rights instruments contain clauses which provide for the extent to which State parties have obligations for each and every kind of right under the respective treaties. In turn, this section will highlight these general application clauses in treaties which apply without any prejudice to positive human rights obligations.

The various human rights treaties differ as to the requirements of jurisdiction or territory in order to define the scope of their application yet, in essence they are fundamentally similar.¹⁵ The ICCPR provides that each 'State party ... undertakes to respect and to ensure to all

¹¹ Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (1st edn Council of Europe 2007), No 7.

¹² *Vgt Verein Gegen Tierfabriken v. Switzerland* [2008] 32772/0228 Council of Europe: European Court of Human Rights, para 45 (The European Court refers therein to the State's obligation to pass domestic legislation).

¹³ *Ibid.*

¹⁴ See Oliver De Schutter, *International Human Rights Law* (1st edn Cambridge University Press New York 2010) 123 (For general discussion on the scope of human rights treaties).

¹⁵ Oliver De Schutter, *International Human Rights Law* (1st edn Cambridge University Press New York 2010) 123.

individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'.¹⁶ Similarly the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* states that each 'State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.¹⁷ Further, according to the *Convention on the Rights of Child*, 'State parties shall respect and ensure the rights set forth in the present convention to each child within its jurisdiction'.¹⁸ Even though the *International Covenant On Economic, Social and Cultural Rights* does not make any reference to jurisdictional competence or territory, the International Court of Justice (ICJ) in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* stated that the silence can be explained by the fact that the covenant guarantees rights which are primarily territorial in nature.¹⁹

In general, even the regional human rights instruments provide that they will impose obligations on States, which are owed to all persons under their jurisdiction.²⁰ The ECHR provides that the State parties shall secure to everyone within their jurisdiction the rights and freedoms recognised under the instrument.²¹ Additionally, even the *American Convention on Human Rights* states that the State parties undertake to respect the rights and freedoms recognised therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.²²

¹⁶ Article 2(1), *International Covenant on Civil and Political Rights* (16 December 1966, 23 March 1976) 999 UNTS 171.

¹⁷ Article 2(1), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984, 26 June 1987) 1465 UNTS 85.

¹⁸ Article 1, *Convention on the Rights of the Child* (20 November 1989, 2 September 1990) 1577 UNTS 3.

¹⁹ See De Schutter *supra* n. 15, 123 (citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136, para 112).

²⁰ De Schutter *supra* n. 15.

²¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14* (4 November 1950, 3 September 1953) ETS 5.

²² Article 1(1), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, (22 November 1969, 18 July 1978) 1144 UNTS 144.

Hence, most human rights instruments highlight ‘territory’ and ‘jurisdiction’ as major factors in determining the scope of a State’s human rights obligations.

C. What do ‘Territory’ and ‘Jurisdiction’ Signify?

In the former part it was observed that the applicability provisions of human rights treaties make reference to two words to define their scope—‘territory’ and ‘jurisdiction’. But what are these terms? And, are they to be read together or separately?

1. How are these terms defined in International Human Rights Law?

In answering the above question, as far as human rights law is concerned, the terms ‘territory’ and ‘jurisdiction’ have rather simple connotations and have the same meaning that exists for these terms across the body of Public International Law. Territory refers to any defined area with sufficient consistency over which a State exercises control.²³ The regime of human rights law has particularly adhered to this definition of territory. In this definition, territory is not addressed as a component of statehood but rather as an independent term in itself. Looking at the term ‘territory’ in isolation in contrast with defining territory as a component of statehood enables international adjudicatory bodies to guarantee the effective protection of human rights. On the other hand, jurisdiction is a concept used to describe the lawful power of a state to define and enforce the rights and duties as well as control the conduct of both natural and juridical persons.²⁴ This lawful power can be exercised in a number of ways such as by means of the territory principle, nationality principle, protective principle, passive personality principle and universality principle.²⁵

2. Are these Terms to be Read Jointly or Separately?

The notions of territory and jurisdiction are extremely essential to determine in which situations and to what extent can the international responsibility of States be engaged. The main question addressed in

²³ Alina Kaczorowska, *Public International Law* (4th edn Routledge Oxfordshire) 309.

²⁴ *Ibid.*

²⁵ The Research in International Law of the Harvard Law School, Jurisdiction with respect to Crime (1935) 29 *American Journal of International Law (Special Supplement)*.

much of the literature is whether the notion of jurisdiction is to be taken separately or in combination with that of territory in designating conditions for a finding of State responsibility and attribution. This has become one of the most debated issues in International Human Rights law.

To answer the above question international jurisprudence provides sufficient data. From the standpoint of their usage in human rights treaties, these terms must be interpreted jointly ie within its territory ‘and’ subject to its jurisdiction.²⁶ Such a clause is used to enlarge the scope of these treaties to apply to everyone present within a State’s territory rather than merely those permanently residing. At the same time, the latter restricts the application of treaties in such a way that they do not infringe on the jurisdictional components of other States. Since territory and jurisdiction both reflect the sovereign independence and the sovereign equality of States, an extremely liberal interpretation would result in the breakdown of the essential principles on which international law rests.

The *travaux préparatoires* of a regional instrument like the ECHR is a testimony to such reasoning. During the drafting stages of the ECHR, the Expert Intergovernmental Committee²⁷ had replaced the words ‘all persons residing within their territories’ with ‘persons within their jurisdiction’. This was mainly done with a view to expand the ECHR’s application to individuals who may not be legal residents but are, nevertheless, present on the territory of any of the contracting States.²⁸ The above also results in the exclusion of, from the State’s ambit, foreign diplomats, members of alien armies, other individuals with immunities etc.

²⁶ Select Committee of Experts on Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, ‘Extraterritorial Criminal Jurisdiction’ (1990) 8-30.

²⁷ The Expert Intergovernmental Committee referred to here is the consultative assembly of the Council on Europe on Legal and Administrative Questions. This Expert Intergovernmental Committee was primarily responsible for the drafting of the ECHR. The Council of Europe should not be confused with the Council of the European Union or the European Council. The European Union is not a party to the Convention and has no role in the administration of the European Court.

²⁸ Collected Edition of the *Travaux Préparatoires* of the ECHR Vol III, (Martinus Nijhoff 1976) 260.

Therefore ‘territory’ and ‘jurisdiction’ used together in the applicability provision of human rights treaties signifies that the State’s obligations to protect human rights extends to every person subject to its jurisdiction who is present in the territory over which the State has control.

III. WHO IS LIABLE WHEN AN INDIVIDUAL’S POSITIVE HUMAN RIGHTS GUARANTEES HAVE NOT BEEN FULFILLED IN THE HYPOTHETICAL SITUATION

The previous part of the article highlighted how the notion of territory plays a central role in determining the scope of jurisdiction of a State for defining the extent of its human rights obligations. However, territory should not be construed as extending to the entire territory or only to the territory that is considered as belonging to a State under international law. This is something that has been reiterated in past international case laws and should be retained in mind in attempting to resolve the question – ‘Who is to be blamed?’ This part of the article will first deal with the question of ‘Why can there not be a situation where no country is responsible?’ and will then go ahead to propose two theories: ‘Effective Control Theory’ and ‘Existent Sovereign Theory’ to assess which State will be liable for the failure to provide an individual his positive human rights in the hypothetical situation.

A. *Why can there not be a situation where no country is responsible?*

The introduction highlighted how in the hypothetical situation a *de jure* State loses *de facto* control over its territory. In such a scenario there is no State with legitimate control over the given territory. This leads to an important question that is to be dispensed with ‘Why can there not be a situation where no country is responsible?’

The answer to the above is simple – If there is no country that can be deemed liable for infractions of positive human rights it would create a void or a vacuum which would go counter to the principle of effectiveness.²⁹ Effectiveness refers to the efficacy of law as differenced

²⁹ *Loizidou v. Turkey* [1995] 40/1993/435/514, Council of Europe: European Court of Human Rights, 49.

from its validity.³⁰ For the positivist view that international law is not a mere speculation to stand, it is to be significantly efficacious and come to terms with reality to some extent.³¹ In other words, legal fictions are to be discouraged in international law.³² The principle of effectiveness underlies most of the human rights treaties promising positive obligations, like the ICCPR and the ECHR amongst others. This is a position that is even upheld by international court and tribunals.³³

Two fundamental rules underline effectiveness. Rule 1 – A legal order, as a whole, must be, by and large, effective in order to be valid.³⁴ Rule 2 – Treaties must be interpreted in accordance with the Latin maxim ‘*ut res magis valeat quam pereat*’ which translates to ‘the matter may have effect rather than fail’³⁵. Hence, in accordance with Rule 1 it is essential that, in order for the human rights treaty system to be effective a void or vacuum is to be prevented. For facilitating the same, international courts and tribunals should apply Rule 2 while interpreting human rights treaties.

Thus in order for human rights treaties to be effective, it is necessary that a void be prevented and a State is held liable whenever an individual is not given the positive human rights he is entitled to.

B. Attribution to External State vis-à-vis Effective Control Theory

There can be instances where a separatist regime that has control over a particular region of a country, receives aid and assistance from an external State. With the emergence of modern intelligence, strategic planning and advanced armies, it becomes impossible for separatist regimes to survive without the assistance of an external State. So much

³⁰ Hiroshi Taki, ‘Effectiveness’, (2013) *Max Planck of Encyclopaedia of Public International Law*.

³¹ Benedict Kingsbury, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’ (2014) 25 *European Journal of International Law* 401-436.

³² Kaczorowska *supra* n. 23, 185.

³³ Kaczorowska *supra* n. 23.

³⁴ Hans Kelsen, *Principles of International Law* (Rinehart & Company New York 1952) 414.

³⁵ *Ibid.*

so, that in accordance with the law of State responsibility the separatist regime becomes a part and parcel of the external State and its conduct can be attributed to the latter.³⁶ An example of this can be seen in the current crisis in the Crimean Peninsula where Russia was providing financial and military support to the separatist regime.³⁷

A State's positive human rights obligation extends to all territories over which it exercises effective control.^{38,39} This goes to say that the jurisdiction⁴⁰ of a State can extend to areas beyond its national territory even in instances such as military invasions and occupations.⁴¹ In fact, in such situations international law recognises the legitimacy of certain legal arrangements and transactions such as registrations of marriage,

³⁶ See James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (1st edn Oxford University Press New York 2010), (For the various modes of attribution of State responsibility in international law).

³⁷ 'Ukraine Crisis—Russia vows troops will stay', (3 March 2014) *BBC News World*, at <http://www.bbc.com/news/world-europe-26414600> (last visited 30 September 2016).

³⁸ Effective control can be defined as the ability of foreign forces to exert authority, in lieu of the territorial sovereign, through their unconsented-to and continued presence with respect to a particular territory. To clarify a State could be said to have effective control over another States territory when the latter Government has been rendered incapable of publicly exercising its authority in that area and when the occupying power is in a position to substitute its own authority for that of the latter Government. See Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 *International Review of the Red Cross* 133-163.

³⁹ See Letter to President Obama, House of Congress (29 October 2014), available at http://hankjohnson.house.gov/sites/hankjohnson.house.gov/files/documents/use_of_torture.pdf and see also Mark Gibney & Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligation* (1st edn University of Pennsylvania Press 2010) 65.

⁴⁰ It has to be understood that the issue of jurisdiction and attribution are not the same thing. Even though these two concepts were clearly confused by the European Court of Human Rights in earlier cases attribution refers to the act of ascribing the work of a particular entity as that of the State (see James Crawford, 'State Responsibility' (2006) *Max Planck of Encyclopaedia of Public International Law*) whereas jurisdiction refers to the power of a State to define and enforce the rights and duties. Further even if the conduct of the separatist entity can be attributed to the State only when the separatist regime with the help of the external State exercises effective control over the territory, can the occupying State be said to have jurisdiction over the territory in question.

⁴¹ De Schutter, *supra* n. 15, 125.

births and deaths etc.⁴² The reason been that if the validity of the above are ignored, it would be contrary to the interests of the inhabitants of the territory.⁴³ It is for the same reason that human rights obligations of States that illegally occupy foreign territories should extend to territories over which such States have effective control. As Olivier De Schutter remarks ‘any other solution would result in depriving the population under occupation from the protection of human rights instrument for the reason that the occupation is illegal under international law, which would be highly paradoxical’.⁴⁴

The ‘Effective Control Theory’ purports that in the hypothetical situation the liability for failure to provide positive human rights guarantees will ‘primarily’ lie on the State that can be said to have effective control over the territory. An example of the same in the backdrop of separatist movements can be seen in the case of *Loizidou v. Turkey*. In this case, Cyprus had lost control over a part of its northern territory which had fallen into the *de facto* control of Turkish Republic of Northern Cyprus.⁴⁵ The Turkish Government was held to be directly exercising detailed control over the policies and actions of the authorities of Turkish Republic of Northern Cyprus.⁴⁶ Further, even the Turkish army exercised a large degree of control over Northern Cyprus.⁴⁷ The European Court had stated that Turkey⁴⁸ had effective control over Northern Cyprus as a result of which it was under the jurisdiction of Turkey and since the above actions of Turkey were contrary to international law, the European Court held Turkey liable for positive human right violations in Northern Cyprus.⁴⁹

⁴² *Loizidou v. Turkey* [1995] 40/1993/435/514, Council of Europe: European Court of Human Rights, 45 referring to the ICJ decision in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1970] ICJ Reports 1971 16.

⁴³ *Ibid.*

⁴⁴ De Schutter, *supra* n. 15.

⁴⁵ *Loizidou v. Turkey*.

⁴⁶ *Loizidou v. Turkey*, 56.

⁴⁷ *Ibid.*

⁴⁸ *Loizidou v. Turkey*.

⁴⁹ *Loizidou v. Turkey*, 50

Another instance would be regarding the ECHR's application to the separatist 'Moldavian Republic of Transnistria', a regime in Moldova which proclaimed its independence, Russia was held to be guilty for violations in Moldova because the separatist regime was set up with the support of the Russian Federation and even though it had its own organs and its own administration, the separatist regime was under the effective authority or at the very least under the decisive authority of the Russian Federation.⁵⁰ Here, the fact that the separatist movement was dependent on the economic, financial, political and military support of the Russian Federation was construed as sufficient to hold Russia to have jurisdiction and to be guilty for violation of human rights in Transnistria.⁵¹

Thus, a situation where the separatist regime in control over a portion of a territory is aided by an external State in such a way that the State has an effective control over the separatist entity it can be said that the territory is under the jurisdiction of the external State. The external State in such situations can be held liable for the failure to implement any positive human right obligations in the territory.

C. Attribution to the De Jure Sovereign vis-à-vis Existent Sovereign Theory

In earlier cases, such as *Loizidou v. Turkey*, the notion of jurisdiction was considered an all or nothing concept. This meant that an event could fall either in the jurisdiction of State X or of State Y depending on which State could have effectively controlled the event and therefore may have been held internationally responsible for not having ensured compliance with human rights and fundamental freedoms.

However, later international court judgments have seemed to have challenged this view. In the case of *Ilascu v. Moldova and Russia*, even though the European Court had found that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, did not exercise authority over that part of its territory which was under the effective control of the Moldovan Republic of Transnistria, it did not conclude therefrom that it is impossible for

⁵⁰ See generally *Ilascu and Others v. Moldova and Russia* (2004) 48787/99, Council of Europe: European Court of Human Rights (emphasis on paras 392-394).

⁵¹ *Ibid.*

Moldova to exercise its jurisdiction on the said territory.⁵² Instead the European Court considered that even in the absence of the effective control, Moldova still had a positive obligation under the ECHR to take all the diplomatic, economic, judicial or other measures that it had in its power to take and in accordance with international law to secure to the applicants the rights guaranteed by ECHR. The European Court's reasoning was based on the fact that, under international law, Moldova was and continued to be the legal sovereign of the particular territory which caused it to have certain rights and duties with respect to the territory.⁵³

The 'Existent Sovereign Theory' lays down that in the hypothetical situation the legal sovereign of the particular territory is not absolved of its obligations under international conventions with respect to the territory and it is still under a duty to ensure that all positive human rights obligations are secured to all individuals. In the latter approach, courts have considered that where a State is prevented from exercising authority over a part of its territory or exercises improvised control by a constraining *de facto* situation, such as when a separatist regime is set up, it does not thereby cease to have jurisdiction over that part of its territory. As a result the State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of all the rights and freedoms protected by international law.⁵⁴ Thus even in such situations it can be said that the cause of human rights is championed and States do have to do all that they can to ensure the continued guarantee of the enjoyment of the rights and freedoms.

From the above it can be stated that international human rights law tries to make sure that in the hypothetical situation there is a State responsible for lapses in human right guarantees.

⁵² *Ilascu and Others v. Moldova and Russia*, paras 330-331.

⁵³ *Ibid.*

⁵⁴ *Ilascu and Others v. Moldova and Russia*, para 336.

IV. STRETCHING THE LIMITS – EXTRATERRITORIAL JURISDICTION AND POSITIVE HUMAN RIGHT OBLIGATIONS?

Recent years have seen a great emphasis on extraterritorial jurisdiction and human rights obligations especially with the limelight that the story of Guantanamo Bay⁵⁵ has gotten. Thus, whenever the question of ‘Who is to be blamed?’ came up, the issue of extraterritorial jurisdiction also started doing the rounds. There were academic discussions on whether the *de jure* State can be adjudged liable on the basis of extraterritorial obligations. According to the proposed hypothesis, for furthering the effective realisation of human rights in the hypothetical situation, the territory over which the state has lost *de facto* control can *ad hoc* be considered a foreign territory. It can then be evaluated whether the *de facto* State can be deemed accountable for instances when the conduct of a person or body is liable for failure to ensure effective realisation of the positive human rights can be attributed to the *de facto* State (present in the territory where the *de jure* State has lost control). However before discussions regarding such a theory could even take root, the applicability of such a theory was totally discarded. There are three reasons why academic discussion regarding this theory is a redundant exercise.

Firstly, the ICJ, in *Georgia v. Russian Federation* case, had held that under general international law unless explicitly indicated, treaty obligations apply only territorially.⁵⁶ As can be observed in Part III of the article none of the human right instruments explicitly hold the respective treaties to apply extraterritorially. In fact the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*⁵⁷

⁵⁵ *Infra* V (B).

⁵⁶ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures*, Summary of the Order, (15 October 2008) ICJ Reports 2008, 353, available at <http://www.icj-cij.org/docket/files/140/14809.pdf> (last visited 30 September 2016).

⁵⁷ Jack Goldsmith, ‘The Debate about the Extraterritorial Scope of the Torture Convention’s Provisions on Cruelty is (Almost Certainly) Not About USG Interrogation Policy’ (24 October 2014) *Lawfare*, at <http://www.lawfareblog.com/2014/10/the-debate-about-the-extraterritorial-scope-of-the-torture-conventions-provisions-on-cruelty-is-almost-certainly-not-about-usg-interrogation-policy/> (last visited 30 September 2016).

which protects a norm of preemptory character, is said to have no extraterritorial application.⁵⁸

Secondly, in *arguendo*, the hypothesis would not require application of extraterritorial jurisdiction. Though earlier accounts of jurisdiction considered it an all or nothing concept, the decision of the European Court in *Ilascu v. Moldova and Russia* put an end to such a school of legal thought. It was stated that the State still had legal jurisdiction over the hypothetical situation at least in principle. Hence, if the State can control any particular individual or entity and it failed to get the positive human rights enforced via them, in that case the State would be liable by virtue of the Existent Sovereign Theory. There would be no need to examine extraterritorial human right obligations at all.

Thirdly, in *arguendo*, if we were to fall back upon the old view of jurisdiction being an all or nothing concept even in that case extraterritorial obligations of States cannot extend to the hypothetical situation. This can be reasoned out on a twofold basis – (1) All suggested bases of a State’s exercise of jurisdiction extraterritorially are defined and limited by the sovereign territorial rights of the other relevant States.⁵⁹ Accordingly, for example, a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence and as such a State may not actually exercise jurisdiction on the territory of another without the latter’s consent, invitation or acquiescence.⁶⁰ In the hypothetical scenario, this is definitely not the situation. (2) The other possible scenario in which extraterritorial obligations can be extended does not seem to apply here. International courts and tribunals have constantly made it clear that extraterritorial jurisdiction is alternatively applied only in the backdrop of the ‘effective control’ standard and is meant to extend to military occupations, conduct on a State’s flag vessels or in its consulates and embassies, situations of arrest and detention, and analogous cases.⁶¹ In the earlier discussed case of *Loizidou v. Turkey* an international

⁵⁸ *Ibid.*

⁵⁹ *Banković v. Belgium* [2001] 52207/99, Council of Europe: European Court of Human Rights, para 59.

⁶⁰ *Banković v. Belgium*, para 60.

⁶¹ Oona Hathaway, ‘Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?’ (2011) 43 *Arizona State Law Journal*, 389.

tribunal for the first time acknowledged a state's 'effective control' in extraterritoriality analysis. This view was later reaffirmed in *Banković v. Belgium*. The ICJ has also supported the aforesaid line of reasoning.⁶²

Therefore it can be deduced that there is no distant possibility of applying the theories of extraterritorial application of human right treaties to attribute liability for failure to provide positive human rights.

V. TESTING THE THEORY

In this section both the above mentioned theories will be analysed using the scenarios of Crimea and Guantanamo naval Base.

A. *Crimea*

In early 2014, Ukraine's President Viktor Yanukovich was deposed by the Ukrainian Parliament.⁶³ The Parliament had then formed an interim government under the presidentship of Oleksandr Turchynov.⁶⁴ The new government was recognised by the United States of America (USA) and the European Union.⁶⁵ Russia and a few other nations condemned the Turchynov government as illegitimate and the consequence of a *coup d'état*.⁶⁶ By the end of February, Russian forces had begun to take control of the Crimean peninsula and by March, Crimea was under the complete control of Russia's forces.⁶⁷ At about the same time the Crimean Parliament voted to dismiss the Crimean government, replace its Prime Minister, and calls a referendum on Crimea's autonomy.⁶⁸

⁶² *Georgia v. Russian Federation*.

⁶³ William Booth, 'Ukraine's Parliament Votes To Oust President; Former Prime Minister Is Freed From Prison' *The Washington Post*, (22 February 2014), available at http://www.washingtonpost.com/world/europe/ukraines-yanukovich-missing-as-protesters-take-control-of-presidential-residence-in-kyiv/2014/02/22/802f7c6c-9bd2-11e3-ad71-e03637a299c0_story.html (last visited 30 September 2016).

⁶⁴ *Ibid.*

⁶⁵ Alan Yuhas, 'Ukraine Crisis: An Essential Guide To Everything That's Happened So Far', *The Guardian* (13 April 2014), at <http://www.theguardian.com/world/2014/apr/11/ukraine-russia-crimea-sanctions-us-eu-guide-explainer> (last visited 30 September 2016)

⁶⁶ *Ibid.*

⁶⁷ *Supra* n. 37.

⁶⁸ Carol Morello, Will Englund and Griff Witte, 'Crimea Parliament Votes to Join Russia', *The Washington Post* (17 March 2014), available at http://www.washingtonpost.com/world/crimeas-parliament-votes-to-join-russia/2014/03/17/5c3b96ca-adba-11e3-9627-c65021d6d572_story.html (last visited 30 September 2016).

The referendum on whether to join Russia was held shortly after and had resulted in about a 96 per cent affirmative vote.⁶⁹ This referendum was condemned by much of the western world as violating Ukraine's constitution and international law.⁷⁰ Post the referendum, the Crimean Parliament declared independence from Ukraine and asked to join the Russian Federation.⁷¹ Russia and the separatist government of Crimea signed a treaty of accession of the Republic of Crimea and Sevastopol into the Russian Federation.⁷² The UN General Assembly passed a non-binding *Resolution 68/262* that declared the Crimean referendum invalid and the incorporation of Crimea into Russia illegal.⁷³ As of 1 November, 2014 the Crimean Issue remains a frozen conflict with Ukraine Parliament holding Crimea a territory temporarily occupied by Russia.⁷⁴

From the above, there are three observations – (1) Ukraine has lost control over Crimea, (2) Ukraine still lays claim over Crimea, (3) Russia has effective control over Crimea. The Crimean case is a perfect example of the hypothetical situation. For the sake of argument let's say an individual, Mr Tamar Karpelyn, in Crimea is being denied the right to a fair trial by the local authorities. The question to answer is 'Who is to be blamed?'

⁶⁹ — 'Crimea Applies to Join Russia', *The Voice of America*, (17 March 2014), at <http://www.voanews.com/content/voting-under-way-in-crimea-referendum-to-join-russia/1872380.html> (last visited 30 September 2016).

⁷⁰ — 'Why the Crimean Referendum is Illegitimate' *Council on Foreign Relations*, at <http://www.cfr.org/ukraine/why-crimean-referendum-illegitimate/p32594> (last visited 30 September 2016).

⁷¹ — 'Crimean Parliament Formally Applies to Join Russia', *BBC News Europe* (17 March 2014), at <http://www.bbc.com/news/world-europe-26609667> (last visited 30 September 2016).

⁷² — 'Crimea Crisis: Russian President Putin's Speech Annotated', *BBC News Europe* (19 March 2014), at <http://www.bbc.com/news/world-europe-26652058> (last visited 30 September 2016).

⁷³ Louis Charbonneau and Mirjam Donath, 'U.N. General Assembly Declares Crimea Secession Vote Invalid', *Reuters USA* (27 March 2014), at <http://www.reuters.com/article/2014/03/27/us-ukraine-crisis-un-idusbrea2q1ga20140327> (last visited 30 September 2016).

⁷⁴ Jeffrey Mankoff, 'Russia's Latest Land Grab How Putin Won Crimea and Lost Ukraine' *Foreign Affairs* (May-June 2014), at <http://www.foreignaffairs.com/articles/141210/jeffrey-mankoff/russias-latest-land-grab> (last visited 30 September 2016).

In the above situation both the theories ie the ‘Effective Control Theory’ and the ‘Existent Sovereign Theory’ will be applicable. Russia as the state with effective control will have primary responsibility to provide Mr Tamar Karpelyn the right to a fair trial. However, Ukraine as the existent sovereign is still under a duty to ensure that Mr Tamar Karpelyn gets a fair trial. Ukraine must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* Russia and other States as well as international organisations, to ensure that Mr Tamar Karpelyn is not denied the right to a fair trial.

If Russia fails to provide Mr Tamar Karpelyn his right to a fair trial it will be liable for violations under article 6 of the ECHR. Additionally, Russia failing in its duty will not absolve Ukraine as the existent sovereign to endeavour with all the means available to it to ensure that Mr Tamar Karpelyn right to a fair trial is guaranteed to him. If Ukraine fails to do so, it will also be liable for violations of the article 6 of the ECHR.

However in the above example the liability between Russia and Ukraine would not be joint. Russia would be primarily responsible for the violation with some liability falling upon Ukraine as well. The fact that Ukraine was *de facto* unable to exercise its governmental powers in Crimea would limit its liability to some extent. This can be explained by the decision of the European Court in the *Ilascu v. Moldova and Russia* case where Russia, who had exercised effective control, was asked to pay 582,000 euros whereas the *de jure* sovereign was asked to pay 199,000 euros. If the case of Mr Tamar Karpelyn was being heard before the European Court, it could have decided a suitable amount of compensation based on Russia’s primarily liability and Ukraine’s efforts in ensuring the ECHR’s application in Crimea.

B. Guantánamo Naval Base

Popular media analysis always resonates around USA and its responsibility for human rights violation in Guantánamo Naval Base. However, the reality is far from this simple fact. The Naval Base situated on the southern coast of Republic of Cuba, was leased to USA through a set of two agreements signed in 1903 and supplemented by a further treaty in 1934. USA was to use the Naval Base exclusively for

the purposes of coaling and naval stations.⁷⁵ Further, the lease was to remain in force as long as USA did not abandon the Naval Base.⁷⁶ The agreements the Naval Base additionally provided that USA recognised the continuance of the ultimate sovereignty of the Republic of Cuba over the Naval base, but exercised complete jurisdiction and control over it.⁷⁷ Following the accession of power in Cuba by Fidel Castro, Cuba had declared US presence in Guantánamo Bay to be illegal.⁷⁸ Although not put forward in accurate legal terms, the Cuban position alludes to the lease agreement being void or voidable because of the inequality inherent in it and because of the change of circumstances with the onset of the Cold War. With the exception of one payment, Cuba has since 1959 refused to accept the rental fee from USA and have continuously maintained the US occupation to be illegal.⁷⁹ USA's occupation of the Naval Base is an unresolved matter of international law however notwithstanding that the positive human rights obligations in the Naval Base can be analysed. Consider that a positive human right obligation such as promotion of equality or guarantee of cultural rights has not been provided to an individual, as unfair as it sounds due to the application of the two discussed theories Cuba might have to share the blame for USA's action if it does not take certain safeguards. In every individual case which arises, Cuba will have to use all diplomatic channels with USA to ensure that the individual is accorded his rights. Cuba will have to take such actions on a case by case basis, rather than a collective appeal/statement for ensuring that detainees in the Naval Base are provided with all human rights available to them. The sharing of liability will be in a manner similar to the illustration above. Thus, it can be said that the Naval Base human rights case is far more complex than what even what a lot of legal experts could imagine.

⁷⁵ Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval stations (23 February 1903), available at http://avalon.law.yale.edu/20th_century/dip_cuba002.asp (last visited 30 September 2016).

⁷⁶ Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda (2 July 1903), available at http://avalon.law.yale.edu/20th_century/dip_cuba003.asp (last visited 30 September 2016).

⁷⁷ *Treaty between the United States of America and Cuba* (adopted 29 May 1934, entered into force 9 June 1934), available at http://avalon.law.yale.edu/20th_century/dip_cuba001.asp (last visited 30 September 2016).

⁷⁸ Yaël Ronen, 'Lease' (2008), *Max Planck Encyclopaedia of Public International Law*.

⁷⁹ *Ibid.*

VI. CONCLUDING REMARKS AND IMPLICATIONS FOR INTERNATIONAL LAW

From the foregoing paragraphs it is clear that as far as the question ‘Who is to be blamed?’ is concerned, when there is a failure to provide an individual his positive human rights guarantees in the hypothetical situation?, the State that has effective control over the situation will be held liable *via* the ‘Effective Control Theory’. Albeit, the latter, the *de jure* State is not completely absolved of its liability under any circumstance and in accordance with the ‘Existent Sovereign Theory’ has to take all steps possible in order to ensure the individual the effective realisation of his rights.

Further, international courts and tribunals have taken a liberal stance in assessing the liability of states in regions torn by secessionist movements in order to secure the effective realisation of human right treaties. Moreover, even though the above would not reflect a utopian pro human rights situation⁸⁰, in adjudicating such cases courts have really stretched their arms and ensured that not only interpretations of international law result in paradoxical situations but also that justice across borders is provided.

Looking beyond the ‘Effective Control’ and ‘Existent Sovereign’ Theories, and trying to make alternate arguments for attributing liability like invoking extraterritorial jurisdiction seems futile in the hypothetical situation.

However, in merely answering the question ‘Who is to be blamed?’ it is seen that this article throws wide implications both positive and negative, on international law. These implications are on two aspects – (1) Law of statehood and (2) Status of human right. The following shows how exactly the analysis has impacted these aspects:

⁸⁰ From a human right advocate standstill a utopian theory would be one in which the complete liability for the *de jure* State for mere inability to not provide positive obligations without sufficient justifications in cases where there is no external State exercising effective control be recognised. Additionally, in cases where the external State exercises effective control, a system of join and several liability between both the States seems apt.

A. *Laws of Statehood*

The analysis in this article has resulted in three positive implications for the laws of statehood. They are:

1. Reiteration of the Additional Criteria for Statehood ie Respect for Provisions of the Charter of United Nations and Jus Cogens Norms

In the discussions surrounding the ‘Effective Control Theory’ courts imposed liability on the State that had effective control over the territory. However before this could result in any mischief, the courts made it clear that despite holding the external State which exercises effective control liable, any illegal annexation or military occupation would not affect statehood. Courts stood by the rule that new States cannot be formed or territories annexed in violation of article 2(4) of the *Charter of United Nations*. In fact, modern jurists consider this one of the new additional requirements (beyond the requirements imposed by the Montevideo Convention) of statehood.

2. Jurisdiction is not Always a Consequence of Sovereignty

During adjudication courts have alienated jurisdiction from *de jure* sovereignty in order to prevent an anomalous situation where despite violating a *jus cogens* norm, a State could get away from human right violations occurring in an area under its effective control. This highlights how jurisdiction or control is not always a consequence of sovereignty and can easily be alienated from it.

3. Reaffirming Rules for Abandonment of Territory

In the case laws dealing with the ‘Existent Sovereign Theory’, courts have indicated the resilience of the States right in its territory.⁸¹ Illegal annexation followed by a passage of significant time would not result in a State losing sovereignty over the territory. States are under no obligation to take continuous steps to exercise jurisdiction in a region where they have lost control. In fact, actions even amounting to estoppel and acquiescence would not result in the State losing

⁸¹ Thomas Grant, ‘Ukraine v. Russian Federation in Light of Ilaşcu: Two Short Points’ (22 May 2014) *EJIL Talk*, at <http://www.ejiltalk.org/ukraine-v-russian-federation-in-light-of-ilascu-two-short-points/> (last visited 30 September 2016).

sovereignty. Courts in taking such a stand have recognised the well-established proposition that it takes a great deal more than brief silence for a State to lose territory.⁸² Abandonment of territory would require both the act as well as intention on part of the State.

B. Status of Human Rights

The analysis in this article seems to have a negative implication for the status of human rights in the international treaty system. In the 'Existent Sovereign Theory', it can be seen that the *de jure* state has to take all the diplomatic, economic, judicial or other measures that it had in its power by means available to it *vis-à-vis* foreign States and international organisations, to secure to the applicants the rights and freedoms protected by international law.

As realistic and just as this sounds in the hypothetical situation, the implications for such reasoning invariably point towards a regime that diminishes the status of human rights in the international system. While we are trying to move to a regime where, except the strict definition of necessity, failure to provide human rights guarantees cannot be justified, a reasoning such as the one above, is inclined towards a regime recognising an effort to ensure realisation of rights to be sufficient.

It can be deduced that apart from norms protected by the peremptory order such as prohibition of torture, slavery etc, the other human rights guarantees are still far away from being inalienable. International courts look at such rights as being derogable very easily and provide the States restricting such rights with ample leverage.

⁸² *Ibid.*