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The Extraterritorial Application of Human Rights Treaties in the Context of Foreign Surveillance

Holly Huxtable

LLM Leiden University

h.l.d.huxtable@umail.leidenuniv.nl

Abstract

The rationale behind the applicability of human rights treaties to foreign surveillance is the subject of debate. Presented with the opportunity to weigh in on this issue in the case of *Big Brother Watch and Others v The United Kingdom*, the European Court of Human Rights simply assumed (and rightly so) that the European Convention on Human Rights applies, providing no further reasoning. This article explores the challenges that arise with establishing jurisdiction over foreign surveillance under human rights treaties, and argues for an alternative base for extraterritorial jurisdiction grounded in the moral and theoretical principles underlying the human rights regime.

Keywords

extraterritorial jurisdiction – foreign surveillance – human rights – mass surveillance – european convention on human rights – international covenant on civil and political rights

State conducted surveillance is no longer an exceptional measure, but a dangerous habit.¹ The vast scope of the practice, as famously revealed by Edward Snowden, coupled with awareness of the resulting negative impact on a number of human rights, has led to increased attention being directed to the compatibility of surveillance with the international legal framework. A central

1 United Nations High Commissioner for Human Rights 'The Right to Privacy in the Digital Age' A/HRC/27/37 (30 June 2014), https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf.

characteristic of modern surveillance, of relevance to legal analysis and debate, is that it is no longer targeted, such that the pool of potential victims of unwarranted intrusions has mushroomed. In the wake of these revelations, civil liberties groups spearheaded a counterattack in domestic and international courts that called for accountability and reform of the legal framework regulating intelligence gathering.² The focus of these challenges was, however, largely on domestic surveillance (by a state within its own borders), and resulted in an increase in the safeguards regulating this type of surveillance. By contrast, somewhat more neglected in current practice is the thorny question of *foreign* surveillance, surveillance conducted outside a state's borders. This disparity has raised the fundamental issue of the applicability of international legal frameworks, such as the European Convention on Human Rights (ECHR) or the International Covenant on Civil and Political Rights (ICCPR) to state conducted foreign surveillance. It is this question that forms the core of this inquiry, whether and how the ECHR and ICCPR apply to foreign surveillance.

The scope for abuse of unfettered foreign surveillance measures leaves little doubt as to the significance of this issue, and is further exacerbated by the fact that domestic legislation often systematically distinguishes between the surveillance of citizens and foreign nationals located outside of the surveilling state, providing inferior safeguards (if any) to the latter.³ The rights affected extend well beyond the right to privacy and impact on freedom of expression, the right to seek, receive and impart information, and the freedom of peaceful assembly and association.⁴ There is also credible evidence to suggest that information gathered by surveillance measures has been linked to cases of torture, cruel, inhuman and degrading treatment.⁵ Indeed, information gleaned from foreign surveillance undoubtedly played a role in operationalizing the extraordinary rendition programme and informing subsequent targeted killing policies.⁶ A leaked CIA presentation on 'Small Footprint Counterterrorism Operations' in Yemen and Somalia stated communications intelligence 'often

2 See for example: *Clapper v Amnesty et Al* 133 US 1138 (2013); *Liberty (The National Council of Civil Liberties) v The Government Communications Headquarters & Others*, The Investigatory Powers Tribunal [2014] UKIPTrib 13_77-H.

3 M. Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' in *Harvard International Law Journal*, 2015, no. 1, p. 88.

4 United Nations High Commissioner for Human Rights 'The Right to Privacy in the Digital Age' A/HRC/27/37 (30 June 2014), para. 14, https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf.

5 *Ibid.*

6 *Ibid.*

from foreign partners, provides 57%’ of the references used to build ‘target packages.’⁷

Despite the panoply of rights at stake, attempts have been made to exclude foreign surveillance from the ambit of international human rights law. Some have argued the distinction in the regulation of foreign and domestic surveillance is not a product of neglect, but rather one of the ‘imperatives of intelligence gathering in the twenty-first century,’⁸ and the necessity to be able to respond effectively to national security threats.⁹ Others have sought to exclude oversight on the grounds of jurisdiction. Proponents of this viewpoint rely on the fact that foreign surveillance is an extraterritorial act to which treaty obligations cannot apply.

The UK Investigatory Powers Tribunal (UKIPT) for example, found that the claims of individuals located outside of the UK, who alleged their right to privacy had been violated by UK government surveillance measures, could not succeed. The Tribunal assessed the factual specificities of surveillance against the recognised grounds for extraterritorial jurisdiction in the case law of the European Court of Human Rights (ECtHR), and found these individuals to be outside the jurisdictional scope of the ECHR ‘because it has not been established by the jurisprudence that they are clearly within it.’¹⁰ This article serves to address this last contention.

The issue of foreign surveillance has been the subject of two recent ECtHR judgements,¹¹ but in both cases the question of jurisdiction was not addressed. Unlike the UKIPT decision however, the treaty was (rightly) assumed to apply. In *Big Brother Watch and Others v The United Kingdom*, the first case that could have dealt with this issue in detail, the Court simply stated that neither the applicant nor the government raised a jurisdictional objection,¹² and as such proceeded on the assumption that the matter fell within their competence,

7 ‘Small Footprint Operations 2/13’ The Intercept, 2015, retrieved 25 November 2018, <https://theintercept.com/document/2015/10/14/small-footprint-operations-2-13/#page-7>.

8 G. Sulmasy and J. Yoo, ‘Counterintuitive: Intelligence Operations and International Law’ in *Michigan Journal of International Law*, 2007, p. 625.

9 See A. Lubin, ‘“We Only Spy on Foreigners”: The Myth of a Universal Right to Privacy and the Practice of Mass Surveillance’ in *Chicago Journal of International Law*, 2018, no. 2.

10 *Human Rights Watch Inc & Ors v The Secretary of State for the Foreign & Commonwealth Offices*, The Investigatory Powers Tribunal [2016] UKIPTrib 15_165-CH, para. 61.

11 *Big Brother Watch and Others v The United Kingdom* (App nos. 58170/13, 62322/14 and 24960/15), 13 September 2018 and *Centrum för rättvisa v. Sweden* (App no. 35252/08), 19 June 2018.

12 *Ibid*, para. 271.

'signalling without so deciding that surveillance taking place in the territory of the state is covered, even if the individual is located overseas.'¹³ The issue of extraterritorial application of the treaties is a fraught and controversial one that speaks to the tensions between promoting the universal nature of rights on the one hand, and considerations of effectiveness, legal certainty and the policy implications of widening the scope of application on the other.

The ECtHR could very well have chosen to assess the issue of jurisdiction *proprio motu*, however, instead it kept us in the dark on the underlying rationale for the applicability of the human rights framework to foreign surveillance. Addressing this gap, this article explores how the ICCPR and ECHR apply to foreign surveillance, and in doing so uncovers the conceptual difficulties of this exercise. It will be demonstrated that the current approach to extraterritorial jurisdiction, consisting of the development of *ad hoc* exceptions to territorial jurisdiction on a case-by-case basis, is ill suited to the task of bringing foreign surveillance under the purview of the courts. Instead, an approach that relies on the underlying moral and theoretical principles of the human rights regime should be employed to justify extraterritorial applicability of the treaties. By taking this principled approach, not only can we succeed in addressing the impact of foreign surveillance, but we also establish a firmer basis upon which to proceed in future cases.

Extraterritorial Jurisdiction under the ICCPR and the ECHR

The scope of application of human rights treaties is determined by jurisdiction clauses that dictate that states parties' obligations apply in respect of persons falling within the jurisdiction of the state.¹⁴ While recognising that jurisdiction is 'primarily territorial,' both the United Nations Human Rights Committee (UNHRC) and the ECtHR have advocated that in line with the object and purpose of the respective treaties, jurisdiction stretches beyond a state's own

13 M. Milanovic, 'ECtHR Judgment in Big Brother Watch v. UK,' EJIL: Talk!, 2018, retrieved 25 November 2018, <https://www.ejiltalk.org/ecthr-judgment-in-big-brother-watch-v-uk/>.

14 Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.' Article 1 of the European Convention on Human Rights (ECHR): 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

territory only when certain conditions are met. As such two further bases of jurisdiction have been developed in the case law, neither of which obviously or adequately respond to the particular circumstances and complexities of foreign surveillance.¹⁵ The first, sometimes termed a spatial or territorial model of jurisdiction, requires the effective control over a territory or an area abroad by the state party. The second, termed a personal model of jurisdiction, requires state agent authority and control over an individual.

1 *Applying the Spatial Model to Foreign Surveillance*

Under the spatial model, it must be established with reference to the particular facts of the case that the state is exercising effective control over the territory or area in which the violation occurs for human rights treaties to be applicable.¹⁶ The ECtHR has held that an area encompasses both the traditional concept of territory,¹⁷ and smaller premises such as a military base.¹⁸ When determining whether or not a state has the requisite level of effective control, the Court primarily has ‘reference to the strength of the State’s military presence in the area’ and the extent to which its military, economic and political support for the local administration provides it with influence and control.¹⁹ In *Ilaşcu v Moldova and Russia*, the Court held ‘decisive influence’ over the subordinate administration could be sufficient to enjoy control of the area.²⁰

It becomes clear relatively quickly that foreign surveillance does not fit easily (if at all) these parameters. The primary issue that arises is that foreign surveillance, conducted virtually, lacks an obvious territorial link – the surveilling state does not enjoy effective control of any area as traditionally understood in the case law. As such, the viability of this model ultimately hinges on both how you conceive of an ‘area’ in the context of surveillance, and where you consider the violation to have taken place – at the location where the communication

15 It is important to clarify that while these two grounds for jurisdiction are those relevant to the present discussion, they stand in addition to other established bases of jurisdiction abroad under international law such as cases involving the activities of diplomatic or consular agents abroad and on board craft and vessels registered in or flying the flag of the State.

16 Relating to the ICCPR see United Nations Human Rights Committee ‘General Comment 31,’ 2004, CCPR/C/21/Rev.1/Add.13, para. 10, <https://undocs.org/CCPR/C/21/Rev.1/Add.13>.

17 *Loizidou v Turkey (Preliminary Objections)* (App no. 15318/89), 23 March 1995, para. 62.

18 *Al-Saadoon and Mufdhi v The United Kingdom* (App no. 61498/08), 2 March 2010.

19 *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011, para. 141.

20 *Ilaşcu and Others v Moldova and Russia* (App no. 48787/99), 8 July 2004, para. 392.

was intercepted, the location where the communication was accessed by the state, or at the location of the individual harmed.

Taking the UK surveillance programme TEMPORA as an example, we first consider the applicability of the spatial model in relation to the location of the interception. The TEMPORA programme functions by tapping undersea fibre-optic cables using an intercept probe.²¹ Traditionally, the tapping of cables in this manner occurred in international waters. Therefore, in this scenario one would need to conceive of an 'area' or territory in an extremely narrow sense, potentially as narrow as the interception pod itself, to establish jurisdiction. While the jurisprudence does not technically bar such an interpretation, taking such an approach leads us to question the logic of the law. In the words of Justice Leggatt we are left wondering 'what the stopping point is.'²² What rights can one practically ensure on an interception pod?

Nowadays, the tapping of fibre optic cables occurs more frequently on land rather than at sea. This is due to the fact that many of the cables that cross the Atlantic Ocean 'land' on the territory of the UK. Probes can therefore be placed on cables by the UK along its coastline. There have also been reports of allies placing probes on said cables with the consent of the UK.²³ In these scenarios, there is no longer an issue of extraterritoriality. Where the UK taps cables on their territory, interception clearly falls under the jurisdiction of the UK. The same is true where the UK consents to an ally tapping the same cables.

If we consider instead the violation to occur at the moment the communication is processed (i.e. opened or stored) rather than intercepted, our focus is not at the location of the intercept pod or where the cable lands, but rather at the location of the servers storing the data or the analyst reading communications. In cases where data is stored and accessed within the territory of the surveilling state, again there is no longer an extraterritorial act. Alternatively, where data is stored overseas, the applicability of the treaties will depend on whether or not a state has effective control over the data storage facility. This question could be further complicated by the fact that the storage of data is often facilitated by private companies, leading to the

21 See *Big Brother Watch and Others v The United Kingdom* (App nos. 58170/13, 62322/14 and 24960/15), 13 September 2018, paras. 9–11.

22 *Serdar Mohammed v Ministry of Defence and Others*, 2014, EWHC 1369 (QB), para. 141.

23 O. Kahzan, 'The Creepy, Long Standing Practice of Undersea Cable Tapping,' *The Atlantic*, 2013, retrieved 25 November 2018, www.theatlantic.com/international/archive/2013/07/the-creepy-long-standing-practice-of-undersea-cable-tapping/277855/.

difficulty of determining whether or not the private company may be viewed as an agent of the state.²⁴

Conceiving of the storage and/or processing of data as the violation rather than the act of interception, is also complicated by the reality of intelligence sharing agreements. Under these arrangements it is theoretically possible that intelligence agencies are each opening and storing the same data, creating a situation where an individual's rights are being violated simultaneously by a multiplicity of states, raising issues of shared responsibility. In *Big Brother Watch and Others v The United Kingdom*, when discussing intelligence sharing agreements and attribution of state responsibility, the Court dispensed of the issue by finding that the 'interference lies in the receipt of the intercepted material and its subsequent storage, examination and use by the intelligence services of the respondent state.'²⁵ As such, the issue of extraterritoriality is expunged in relation to violations stemming from intelligence sharing.

But is the location of the interception really enough to trigger the applicability of the human rights regime? As Milanovic has argued, beyond a sense of intuition, it is hard to justify why the location of the interference rather than the individual should matter.²⁶ Such an interpretation does not appear to be supported by the text of the treaties, which indicate that the correct inquiry is whether the *individual* is within or subject to jurisdiction.²⁷

In line with a more natural reading of the treaties, we now turn instead to the location of the individual rather than the location of the communication being processed. In the context of foreign surveillance, this is *always* outside of any area or territory (e.g. the interception pod) under the control of the surveilling state. Where the interception or processing of the communication takes place in the territory of the surveilling state, foreign surveillance constitutes a territorial act with an extraterritorial violation. The UNHRC has interpreted Article 2(1) of the ICCPR so that a territorial violation with an external effect can constitute grounds for jurisdiction.²⁸ Taking this approach, the tapping of fibre-optic cables on a state's territory, which produces effects in a third state

24 B. Schneier, 'Let the NSA Keep Hold of the Data,' *Slate*, 2017, accessed 25 November 2018, www.slate.com/articles/technology/future_tense/2014/02/nsa_surveillance_metadata_the_government_not_private_companies_should_store.html.

25 *Big Brother Watch and Others v The United Kingdom* (App nos. 58170/13, 62322/14 and 24960/15), 13 September 2018, para. 421.

26 M. Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' in *Harvard International Law Journal*, 2015, no. 1, p. 126.

27 *Ibid.*

28 *Daniel Monguya Mbenge v Zaire* (Comm No. 16/1977), 1990.

(i.e. a violation of an individual's right to privacy could) therefore fall under the jurisdiction of the ICCPR.

Alternatively, where the interception of the communication takes place overseas rather than on the territory of the state, from an embassy for example, or via the tapping of a deep-sea cable, the individual is again never on the territory (the interception pod or embassy) under the effective control of the state. These examples provide very different scenarios to the ones often dealt with in the case law and it is clear the spatial model offers limited scope for rationalising the applicability of the ECHR and the ICCPR to foreign surveillance.

2 *Applying the Personal Model to Foreign Surveillance*

Alternatively, foreign surveillance may be brought under the jurisdiction of the ICCPR and the ECHR via the personal model of jurisdiction. Under this model, 'the reference to individuals subject to jurisdiction is not to the place where the violation occurred, but rather to the relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.'²⁹ Jurisdiction is established in these cases if the applicant can demonstrate that they were under the effective control of a state agent. The acts of state agents may amount to an exercise of jurisdiction when state agents exert authority and control over others, or when 'through the consent, invitation or acquiescence of the Government of that territory, [they] exercise all or some of the public powers normally exercised by the Government.'³⁰

If jurisdiction is established this way, it may provide a solution to the factual specificity of the disconnect between the location of the individual and the intercept or opening of the communication. Jurisdiction in this case hinges on the ability to demonstrate that the extraterritorial act of surveilling is attributable to the state and brings the *individual* under the physical power and control of the state. While it is clear that surveillance is an act of state, establishing that the surveilled individual is under the authority and control of said state is not very easy to prove without entertaining flexible interpretations.

State agent authority and control has been conceived of broadly (as the exercising of public powers) and narrowly (as physical control over an individual). Applying the narrow conception of personal jurisdiction, the question of whether the act of surveillance alone can render the individual under the physical power and control of the surveilling state is not a straightforward one.

29 *Sergio Euben Lopez Burgos v Uruguay* (Comm No. R.12/52), 1981, paras. 12.1–12.3, and *Lilian Celiberti de Casariego v Uruguay* (Comm No. 56/1979), 1984, paras. 10.1–10.3.

30 *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011, para. 135.

This is largely due to the fact that the principle was developed in the context of the specific factual scenarios of detentions, beatings and shootings – each of which suggests corporeal intervention (clearly lacking in the context of surveillance) is necessary. As Milanovic has highlighted however, it would be odd to insist on corporeal intervention when the effects of surveillance may produce in many situations the same results as a physical search.³¹

Alternately, we could conceive of surveillance as the ‘exercise of a public power,’ deemed by *Al-Skeini and Others v The United Kingdom* to bring individuals under the ‘jurisdiction’ of the surveilling state.³² While the act of surveillance is indeed a public power exercised by the state, a surveilling state is not necessarily exercising the public powers of the state in which it is surveilling. There is however arguably a case to be made that this is the situation constructed by intelligence sharing agreements. For example, Australia (that has fewer surveillance capabilities than the UK) could be construed as farming out its public powers of intelligence collection to the UK under intelligence sharing agreements. However, such a construction is tenuous and instead seems to fall into the category of consent rather than the exercising of a public power as conceived of in *Al-Skeini and Others v The United Kingdom*. Moreover, in the context of intelligence sharing, given the ECtHR views the violation as territorial (occurring at the stage of receipt, processing and storage of the information), this is no longer relevant.³³ As such, the personal model of jurisdiction again appears to be ill suited for the purpose of rendering the ICCPR and the ECHR applicable to foreign surveillance.

We are therefore left with a situation in which we intuitively know that the human rights framework should apply to foreign surveillance, and indeed the ECtHR has implicitly agreed in *Big Brother Watch and Others v The United Kingdom*, but this is not well explained by current conceptions of extraterritorial application of the treaties. Foreign surveillance is clearly well established on the human rights agenda,³⁴ and non-applicability of two of the key human rights conventions would therefore present a glaring contradiction in the international regime of human rights protection based on the principle of the universality of rights. But how can we lay bare the legal reasoning underpinning the applicability of the treaties?

³¹ *Ibid.*

³² *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011.

³³ *Big Brother Watch and Others v The United Kingdom* (App nos. 58170/13, 62322/14 and 24960/15), 13 September 2018, para. 142.

³⁴ United Nations High Commissioner for Human Rights ‘*The Right to Privacy in the Digital Age*’ A/HRC/27/37 (30 June 2014), para. 14.

Exploring Alternative Justifications for the Applicability of Human Rights Treaties to Foreign Surveillance

1 *Developing the Personal Model of Jurisdiction*

Manfred Nowak argues for the applicability of the treaties based on a development of the personal model of jurisdiction, and claims that 'the real test of 'effective control' in the case of surveillance is not whether the person is under the direct control (custody) of the foreign agents, but whether the correspondence and communication is under direct control, which is the case with any surveillance measure.³⁵ In support of this argument, Nowak points to the fact that the case law clearly demonstrates that when assessing issues of extraterritoriality specific rights issues must be taken into account.³⁶ For example, in the case of torture it may only be violated extraterritorially if the victim is in custody, given that powerlessness is a definitional element of the offence.³⁷

Following this logic, Nowak posits that extraterritorial surveillance should be assessed in light of the specificities of the right to privacy. The right to privacy can attach to the personal/informational sphere of an individual and has been found to cover both telephone and email conversations, the monitoring of which does not involve any physical intervention.³⁸ It is therefore feasible that jurisdiction with regard to mass surveillance is interpreted such that a person is recognised as being under the authority and/or control of the state where a state has control over its information, for the purposes of the rights that relate to such information.³⁹

But what exactly are then the parameters under which a communication falls under the control of a state agent? For programmes like TEMPORA, is the tapping of cables enough, or does effective control occur when the communication is opened? The Court in *Big Brother Watch and Others v The United Kingdom* seems to opt for the second option. When assessing intelligence sharing practices, the Court finds the interference under consideration (the collection

35 M. Nowak, 'Letter to the Editor from Manfred Nowak, What does extraterritorial application of human rights treaties mean in practice?' *Just Security*, 2014, retrieved 25 November 2018, www.justsecurity.org/8087/letter-editor-manfred-nowak-extraterritorial-application-human-rights-treaties-practice/.

36 *Ibid.*

37 *Ibid.*

38 See for example, *Klass and Others v Germany* (App no 5029/71), 6 September 1978 and *Weber and Saravia v Germany* (App no 54934/00), 29 June 2006.

39 This argument was made by the International Commission of Jurists as interveners in *Big Brother Watch v United Kingdom*, retrieved 25 November 2018, www.icj.org/wp-content/uploads/2016/02/UK-ICJ-AmicusBrief-BBWothers-ECtHR-legalsubmission-2016.pdf.

of communications data by another state that subsequently shares the information) not to 'lie in the interception itself, which did not, in any event, occur within the United Kingdom's jurisdiction, and was not attributable to that State [...] [but] in the receipt of the intercepted material and its subsequent storage, examination and use.'⁴⁰ Still questions can be raised, is receipt of the material enough to render it under the state's control or are examination and use also necessary?

Further clarifying the personal model of jurisdiction is indeed open to the courts and would be reflective of the manner in which extraterritorial applicability has evolved over the years. Courts have consistently expanded the scope of the treaty in order to meet the needs of evolving factual situations. For example, *Loizidou v Turkey*⁴¹ was a response to an increase in situations of overseas occupations. *Issa v Turkey*⁴² and *Al-Skeini and Others v The United Kingdom*⁴³ offered further carve outs to deal with foreign intervention that did not amount to occupation. However, taking this approach risks sewing another patch into the case law that is not necessarily easily applicable to other factual scenarios as they evolve.

2 Viewing Foreign Surveillance as a State Transaction

In an appraisal of the extraterritorial applicability of the ICCPR, Van Schaak consistently refers to *de facto* control over a territory, individual or a *transaction* as grounds for extraterritorial applicability of the treaty.⁴⁴ With regards to the term transaction, she points to the case of *Montero v Uruguay*.⁴⁵ The case concerned the refusal to renew a Uruguayan national's passport in Germany. The UNHRC held that 'the issuing of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction' of the Uruguayan authorities and [Montero] is 'subject to jurisdiction' of Uruguay for that purpose.⁴⁶ As such, even though the refusal to issue a passport took place overseas, 'article 2(1) of the Covenant could not be interpreted as limiting the obligations of Uruguay...to citizens within its own territory.'⁴⁷ Here the Committee seemed to accept that control

40 *Big Brother Watch and Others v The United Kingdom* (App nos. 58170/13, 62322/14 and 24960/15), 13 September 2018, para. 420.

41 *Loizidou v Turkey (Preliminary Objections)* (App No 15318/89), 23 March 1995.

42 *Issa and others v Turkey* (App no 31821/96), 16 November 2004.

43 *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011.

44 B. Van Schaak, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change,' in *International Law Studies*, 2014, p. 24.

45 *Mabel Pereira Montero v. Uruguay* (Comm No 106/1981), 1983.

46 *Mabel Pereira Montero v. Uruguay* (Comm No 106/1981), 1983, para. 5.

47 *Ibid.*

over the transaction (the issuing of a passport) was sufficient to establish extraterritorial application of the treaty. In reaching this conclusion, no specific reference was made to the location in which the act of denying a passport took place, a consulate. The nature of the act rather than any official premises automatically rendered it within the realm of state control. This example can be analogised to the issue in question. State run foreign surveillance can be conceived of by its nature as an official act conducted by the state.

An alternate approach, also focussing on control of the activities causing harm, was recently advocated for by the Inter-American Court of Human Rights. In the context of transboundary environmental harm, the Court argued jurisdiction could be established over violations occurring outside the territory of the state when the state ‘exercises effective control over the activities carried out that caused the harm and consequent violation of human rights.’⁴⁸ The Court based this form of jurisdiction on the causal relationship or nexus that exists between the conduct performed in the state and a violation occurring abroad.⁴⁹ It is conceivable under this model that an individual located in the US, being surveilled by the UK for example falls under the jurisdiction of the UK by virtue of the fact that the state has effective control over the surveillance operation causing the subsequent violation.

These approaches have the allure of offering a more principled foundation for extraterritorial applicability rather than reacting solely to the factual specifics of foreign surveillance, and serve to avoid a situation where a state could commit violations abroad that it could not commit at home.

3 *Distinguishing Between Positive and Negative Obligations*

An alternative explanation, proposed by Milanovic, exploits the distinction between positive and negative obligations. The proposed model stipulates that the negative obligation to respect human rights is territorially unbound, while the obligation to secure human rights (i.e. a state’s positive obligation) is restricted to areas in which a state has *de facto* effective control over areas and places.⁵⁰

48 The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights) Advisory Opinion (OC-23/17), 15 November 2017, para. 104(h).

49 *Ibid*, paras. 95, 101–102.

50 M. Milanovic, ‘Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age’ in *Harvard International Law Journal*, 2015, no. 1, p. 209.

Harold Koh has argued for a similar approach specific to the ICCPR. Koh argues the duty to ensure rights (a positive one) only applies to persons within a state's territory and subject to its jurisdiction. With regards to those outside a state's jurisdiction, a state only needs to respect rights 'where a state exercises authority or effective control over the person or context at issue' (a negative duty).⁵¹ The ECtHR took a similar approach, in *Al-Skeini and Others v The United Kingdom*, holding the state is obliged to secure *only* the rights and freedoms 'relevant to the situation of that individual'.⁵² This stands in contrast to Milanovic's proposition under which there is no limit, territorial or otherwise, to a state's negative duty to respect human rights.

The approaches of Milanovic and Koh are not inherently incompatible with the texts of the ICCPR and the ECHR. The ICCPR references the duty to respect (a negative right) explicitly in Article 2(1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.' While the more natural reading of this clause is one that places a jurisdictional threshold on both the duty to respect and the duty to ensure – this is not the only plausible interpretation. The text can indeed be read to limit only the duty to ensure, rendering it thus consistent with Koh's interpretation. With regard to the ECHR, this approach requires implying the duty to respect, which is not explicitly mentioned in the text of the convention. This however is entirely in line with the case law of the Court, which 'has always generally assumed that negative obligations are inherent in the Convention'.⁵³

Assessing these explanations in the context of foreign surveillance, it is clear that Milanovic's justification in which the obligation to refrain from breaching rights is territorially unbound serves to cure the issue of extraterritorial violations and promotes the universal protection of human rights. Koh on the other hand does not achieve such broad rights protection, given that a state is only obliged to respect the rights of those *within* their jurisdiction. In both cases, applicants still encounter the difficulty of having to prove that the state exercises control over the context or individual, and as such the issues discussed above remain intact.

51 H. Koh, 'Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights,' United States Department of State, 2010, p. 4, retrieved 25 November 2018 <https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-icpr-memo.pdf>.

52 *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011, para. 137.

53 D. Shelton and A. Gould, 'Positive and Negative Obligations' in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, p. 569.

4 *Reliance on Broader Principles of International Human Rights Law*

Alternatively, a broader approach based on key principles of human rights law could be adopted. Under this approach, rather than carving out extraterritorial jurisdiction exceptionally on a case-by-case basis, jurisdiction is established in situations where a state takes any action extraterritorially that would be prohibited under international human rights law on their own territory. This approach characterised the first cases concerning the extraterritorial scope of the ICCPR such as *Lopez Burgos v Uruguay* and pushed the initial expansion of the extraterritorial application of the ECHR.⁵⁴ In *Lopez Burgos v Uruguay* it was held it would be 'unconscionable to interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetuate violations of the Covenant on the territory of another state, which violations it could not perpetuate on its own territory.'⁵⁵

This principled approach was endorsed by the Office of the High Commissioner for Human Rights (OHCHR) in the context of surveillance in their report 'The Right to Privacy in the Digital Age.' While the report acknowledges that jurisdiction applies when a state exercises effective power and control or authority,⁵⁶ it goes a step further to highlight the principle that a State may 'not avoid its international human rights obligations by taking action outside its territory that it would be prohibited from taking 'at home.'⁵⁷ To support the adoption of this position, the report argues that notions of power and effective control are indicators of whether a state is exercising jurisdiction or governmental powers, the abuse of which the ICCPR is intended to constrain.⁵⁸ A state cannot therefore avoid its human rights obligations simply by refraining from bringing those powers within the bounds of law.⁵⁹ Such a conclusion undermines the 'universality and essence of the rights protected by international human rights law.'⁶⁰ The report's direct reference to the principle of universality as a justification for applicability of the international human rights regime calls back to the values that underpinned its creation. It reflects the notion that human rights are common to all human beings by virtue of their humanity rather than their geographic location.

54 *Issa and others v Turkey* (App no. 31821/96), 16 November 2004, para. 71.

55 *Sergio Euben Lopez Burgos v Uruguay* (Comm No. R.12/52), 1981, para. 12.3.

56 United Nations High Commissioner for Human Rights 'The Right to Privacy in the Digital Age' A/HRC/27/37 (30 June 2014), para. 32.

57 *Ibid.*, para. 33.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

Under this logic, our inquiry with regards to foreign surveillance begins with the fact that there are indeed *prima facie* violations of rights that are ordinarily protected by international human rights regimes within their own borders. The fact that the spatial and personal models of extraterritorial application of the treaties are ill suited to address foreign surveillance (a clear act of governmental power) cannot as a result be relied on to exclude the practice from the scrutiny of the international human rights framework. Such a conclusion not only undermines the essence of the human rights regime, 'but may also create structural incentives for States to outsource surveillance to each other.'⁶¹

To continue overseas intelligence gathering therefore, a state would be required to demonstrate that it has undertaken measures to ensure that such intelligence gathering was not unlawful or arbitrary. This would require positive measures to be taken, the extent of which would be determined (as in *Al-Skeini and Others v The United Kingdom*) by the ability of the state to impact the right in question.

Interestingly for our purposes, the report also directly addresses the gaps in protection between citizens and foreign nationals subject to surveillance. The report finds that the general principle of non-discrimination enshrined in the ICCPR prohibits such a discrepancy.⁶² In this regard, Article 17 ought to be read in conjunction with Article 26, which provides that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law...in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.'⁶³ Of note, is the fact that this claim was rejected by the Court in the case of *Big Brother Watch and Others v The United Kingdom*. In addition to finding that the claim had not been substantiated, the Court argued that the distinction was based on 'geographical location' rather than nationality, and was justified given that the UK government had 'considerable powers and resources to investigate persons within the British Islands and do not have to resort to interception of their communications under a Section 8(4) warrant' which they do not have to investigate outside of the British Islands.⁶⁴

Additionally, the OHCHR report underscores the importance of 'measures to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity regardless of the nationality or

61 *Ibid.*

62 *Ibid.*

63 Article 26 ICCPR.

64 *Big Brother Watch and Others v The United Kingdom* (App nos. 58170/13, 62322/14 and 24960/15), 13 September 2018, para. 420.

location of individuals whose communications are under direct surveillance.⁶⁵ While the legality of the distinction in protection measures is not the focus of this commentary, it is interesting to note that in reaching this conclusion the OHCHR have assumed the human rights framework to be applicable to foreign surveillance on the basis of the unconscionability of any alternative. The key message here appears to be that it does not matter *how* you conceptualise extending the scope of human rights protection, at the end of the day the ICCPR is applicable.

The importance of the foundational principles of human rights law as a means to inform interpretations of extraterritorial jurisdiction was also raised in the separate opinion of Judge Bonello in *Al-Skeini and Others v The United Kingdom*. In this case Judge Bonello made a 'guileless plea...to return to the drawing board...[to] stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underline the fundamental functions of the Convention.'⁶⁶ Highlighting that the cornerstone of the Convention was to achieve the aim of the supremacy of human rights law, by undertaking to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention, Judge Bonello's reasoning is similar to that found in the OHCHR report, and *Lopez Burgos v Uruguay*. Judge Bonello explicitly references the commitment to 'universal and effective recognition and observance' of rights as a key factor for consideration. Endorsing this approach in no uncertain terms Judge Bonello states, 'universal' hardly suggests an observance parcelled off by territory on the checkerboard of geography.'⁶⁷

Unlike the OHCHR however, Judge Bonello offers a threshold by which to operationalise the reliance on foundational human rights principles in relation to extraterritorial human rights violations and coins this approach a 'functional test.' Under this test, a state would effectively exercise jurisdiction 'whenever it falls within its power to perform, or not to perform' any of the five key functions ensuring the observance of human rights.⁶⁸ These include 1) refraining from the violation of human rights 2) putting in place systems, which prevent breaches of human rights 3) investigating complaints of human rights

65 United Nations High Commissioner for Human Rights 'The Right to Privacy in the Digital Age' A/HRC/27/37 (30 June 2014), para. 36.

66 *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011, separate opinion of Judge Bonello, para. 8.

67 *Ibid*, para. 9.

68 *Ibid*, para. 11.

4) 'scourging those of their agents who infringe human rights'⁶⁹ and 5) providing compensation to victims.⁷⁰

Jurisdiction is neither territorial or extra-territorial... [but] functional – in the sense that when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether perpetrators are, or are not, identified and punished, whether the victims of violations, are or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction... The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations and from having the capability to fulfil them (or not to fulfil them).⁷¹

To apply the test two questions need to be asked, firstly, did it depend on the agents of the state whether the alleged violation would be committed or not? Secondly, was it within the power of the state to punish the perpetrators and to compensate the victims? If the answer is yes, jurisdiction is established. The threshold of jurisdiction in this case is the ability to make a practical difference to the enjoyment of human rights on the ground. In adopting this threshold, Judge Bonello has rightly limited total universality of the duty to ensure rights. The positive obligation to ensure rights only kicks in if the context is such that a state is in a position to do so. Applying Judge Bonello's test to a violation of the right to privacy resulting from foreign surveillance, it can be observed that the violation of the right was dependent on the action of a state agent. As such it is within the power of the state to punish the perpetrators and compensate victims.

In appraising Judge Bonello's approach, De Boer contends that the effective control test and the conclusion regarding the dividing and tailoring of rights applied by the ECtHR in *Al-Skeini and Others v The United Kingdom* is 'already a functional jurisdiction test in disguise'.⁷² Both tests are arguably methods to ascertain whether the factual reality is such that a state via its agents is in a position to affect human rights on the ground. Others have argued that

69 *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011, separate opinion of Judge Bonello, para. 10.

70 *Ibid*, para. 10.

71 *Ibid*, para. 12.

72 T. De Boer, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' in *Journal of Refugee Studies*, 2015, no. 1, p. 129.

the functional test is in essence the cause and effect jurisdiction rejected in *Banković*⁷³ on the grounds it extends the scope of obligations too far, in a manner that undermines the centrality of state borders under international law and the inherent fact that the purpose of jurisdiction is to limit obligations. However, as has been established foreign surveillance does not respect traditional state borders and calls for a new approach.

In addition to providing a rationalisation for bringing foreign surveillance under the jurisdiction of the international human rights regime, the approaches of the OHCHR and Judge Bonello have the additional benefit of drawing a bright line by which future cases can be more easily adjudicated. Extraterritorial jurisdiction in this case is measured against the 'essential yardstick of the supremacy and universality of human rights anytime, anywhere.'⁷⁴ This would constitute a more principled approach that avoids interpretive difficulties associated with creating fact based carve outs. Specifically it avoids the necessity of technical adaptations of the concepts of 'state agent authority and control' and 'physical control over an individual' that could lead to illogical case law. More importantly, it avoids a situation by where the specificities of exceptional carve outs can be relied on as a basis for excluding application of the treaties.

This approach could be criticised on the basis that it provides an unworkable solution that leans too far toward a utopian ideal. It cannot be forgotten that the implementation of the law requires state consent, a political reality courts and treaty bodies unfortunately need to be cognisant of. However, the approach advocated for is not limitless. Jurisdiction is only established in situations where states are factually in a position to negatively affect human rights. It does not call for a universal obligation to *ensure* the protection of rights – unless a state is in a position to do so.

Advocating for a Functional Approach to Jurisdiction Based on the Basic Principles of Human Rights

In an effort to keep up with states' ability to act and affect change overseas, 'human rights law has struggled to define a standard for determining the extra-territorial applicability of its norms that would reconcile the ethos of universal entitlement, on the one hand, with the centrality of borders in delineating

73 C. Ovey, 'ECHR in Armed Conflict' in K. Siegler, E. Wicks and L. Hodson (eds.), *The UK and European Human Rights: A Strained Relationship?*, Hart Publishing, Oxford, 2015, p. 231.

74 *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011, Separate opinion of Judge Bonello, para. 20.

state powers and responsibilities under international law, on the other hand.⁷⁵ This struggle has led to a contradictory line of case law culminating in two factually specific exceptions to the primarily territorial conception of jurisdiction. This body of law as it stands is ill suited to quick and predictable adaptation to new factual scenarios.

As has been demonstrated, barring illogical and sometimes absurd interpretations, the human rights framework is not, in its current form, obviously and easily applicable to the context of foreign surveillance. Indeed this may be why the ECtHR did not choose to assess the issue of its own accord in the case of *Big Brother Watch and Others v The United Kingdom*, and even why the government chose not to raise it themselves. However, just because the law is ill fitted to address the question, does not mean that the human rights framework is inapplicable. The array of rights at stake, the rule of law, and the integrity of the system as a whole strongly militate against such a conclusion. Rather than accepting foreign surveillance as an unfortunate reality and 'moving on with grace' as has been suggested,⁷⁶ it is vital that the Court clarify the principles relating to extraterritorial jurisdiction. In the field of foreign surveillance where factual realities only tend to become more complex, this becomes even more critical.

Theorising the issue demands creative evolution of the law. What is the best way to achieve this? Should a principled approach driven by universalist ideals of respect for human rights be adopted to strengthen the doctrine of extraterritorial applicability, or should the law continue to be rationalised and developed on an *ad hoc* basis case-by-case taking into account the specificities of the factual scenario in question. The dichotomy presents a balancing act that characterises much of human rights law.

The factual difficulties of foreign surveillance do not lend themselves to a simple tweaking of current models and there is no guarantee that any one model will adequately capture the full breadth of a state's technological capabilities. This author therefore argues for extraterritorial applicability of the treaties on the grounds of broader human rights principles, indeed the same reasoning as was employed in the initial cases concerning the extraterritorial applicability of the ECHR when the ECtHR referenced *Lopez Burgos v Uruguay*. This approach can be encompassed in the evolutive interpretation of the

75 Y. Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' in *Law & Ethics of Human Rights*, 2013, accessed 25 November 2018, <https://doi.org/10.1515/lehr-2013-0004>.

76 J. Radsan, 'The Unresolved Equation of Espionage and International Law' in *Michigan Journal of International Law*, 2007, no. 3, p. 595.

ECHR. The Court has often strived for coherence by ‘stressing that the interpretive questions it faces are not questions about the linguistic meaning of a Convention term, but rather questions about what can be considered compatible with a democratic society and the values expounded in the convention.’⁷⁷

In this light, the OHCHR’s report, accompanying United Nations Resolutions,⁷⁸ and the Council of Europe’s report on surveillance⁷⁹ should play an important role in interpretation. Indeed, the ECtHR has ‘never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms therein...and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States.’⁸⁰ In fact, the Court has even looked at other international human rights materials for interpretive guidance under Article 31(3) of the Vienna Convention on the Law of Treaties.⁸¹ For example, the Court has considered ‘recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly, reports of the Venice Commission, reports of the European Commission Against Racism, the European Social Charter, the EU Charter of Fundamental Rights’ to name a few.⁸² Such documents have been considered even in situations where they are neither pertinent to, nor legally binding on the respondent state.⁸³ As such, the OHCHR report along with the Council of Europe and United Nations General Assembly resolutions on the topic are exactly the kind of documents that constitute the expression of the current understanding of the right to privacy in the international community.⁸⁴ As such, they form persuasive evidence of a common value regarding international respect for the

77 G. Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ in *European Journal of International Law*, 2010, no. 3, p. 523.

78 UNGA Res 68/167 (18 December 2013) A/RES/68/167; UNGA Res 69/166 (18 December 2014) A/RES/69/166.

79 P. Omtzigt, ‘Mass Surveillance,’ Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, 2015, C AS/Jur (015) 01, para. 10.

80 *Demir and Baykara v Turkey* (App no. 34503/97), 12 November 2008, para. 67.

81 G. Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ in *European Journal of International Law*, 2010, no. 3, p. 521.

82 *Ibid.*, p. 522.

83 *Ibid.*, p. 521.

84 See eg: UNGA Res 69/166 (18 December 2014) UN Doc A/RES/69/166; UNHRC Res 28/16 ‘The Right to Privacy in the Digital Age’ (1 April 2015) UN Doc A/HRC/28/L.27; UNGA Res 68/167 (18 December 2013) UN Doc A/RES/68/167.; ‘Mass Surveillance’ Parliamentary Assembly Resolution 2045 (Council of Europe 21 April 2015).

right to privacy to be taken into account by the Court in order to open up the possibility of a progressive reading of Article 1.

The project undertaken by states when drafting human rights treaties was 'not one of creating new contractual obligations for themselves, as a means to pursue some further end, rather it was a project of finding ways to strengthen moral obligations they already had.'⁸⁵ In this regard it is important that states are not able to avoid their duties by using the specificities of establishing extraterritorial jurisdiction to render their actions outside the bounds of law. To this end, rather than developing grounds for extraterritorial jurisdiction on an *ad hoc* basis, plugging gaps as each new factual scenario arises, a more principled approach is called for. As has been argued, one such approach relies on the universal nature of rights to establish jurisdiction in cases where a state has the power to negatively impact human rights abroad. Taking this broad-brush approach ensures both the continuing flexibility and relevance of the law, allowing it to better meet the demands of the digital age and increasingly complex factual scenarios. Moreover, it speaks to the moral, ideological and theoretical underpinnings of the regime, which ought not to be forgotten, by providing a system in which the facts can be appraised 'against the principles which underline the fundamental functions of the Convention.'⁸⁶

85 G. Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' in *European Journal of International Law*, 2010, no. 3, p. 540.

86 *Al-Skeini and Others v The United Kingdom* (App no. 55721/07), 1 July 2011, Separate opinion of Judge Bonello, para. 8.