Chapter V

Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties

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1. Introduction

Determining whether state obligations apply to a particular area of activity usually involves asking whether the activity in question falls within the scope *ratione materiae* of the obligations in question, and whether the connection between the state and the activity meets the requirements of the relevant responsibility norms. When the activity under consideration takes place outside the state’s territory, however, a further question must be resolved: do the obligations in question apply to the state at all, given the extraterritorial nature of the location? This question is at issue for two legal regimes which, in terms of subject-matter, are potentially relevant to extraterritorial state activity: the law of occupation and international human rights law. Without an answer in the affirmative, the norms in these two areas of law are not in play, regardless of whether as a matter of fact the state is acting in a manner that speaks to the kinds of issues, notably concerning the treatment of individuals, they seek to regulate.

The trigger for the law of occupation, and one of the two triggers for the human rights law concept of “jurisdiction” extraterritorially, are based on a *spatial* concept of territorial control. The interplay between the approaches taken in each case on the question of what type of control is required mediates the extent to which the field of activity covered by the two areas of law overlaps. Since debate on what these approaches are is highly contested, there is considerable uncertainty and disagreement as to the scope of their parallel application.

A complete and comparative analysis of the various aspects of the spatial tests in these two areas of law is beyond the scope of a piece of this length. Instead, the focus is narrowed considerably to a particular aspect that has been the subject of

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significant judicial comment in recent years: the spatial test in human rights treaties on civil and political rights. What light do these determinations shed on the meaning of the scope of the spatial test, thereby mediating the degree to which the human rights obligations at issue will apply, potentially overlapping with the law of occupation?

In the judicial treatment of the spatial test in this area of human rights law, one can identify various suggestions that coverage is limited to a sub-set of extraterritorial state activities involving territorial control occurring as a matter of fact. The effect of these suggestions, which is sometimes explicitly acknowledged when they are made, is that a situation of territorial control by a foreign state might trigger that state’s obligations in the law of occupation, but not its obligations in human rights law. This article conceptualizes these suggestions in four categories, and offers a critical appraisal of each, by way of contributing to understandings of their significance for the scope of the law in this area.

This piece begins in part 2 by explaining the concept of “jurisdiction” used in the human rights treaties under evaluation to determine their field of application, how this concept is understood in the extraterritorial context and, within this general issue, the contours of the spatial test that will be the focus of the present piece. In Part 3 the equivalent trigger in the law of occupation is explained in overview.

Part 4, the heart of the piece, explains and critically analyses four different suggestions that have been made as to understandings of “jurisdiction” as territorial control which have the potential to attenuate the scope of this concept to a sub-set of the situations of extraterritorial control as a matter of fact. The first suggestion is that “jurisdiction” maps onto the meaning of this term in general international law, thereby supposedly limiting applicability to extraterritorial situations that enjoy some sort of international legal sanction. The second suggestion is that “jurisdiction” as a matter of human rights law only exists exceptionally, that this exceptionalism is somehow autonomous from the exceptional nature of extraterritorial activities as a matter of fact, and the former is more exceptional than the latter. The third suggestion is that the test includes a requirement that the state is in a position to exercise civil administration; without this capacity, the obligations are not triggered. Finally, the fourth suggestion is that control must be exercised “overall” and that the concept of jurisdiction cannot accommodate situations involving varying degrees of control.