Abstract—This article explores the existing models of extraterritorial application of human rights treaties. It concludes that these are inadequate as they allow for situations where no jurisdictional link is found between a State party and a victim of a human rights violation even where the State party has the ability to prevent this violation. This article therefore proposes that the existing models be replaced with the legal test for determining such ability: a causal model, applying principles of foreseeability and remoteness, which determines whether the State party has control over an act or omission causing an extraterritorial rights violation.

* University College London. I am grateful to Professor Jeff King and Professor Christian Walter, as well as the OUULJ editorial team, for their comments on earlier drafts. All errors remain my own.
1. Introduction

Human rights are founded on the principle of universality. This is apparent in the preamble of the United Nations Declaration of Human Rights which considers ‘recognition […] of the equal and inalienable rights of all members of the human family [to be] the foundation of freedom, justice and peace in the world’. A truly universal scheme of human rights protection envisages that all individuals are empowered to enforce these rights against any State party.\(^1\) However, human rights treaties are drafted by States which seek to limit the universal protection of rights where this would incur their own international responsibility.\(^2\) As a result, the obligations contained under these treaties are limited not only in content but also in the pool of rights-holders to whom they are

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\(^1\) International law is founded on the principle of State sovereignty (‘The principle…of supreme authority within a territory’: Samantha Besson, ‘Sovereignty’, Max Planck Encyclopedia of Public International Law). It is therefore only through the consent of individual States that schemes of human rights protection emerge on an international level. Thus, there is no intrinsic universal scheme of protection; this is established by treaties negotiated on a multilateral basis.

\(^2\) For example, the US introduced amendments during the drafting of the ICCPR to ensure that the US’ international responsibility would not extend to its overseas activities. Eleanor Roosevelt, the then US representative and Chairman of the UN Commission on Human Rights, made clear that the US would not assume ‘an obligation to ensure the rights recognized in [the Treaty] to citizens of countries under United States occupation’: Summary Record of the Hundred and Ninety-Third Meeting, UN ESCOR Human Rights Committee (1950) UN Doc E/CN.4/SR.193, [14] (Mrs Roosevelt). The US has since maintained this strictly territorial interpretation of the application of the ICCPR: Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (21 October 2005) Annex 1, available at [https://www.state.gov/j/drl/rls/55504.htm#annex1] accessed 25 April 2019.
owed; the universal scheme of protection envisaged in the Declaration does not exist.

In determining this pool of rights-holders through the extraterritorial application of human rights treaties (Part 2), a balance must be struck between protecting the rights of all individuals and ensuring that obligations imposed on State parties can be effectively achieved (Part 3). The current models for determining extraterritorial application only roughly correlate to this notion of effectiveness and create a *prima facie* presumption that those outside of a State party’s territory do not enjoy rights against it (Part 4). The presumption must be reversed with the adoption of a causal model of extraterritorial application (Part 5). Causation constitutes a legal test for determining whether a State party is able to effectively secure rights under human rights treaties and thus is most closely aligned with the guiding principles of human rights protection, namely universality and effectiveness. The causal model can be introduced through customary principles of treaty interpretation and should apply to both negative and positive obligations.³ State parties will retain the possibility of being exculpated, but only when it can be shown that they were unable to effectively secure the relevant rights, because of an insufficiently direct causal chain or because they acted reasonably in preventing human rights harm, thus discharging their obligations of due diligence. It is only in such cases that a State party has acted in accordance with the object and purpose of the relevant human rights treaty and where deviation from the universality of human rights is permissible.

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³ These are obligations to respect and protect human rights, respectively. On this, see Dinah Shelton and Ariel Gold, ‘Positive and Negative Obligations’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 562–584.
2. The exercise of extraterritorial jurisdiction

A human rights treaty is applied extraterritorially where, at the moment of a violation by State A of a right protected under the treaty, the right-holder is located outside State A’s territory. The extraterritorial element, therefore, is the location of the affected individual at the point of the act or omission by State A, rather than the location of State A’s act or omission. While many extraterritorial situations also involve extraterritorial State acts, this is not required for the issue of extraterritoriality to arise. For example, in *Montero v Uruguay*, the relevant rights violation was a decision not to issue a passport to the applicant; this decision was taken within Uruguay’s territory with extraterritorial effect on the applicant, who was situated in Germany.

There is no default rule on the extraterritorial application of human rights treaties in international law; some treaties expressly require State A to ensure rights to those in its ‘jurisdiction’, while others have a notion of ‘jurisdiction’

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6 Milanovic (n 4) 9–11. Some treaty obligations are applied universally, for example, the obligation to prevent genocide under the Convention on the Prevention and Punishment of the Crime of Genocide: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007]* ICJ Rep 43. This article will focus on human rights obligations which are limited in application by the notion of ‘jurisdiction’.
7 For example, Article 1 ECHR, Article 1 (1) ACHR and Article 2 (1) ICCPR.
introduced through subsequent interpretation and application.\(^8\)

This is distinct from jurisdiction in general international law, meaning the permission to exercise legal authority, and refers instead to factual control.\(^9\) Whether particular obligations under a human rights treaty can be applied extraterritorially is a question of interpretation of the relevant treaty,\(^10\) and must therefore be determined with reference to the customary rules on interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties (‘VCLT’).\(^11\) Jurisdiction must be interpreted in line with the term’s ordinary meaning and the object and purpose of the relevant treaty – Article 31(1) VCLT – as well as with relevant rules of international law – Article 31 (3) (c) VCLT.

### 3. The principles of universality and effectiveness

In determining jurisdiction under human rights treaties, international human rights courts and treaty bodies must have regard to the interlinking principles of universality and effectiveness. The universality of human rights\(^12\) is a foundational

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\(^8\) For example, the ICESCR (Legal Consequences of the Construction of a Wall (Advisory Opinion) [2004] ICJ Rep 136, [112]) and CEDAW (CEDAW, ‘General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) [12], CEDAW/C/GC/28).

\(^9\) See discussion in Part 5.A.

\(^10\) As the ECtHR noted in Banković v Belgium, App No 52207/99 (ECtHR, 12 December 2001) [55].

\(^11\) See Territorial Dispute (Libya v Chad), (Merits) [1994] ICJ Rep 6 1045 [41], where the ICJ confirmed the customary status of Articles 31 and 32 VCLT.

\(^12\) There is continuing opposition to the notion that human rights are universal. It is argued that they are instead a Western ideal which cannot
principle of the International Bill of Rights\textsuperscript{13} and its fundamental nature requires that it be deviated from only in line with the object and purpose of human rights treaties, namely the \textit{effective} protection of human rights.\textsuperscript{14}

State A is able to effectively secure the relevant rights when it has some degree of power or influence over the relevant actors involved in the rights violation. Human rights are dual in nature, requiring observance of negative and positive obligations,\textsuperscript{15} and therefore State parties are obligated to prevent the harmful actions of both its agents\textsuperscript{16} and, generally to a lesser extent, of private parties. This must be effective in the sense that it does not impose too great a burden on State parties,\textsuperscript{17} i.e.

\begin{itemize}
\item Universality is reflected in a great number of international human rights instruments including the UNDHR (see Part I). The International Bill of Rights consists of the UNDHR and the twin covenants (ICCPR and ICESCR): UN General Assembly Resolution 217 (III), 10 December 2014.
\item Milanovic (n 4) 56.
\item HRC, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) [6], UN Doc CCPR/C/21/Rev.1/Add.13. See generally Shelton and Gold (n 3) 562.
\item In the sense of Article 4 of the Articles on State Responsibility.
\item This can be contrasted against the notion of effectiveness as applied elsewhere in international law, for example, by the CJEU through the notion of \textit{effet utile}, which requires that international legal norms are
\end{itemize}
obligations beyond what could ever be achieved in light of the insufficient proximity between the rights violation and State A. For example, where a private party in another territory, with no relevant link to State A, violates the rights of an individual also located in another territory, State A would be unable to anticipate the actions of the private party, introduce preemptory measures, or indeed carry out proper investigations once the violation had taken place. In line with the shared object and purpose of human rights treaties, it is only in these circumstances, where State A is completely unable to fulfil any of the various obligations under the treaty, in which jurisdiction should not be found. Any model of extraterritorial application of human rights treaties must therefore be viewed in light of this principle of effectiveness.

Judge Angelika Nußberger notes that international courts and treaty bodies must ‘be aware of [their] own capacities’. As these institutions have seen a greatly increased workload over the last half-century, Judge Nußberger suggests that a restrictive interpretation of jurisdiction may be necessary to ensure the effectiveness of such institutions in maintaining international justice. However, the question of who holds human rights under a treaty is fundamental and the application of thresholds which, to a large extent, discount rights violations abroad undermines the integrity and coherence of international human rights law. Selectivity is necessary, but this must be done observed in order to protect the efficacy of the legal order: ‘effet utile’ Enyclopaedic Dictionary of International Law (3rd edn, 2009).

18 Where State A’s ability to protect against rights violations is minimal, it would still be under an obligation to cooperate, which constitutes a legal duty under Articles 55 and 56 UN Charter (see discussion at Part V.1).

on a reasoned basis, by focusing on exemplary cases and ensuring a robust admissibility stage of proceedings.\textsuperscript{20}

4. The failings of the spatial and personal models of extraterritorial application

In practice, international courts and treaty bodies have interpreted the notion of ‘jurisdiction’ under human rights treaties restrictively.\textsuperscript{21} Jurisdiction is largely established using the spatial and personal models of extraterritorial application; these are engaged where the area in which the affected individual is situated or where the individual is themselves under State A’s effective control.\textsuperscript{22} These models, though, do not extend to all situations where State A is able to secure the rights of relevant individuals and consequently these interpretations of jurisdiction do not align with the principles of universality and effectiveness.

A. The spatial model

Article 1 of the European Convention on Human Rights (‘ECHR’) obliges States parties to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [...] this Convention’. The standard for the spatial model of extraterritorial application was set by the European Court of Human Rights (‘ECtHR’) in \textit{Loizidou v Turkey},\textsuperscript{23} concerning the Turkish occupation of Northern Cyprus, and requires that State A

\textsuperscript{20} As Judge Nußberger acknowledges: ibid 253.
\textsuperscript{21} ‘Jurisdiction’ has been consistently interpreted across the ECHR, ICCPR, ACHR, ICESCR, CEDAW, and others as pertaining to control.
\textsuperscript{22} ‘Control’ is rarely defined by international courts and treaty bodies and the threshold varies between the two models of extraterritorial application, as is discussed below in Parts IV.1 and IV.2.
\textsuperscript{23} (Preliminary Objections) App No 40/1993/435/514 (ECtHR, 23 March 1995) [62].
‘exercise[] effective control of [the relevant] area outside its national territory’.\textsuperscript{24} State A has effective control where it exercises executive powers over the relevant area,\textsuperscript{25} such that it generally directs the local authorities.\textsuperscript{26}

The spatial model is restrictive as it requires control over an area in order for human rights obligations to be engaged. Invasion constitutes only one example of the numerous types of extraterritorial activity – military, political, economic – which are carried out by State parties abroad and which affect human rights. There are many other types of activity, though, which do not bring the relevant territory under State parties’ effective control. For example, where an Iraqi civilian is taken into custody and killed by UK forces operating in Iraq,\textsuperscript{27} it cannot sensibly be argued that the precise area in which the human rights violations took place was under the UK’s effective control. The UK, though, is able to secure the rights of the relevant individuals as it exerts complete control over them. The spatial model therefore excludes extraterritorial situations where State A remains able to secure the relevant right because it has control over people rather than territory.

\textsuperscript{24} ibid [52].
\textsuperscript{25} \textit{Al-Skeini v United Kingdom}, App No 55721/07 (ECtHR, 7 July 2011) [131].
\textsuperscript{26} \textit{Issa v Turkey}, App No 31821/96 (ECtHR, 16 November 2004) [70].
\textsuperscript{27} See \textit{Al-Skeini v United Kingdom} (n 25). Only Mousa, the son of the sixth claimant, was detained under British custody, whereas the other claimants’ relatives were killed on the streets of Basra while British troops were on patrol: Karen da Costa, \textit{The Extraterritorial Application of Selected Human Rights Treaties} (Martinus Nijhoff 2013) 223.
International courts and treaty bodies have avoided rigid application of the spatial model by also focusing on the direct relationship between State A and the affected individual. In Öcalan v Turkey the applicant claimed that Turkish authorities operating overseas had abducted him. The ECtHR looked beyond notions of territorial control, which limited the normative efficacy of the spatial model, and instead applied the personal model of jurisdiction. The personal model arises where the individual whose right is damaged is themselves under State A’s ‘authority and control’, for example, where they have been captured by State A’s agents or where State A enjoys sovereign rights over them because they are its national. Returning to the example of the Iraqi civilian, in Al Skeini v United Kingdom the ECtHR found that, independent of control over the relevant area in Iraq, the detainee had been ‘taken into the custody of [the UK]’ and was consequently under the UK’s complete control and, therefore, under its jurisdiction. The personal model operates alongside the spatial model and had been used in earlier decisions of the European Commission of Human Rights as

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30 ibid [93].
31 Isa v Turkey (n 26) [71]; da Costa (n 27) 162.
32 For example, López Burgos v Uruguay (n 28).
33 For example, Montero v Uruguay (n 5).
34 Al-Skeini v United Kingdom (n 25).
35 ibid [136].
36 ibid [149] – [150].
37 For example, X v United Kingdom, (Admissibility Decision) App No 7547/76 (ECommHR, 15 December 1977) [74].
well as in communications of the Human Rights Committee (‘HRC’),\textsuperscript{38} the treaty body to the International Covenant on Civil and Political Rights (‘ICCPR’).

However, the personal model excludes extraterritorial situations where State A has insufficient proximity to the individual to control them but is nonetheless able to secure their rights. For example, global surveillance and modern armed conflict are often controlled centrally within State A’s territory with effects abroad. The UK’s surveillance regime involves the collection of data belonging to those situated outside the UK’s territory and has impacts on their right to privacy (Article 8 ECHR);\textsuperscript{39} they are not, however, controlled by the UK. Similarly, the US engages in drone attacks abroad which endanger civilian lives contrary to the right to life (Article 6 ICCPR);\textsuperscript{40} however, the targets are not controlled by the State and thus the personal model is not engaged.\textsuperscript{41} The extraterritorial element in such situations

\textsuperscript{38} For example, in López Burgos v Uruguay (n 28) [12.2].
\textsuperscript{39} See Big Brother Watch and Others v United Kingdom, App Nos 58170/13, 62322/14 and 24960/15 (EctHR, 13 September 2018).
\textsuperscript{40} See HRC, ‘Concluding Observation on the United States of American’ (23 April 2014) [9], UN Doc CCPR/C/USA/CO/4.
\textsuperscript{41} Interestingly, in a recent case the German Higher Administrative Court for North Rhine-Westphalia was asked whether such drone strikes would offend the German Basic Law as the US Air Base in Ramstein, Germany plays an essential role in these operations. The German Court emphasised that there is no limitation to the extraterritorial effect of the right to life under the Basic Law: OVG NRW, Urteil vom 19.3.2019 – 4 A 1361/15 <https://www.justiz.nrw.de/JM/Presse/presse_weitere/PresseOVG/19_03_2019_1/190319a_Anlage.pdf> accessed 25 April 2019: ‘Die Schutzpflicht des Staates aus Art. 2 Abs. 2 GG besteht bei Gefahren für das Grundrecht auf Leben auch bei Auslandssachverhalten, sofern ein hinreichend enger Bezug zum deutschen Staat besteht.’ (‘The State’s duty to protect under Art. 2 II BL also arises in cases of threats to the basic right to life abroad, so long as there is a sufficiently close
situations, merely the location of the affected individual, in no way impacts State A’s ability to prevent the rights violations. The UK is able to respect Article 8 ECHR by prohibiting the storage of certain data and the US can effectively secure the right to life by adopting suitable measures to ensure that the prophylactic obligations under Article 6 ICCPR are met. Further, the personal model incentivises State A to commit human rights violations against an individual before performing proper checks, as such checks might require bringing individuals under State A’s control and, therefore, jurisdiction. Thus, the personal model also fails to balance effectiveness against the universality of rights as it derogates from the latter in situations where the former is not impaired.

5. A causal model of extraterritorial application

There are two problems inherent in the above models of extraterritorial application of human rights treaties. Firstly, extraterritorial application is necessary to ensure that State A cannot perpetrate violations of treaty rights in other territories which it could not perpetrate in its own. However, the existence relationship with the German State.’). See Leander Beinlich, ‘Germany and its Involvement in the US Drone Programme before German Administrative Courts’ (EJIL: Talk!, 8 April 2019) <https://www.ejiltalk.org/germany-and-its-involvement-in-the-us-drone-programme-before-german-administrative-courts/> accessed 25 April 2019.

42 Noam Lubell, Extraterritorial Use of Force Against Non-State Actors (OUP 2010) 224, Al-Skeini v United Kingdom, (Concurring Opinion of Judge Bonello) App No 55721/07 (ECHR, 7 July 2011) [15].

43 As acknowledged by the HRC in López Burgos v Uruguay (n 28) [12.3] and the ECtHR in Isak v Turkey, (Admissibility Decision) App No 44587/98 (ECtHR, 28 September 2006) 20.
of tests for jurisdiction, in addition to what an applicant must already prove, means that extraterritorial application is treated as an ‘exception’ to be justified. This creates a prima facie presumption that, where the affected individual is situated outside of State A, they do not hold the relevant rights. This has given rise to conflicting case law; courts have sought equitable outcomes in specific cases by formulating contradictory tests, resulting in a total loss of coherence.

Secondly, although the spatial and personal models are successfully applied in situations where State A is able to secure rights, they do not constitute legal tests for determining such ability. They consequently exclude situations where State A is able to secure relevant rights and thus do not align with the principles of universality and effectiveness. State A can, of course, guarantee the rights of those situated in an area it has annexed, or who have been captured by its agents. However, the decisive factor indicating whether State A is able to prevent a rights violation is not whether it has general control over a person, but whether it controls the relevant act or omission which causes the violation. It is in such circumstances in which State A has the power to prevent the human rights infringement. The spatial and personal models must therefore be replaced with a legal test for

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44 The ‘exceptional’ nature of extraterritorial application of the ECHR is emphasised often by the ECtHR, for example, in: Banković v Belgium (n 10) [67]; Manitaras v Turkey, (Admissibility Decision) App No 54591/00 (ECtHR, 3 June 2008) [26]; and Al-Skeini v United Kingdom (n 25) [131].
46 Al-Skeini v United Kingdom, (Concurring Opinion of Judge Bonello) (n 42) [5].
47 See Part III.
48 Al-Skeini v United Kingdom, (Concurring Opinion of Judge Bonello) (n 42) [11].
determining State A’s ability to secure rights: a causal model which determines whether State A has control over an act or omission which causes an extraterritorial rights violation.

A. Introducing the causal model through principles of interpretation

A causal model of extraterritorial application was expressly rejected by the ECtHR in Banković.\(^{49}\) This case concerned airstrikes by NATO forces on the former Federal Republic of Yugoslavia. A missile had hit a radio and television broadcasting centre, killing sixteen people and injuring a further sixteen. The ECtHR rejected what it considered a ‘cause-and-effect’ notion of jurisdiction,\(^{50}\) where an individual who was causally affected by an act or omission emanating from a State party is brought under its jurisdiction. It considered this model to be contrary to the ordinary meaning of the term ‘within their jurisdiction’ in Article 1 ECHR as it rendered those words ‘superfluous and devoid of any purpose’.\(^{51}\) It further noted that this model conflates jurisdiction with the question of whether the applicant is a victim of a rights violation.\(^{52}\)

However, the ECtHR failed to distinguish between different notions of ‘jurisdiction’ in international law and their separate ordinary meanings in the sense of Article 31(1) VCLT. Jurisdiction under general international law refers to the permission to exercise legal authority in a given situation.\(^{53}\) However, as Dr Ralph Wilde notes, the suggestion that human

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\(^{49}\) Banković v Belgium (n 10) [75].

\(^{50}\) ibid [75].

\(^{51}\) ibid [75].

\(^{52}\) ibid [75].

\(^{53}\) Cedric Ryngaert, Jurisdiction in International Law (OUP 2008) 5–10.
rights are owed only to those over whom States *lawfully* exercise power would be ‘perverse’. State party jurisdiction under human rights treaties is therefore a separate doctrine which refers to *de facto* rather than *de jure* jurisdiction; we look for control factually resembling the sovereign powers which a State enjoys over its territory and nationals. This was confirmed by the HRC, which has found that jurisdiction ‘applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained’.

State party jurisdiction therefore need not be tied to notions of territory and arises where there exists factual control over the relevant rights violation. This interpretation is supported by the drafting of jurisdiction clauses under human rights treaties, *inter alia*, Article 1 ECHR, Article 2(1) ICCPR and Article 1(1) American Convention on Human Rights (‘ACHR’). These require each State party to secure the rights contained within the respective treaty to all those under its jurisdiction; such jurisdiction is therefore prefaced on the State party’s *ability* to secure the rights.

In any event, there is no hierarchy among the tools of interpretation in Article 31 VCLT, and it would be justifiable to favour an interpretation of ‘jurisdiction’, in line with the treaty’s object and purpose, which relies on an alternative ordinary

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55 General Comment 31 (n 15) [10]. See also: Wilde, ibid 513; Milanovic (n 4) 39. Indeed, this is apparent from the distinction between ‘territory’ and ‘jurisdiction’ under Article 2 (1) ICCPR.
56 *Al-Skeini v United Kingdom*, Concurring Opinion of Judge Bonello (n 42) [12].
meaning of the term.\textsuperscript{57} Such interpretations have already been adopted in respect of numerous jurisdiction clauses. For example, the jurisdiction clause under Article 2(1) ICCPR requires each State party to guarantee the rights of those under its ‘territory and jurisdiction’. This has been applied by the International Court of Justice\textsuperscript{58} and the HRC\textsuperscript{59} as meaning territory or jurisdiction. Similarly, Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment refers to ‘acts of torture in any territory under [a State party’s] jurisdiction’ but is applied extraterritorially under the personal model.\textsuperscript{60}

Such an interpretation is further supported by the duty to ‘take joint and separate action in cooperation’ under Articles 55 and 56 UN Charter,\textsuperscript{61} a relevant rule of international law which constitutes an interpretative tool under Article 31(3)(c) VCLT. In many situations, it is only the State party in the territory in which the act or omission occurs which is able to prevent the extraterritorial harm. Outright rejection of the causal model therefore creates a vacuum in rights protection.\textsuperscript{62} This runs

\textsuperscript{58} \textit{The Wall} (n 8) [111].  
\textsuperscript{59} General Comment 31 (n 15) [10].  
\textsuperscript{60} CAT, ‘General Comment No. 2: Implementation of Article 2 by States parties’ (24 January 2018) [16], UN Doc CAT/C/GC/2.  
\textsuperscript{61} For a discussion on the legal basis of the obligation to cooperate in the UN Charter, see Tahmina Karimova, \textit{Human Rights and Development in International Law} (Routledge 2016) 126–132.  
contrary to the duty to cooperate, a fundamental principle of international law, as it removes the ability of the affected State party, State B, to prevent the violation of rights in its territory. A causal model thus ensures the greatest level of cooperation to fulfil obligations under human rights treaties.

In respect of the ECtHR’s second objection – that the causal model conflates jurisdiction with the requirement that the applicant is a victim of a rights violation – the test applied to determine whether or not the applicant is a victim of a rights violation is a preliminary survey which applies only a basic notion of causation. The test applied under the causal model is considerably more rigorous.

**B. Case law applying a causal model**

The ECtHR encountered clear normative difficulties following its rejection of the causal model in *Banković*, as seen in *Andreou v Turkey*. This case concerned the cross-border shooting of demonstrators situated on Greek-Cypriot territory by Turkish forces situated on Turkish-Cypriot territory. Turkey sought to

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64 For example, in ECtHR jurisprudence an applicant must show that they were ‘directly affected’: *Tănase v Moldova*, App No 7/08 (ECtHR, 27 April 2010) [96].

65 See Part V.3.

66 *Banković v Belgium* (n 10).

67 App No 16094/90 (ECtHR, 27 October 2009).
deny responsibility by claiming that the affected individuals did not fall under its jurisdiction as they were neither situated in an area under its control (the spatial model) nor were they themselves directly under the control of Turkish authorities (the personal model). This analysis highlights the two difficulties with rejection of a causal model highlighted above. Firstly, it allows for States parties to deny jurisdiction because of damage where the extraterritorial element, the location of the affected individuals, has no impact on State A’s ability to prevent the rights violation. The mere incidence of a cross-border, rather than intrastate, shooting does not limit Turkey’s ability to prevent the shots being fired as this still took place on Turkish-controlled territory. Secondly, in this situation it was only Turkey which was able to prevent the harm; the Turkish forces operating on Turkish-Cypriot territory could be controlled only by Turkey. This denies Greece the ability to guarantee the rights of the applicant, contrary to the duty to cooperate.

In light of these difficulties, the ECtHR departed, although only implicitly, from its position in Banković by finding that:

*even though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the applicant should be regarded as ‘within [the] jurisdiction’ of Turkey within the meaning of Article 1 of the Convention.*

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A causal model has been applied in several other admissibility decisions and in the judgement of *Stephens v Malta (No. 1)*, concerning the detention of an individual by Spanish authorities under the instructions of Malta. In finding jurisdiction, the ECtHR here emphasised that:

> it cannot be overlooked that the applicant’s deprivation of liberty had its *sole origin* in the *measures taken exclusively* by the Maltese authorities […] By *setting in motion* a request for the applicant’s detention pending extradition, the responsibility lay with Malta […].

The Strasbourg Court did not assert that the actions of the Spanish authorities are directly attributable to Malta; these actions were instead framed as the causal consequence of Maltese actions, attributable to the respondent.

An explicit application of the causal model can be found in Advisory Opinion 23/17 of the Inter-American Court of Human Rights (‘IACtHR’). It was invited to consider situations of transboundary environmental harm with simultaneous human

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69 In two further admissibility decisions (*Pad and Others v Turkey*, (Admissibility Decision) App No 60167/00 (ECtHR, 28 June 2007) [54] and *Kovačić and Others v Slovenia*, (Admissibility Decision) App No 45653/99 (ECtHR, 3 June 2008) 52) the ECtHR has implicitly found clear causal harm to suffice for establishing jurisdiction.

70 App No 11956/07 (ECtHR, 21 April 2009).

71 ibid [51]–[52] (emphasis added).


73 This occurs when State A breaches its obligation to prevent activities taking place on its territory which cause significant environmental damage to that of State B: Article 3 Draft articles on Prevention of Transboundary Harm from Hazardous Activities; Philippe Sands, *Principles of International Environmental Law* (2nd edn, CUP 2012) 317f.
rights harm. The IACtHR took an expansive approach to interpreting ‘jurisdiction’ under Article 1(1) ACHR, finding that:

Under the American Convention, when transboundary harm which affects Convention rights occurs, it is understood that the persons whose rights have been injured are under the jurisdiction of the State of origin [of the transboundary harm] if a relationship of causation exists between the act that occurred in its territory and the infringement of the human rights of persons outside its territory.

This is a welcome step towards an approach which achieves a principled interpretation of jurisdiction in line with the notions of universality and effectiveness, particularly as it views positive obligations as applicable under a causal model. However, limiting the model to cases of transboundary harm is as arbitrary as finding the requirement of jurisdiction only to be met in situations of military occupation under the spatial model or passport confiscation under the personal model.

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74 Such a situation was the subject of Aerial Herbicide Spraying. Colombia was engaged in toxic herbicide spraying over its territory in order to combat the cultivation of coca, however this had numerous environmental and human rights impacts in Ecuador: see Memorial of Ecuador, 28 April 2009, [9.9], and Counter-Memorial of Colombia, 29 March 2010, [9.10]–[9.15], available at <https://www.icj-cij.org/en/case/138/written-proceedings> accessed 25 April 2019. This dispute was settled: Aerial Herbicide Spraying (Ecuador v Colombia), Order of 13 September 2013, ICJ Reports 2013, 278.

75 Advisory Opinion OC-23/17 (n 72) [101].

76 For example, Loizidou v Turkey (n 23).

77 For example, Montero v Uruguay (n 5).
Although these decisions are non-binding\textsuperscript{78} and do not amount to outright endorsements of a universally-applicable causal model of jurisdiction, they highlight the normative pull of an interpretation of jurisdiction relying on principles of causation.

\textbf{C. The relevant causal test}

Principles used to determine causation in international law are closely tied with State A’s ability to guarantee human rights. The causal model does \textit{not} amount to the universal application of human rights treaties as it includes principles which will exculpate State parties where they are, despite a factual causal link between their acts and omissions and human rights violations, unable to secure the relevant rights. This is evident when looking to the two types of obligations owed under human rights treaties, negative and positive.

\textbf{I. Negative obligations}

Causation is assessed in two stages: first, an international court looks for cause-in-fact; second, it assesses scope of responsibility.\textsuperscript{79} Cause-in-fact requires State A’s act or omission

\small\textsuperscript{78} There is no \textit{stare decisis} system in the jurisprudence of international courts (see generally Gilbert Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 Journal of International Dispute Settlement 5). Decisions, though, constitute subsidiary means of interpretation under Article 38 (1) (d) ICJ Statute. Further, international courts will generally not deviate from their previous decisions on the same matter for the sake of legal certainty: \textit{Goodwin v United Kingdom}, App No 28957/95 (ECtHR, 11 July 2002) [74].

to be a ‘but for’ cause of the human rights damage.\textsuperscript{80} Where there are multiple factual causes including State A’s act or omission, State A will only be deemed to have caused the wrongful harm if its contribution was a ‘principal cause’;\textsuperscript{81} this is in line with the principle of effectiveness as, where State A is only an ancillary cause of the harm, they lack the ability to prevent it and therefore jurisdiction would not be established. A further limitation to liability when establishing factual causation is that the burden of proof for establishing a causal link rests with the applicant.\textsuperscript{82}

The scope of responsibility stage of the causation analysis further limits the liability of State A for the harm it factually caused. The principle of foreseeability requires that the wrongful harm which eventuates would have been foreseen by a person of normal prudence when the relevant act or omission was carried out.\textsuperscript{83} This standard will vary dependent on the information available to State A at the relevant time.\textsuperscript{84} In \textit{Lemire v Ukraine}\textsuperscript{85} the

\begin{footnotesize}
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\item \textsuperscript{80} Kellner and Durant, ibid 457–460; \textit{Case of YATAM v Nicaragua}, IACtHR Series C No 127 (2005) [239]–[245].
\item \textsuperscript{81} \textit{Campbell and Cosans v United Kingdom}, App Nos 7511/76 and 7743/76 (ECtHR, 25 February 1982) [26]; \textit{Khodorkovsky and Lebedev v Russia}, App Nos 11082/06 and 13772/05 (ECtHR, 25 July 2013) [940]; Pusztai (n 79) 189–192.
\item \textsuperscript{82} This is true of any legal submission to be substantiated by fact: see, for example, Caroline E Foster, ‘Burden of Proof in International Courts and Tribunals’ (2010) 29 Australian Yearbook of International Law 27, 41–42; \textit{Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)}, (Preliminary Objections) [1998] ICJ Rep 275, 319.
\item \textsuperscript{83} Marta Infantino and Eleni Zervogianni, ‘Summary and Survey of the Results’ in Marta Infantino and Eleni Zervogianni (eds), \textit{Causation in European Tort Law} (CUP 2017) 604.
\item \textsuperscript{84} \textit{Bosnia Genocide} (n 6) [430].
\item \textsuperscript{85} ICSID Case No ARB/06/18, Award of 28 March 2011.
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tribunal emphasised that the victim must show that each intermediary link in the causal chain can be traced back to the initial act or omission. Foreseeability is therefore premised on State A’s awareness of the likely harmful effects and therefore its ability to avoid rights violations.

Where there is insufficient closeness between State A’s act or omission and the rights violation, the principle of remoteness operates to exculpate States. The tribunal in *Micula v Romania* formulated a remoteness test for cases of multiple successive causes where subsequent causes which disrupt the chain of causation may constitute intervening acts which render the resulting damage too remote. The notion of remoteness generally affords international courts discretion to exculpate States on a number of grounds, and has been utilised in the jurisprudence of the ECtHR. Remoteness is closely tied with the principle of effectiveness; it is based on the notion that State A cannot control all subsequent causal contributions to its acts or omissions and thus lacks the ability to prevent the harm.

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86 ibid [164]–[167].
87 Infantino and Zervogianni (n 83) 604.
88 ibid 606–607.
89 Ioan Micula, Viorel Micula, SC European Food S.A, SC Starmill SRL and SC Multipack SRL v Romania, ICSID Case No ARB/05/20, Award of 11 December 2013.
90 ibid [926].
91 Gerhard Dannemann, *Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention* (Heymann 1994) 146–147; Kellner and Durant (n 79) 449, 467–471. See, for example, *Vereinigung Bildender Künstler v Austria*, App No 68354/01 (ECtHR, 25 January 2007) [44]. The ECtHR also refers to the requirements of a clear, direct or sufficient causal link when it chooses to reject an applicant’s claim because, for example, the wrongful harm falls outside of the protective scope of the obligations violated: *Isaak v Turkey*, App No 44587/98 (ECtHR, 24 June 2008) [137]; Kellner and Durant, 468.
These principles greatly limit State A’s liability for extraterritorial human rights harm. For example, in the *Aerial Herbicide Spraying Case*, Colombia was engaged in toxic herbicide spraying over its territory in order to combat the cultivation of coca. This had numerous human rights impacts as the herbicides travelled over the border into Ecuador. Under the causal model, if the affected individuals could show that there is but-for causation, Colombia would be *prima facie* responsible. Colombia would be exculpated, though, where the spraying is only a negligible contribution to the general harmful exposure in Ecuador as its contribution would not be the principal cause. Further, if the aerial spraying has a completely unexpected health effect on the relevant individuals, the damage would be unforeseeable. If the aerial spraying only causes damage to health because it reacts with chemicals being sprayed by the affected individuals themselves, there would be an intervening act rendering the harm too remote.

The causal test has a number of advantages when determining the scope of State A’s liability. Firstly, it favours case-by-case assessment; it incorporates discretion by allowing courts to consider the culpability of States parties in each case. In particular, the notion of remoteness gives courts considerable breadth in exculpating State A for extraterritorial rights violations.

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Secondly, a causal model would ensure greater legal certainty; in comparison to the inconsistently applied spatial and personal models, the question of whether an individual can be causally harmed by State A in a given instance is initially a question of fact rather than law. This may require a degree of cooperation among parties to a dispute to provide evidence related to the rights violations, however this is unlikely to impede the efficacy of international human rights courts and treaty bodies, which have been willing to find violations in cases where the respondent State withholds information.93

Thirdly, a causation-based analysis would avoid situations where extraterritorial harm to human rights is not subject to review as it would ensure that a claim could be brought against any State party to a human rights treaty which causally contributed to the human rights harm to an individual. The causal model thus removes vacuums in the protection of rights under human rights treaties.

II. Positive obligations

The causal model would also balance the principle of universality and the effective protection of treaty rights if applied to positive human rights obligations. Professor Marko Milanovic is wary of imposing an expansive model of extraterritorial application for positive obligations because, in such instances, the obligations on State A are so wide-ranging that it requires some degree of control, over the area in which the affected individual is situated, in order to meet them.94 His proposed model of extraterritorial

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93 For example, *Timurtaş v Turkey*, App No 23531/94 (ECtHR, 13 June 2000).
94 Milanovic (n 4) 209–212.
application\textsuperscript{95} would remove the requirement of jurisdiction when determining violations of negative obligations, as well as for procedural positive obligations which are required to make negative obligations effective,\textsuperscript{96} while maintaining the spatial model of jurisdiction in applying substantive positive obligations extraterritorially.\textsuperscript{97} Professor Milanovic considers this to strike the best balance between the principle of universality and imposing manageable burdens on States parties as it only deviates from a universal approach when applying obligations to protect rights, which he believes cannot be effectively secured in extraterritorial scenarios.

However, extraterritorial scenarios relate to the location of the \textit{affected individual}, whereas positive due diligence obligations require State action in relation to \textit{third parties}; where the former is located extraterritorially this does not render the latter beyond State A’s control. This is apparent in the aerial spraying example, now with a private party engaged in aerial spraying activities in Colombia which cause human rights damage to individuals situated in neighbouring Ecuador.\textsuperscript{98} Under Professor Milanovic’s model, Colombia would come under no due diligence obligations to prevent the spraying activities as the affected individuals are not in an area under Colombia’s effective control. However, the extraterritorial element in no way diminishes Colombia’s ability to prevent the rights damage as the private party’s activities emanate

\textsuperscript{95} ibid 209–222.

\textsuperscript{96} For example, the obligation to initiate an effective public investigation into any death where it appears that the negative obligation has been breached: Milanovic (n 4) 216. See Laurens Lavrysen, \textit{Human Rights in a Positive State} (CUP 2016) 50–53.

\textsuperscript{97} For example, due diligence obligations which are prophylactic in nature. See Lavrysen ibid.

\textsuperscript{98} The same scenario was discussed by Professor Milanovic: Milanovic (n 4) 218.
from Columbia’s territory; Columbia remains able to take reasonable steps to prevent the rights violation by carrying out investigations, identifying those responsible and imposing appropriate punishment. Such situations were acknowledged by the Committee on Economic, Social and Cultural Rights, the treaty body to the International Covenant on Economic, Social and Cultural Rights, which demands that each State party protect the rights of those situated outside its territory who are harmed by the activities of companies domiciled within its territory.

The application of the causal model to positive obligations would impose burdens that can effectively be met as responsibility, as with negative obligations, would be limited by principles of causation. Jurisdiction in these instances would be limited by factual causation, foreseeability and remoteness. Further, the positive obligation of due diligence is one of conduct,

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99 Velásquez v Honduras, IACtHR Series C No 4 (1988) [174].
100 CESCR, ‘General Comment 23 on the Right to Just and Favourable Conditions of Work (article 7 ICESCR)’ (7 April 2016) [70], UN Doc E/C.12/GC/23. See also the UN Guiding Principles on Business and Human Rights, UN General Assembly Resolution 17/4, 16 June 2011. In a recent case, the UK Supreme Court found that villagers in Zambia, where a UK-domiciled company operated a mine, could bring a group tort claim before English courts against the company in relation to alleged toxic emissions which caused human rights and environmental harm: Vedanta Resources PLC and another v Lungowe and others [2019] UKSC 20.

rather than result; \footnote{Bosnia Genocide (n 6) [430].} State A is obligated to take \textit{reasonable} steps to prevent human rights harm, \footnote{Velásquez v Honduras (n 99) [174]; Shelton and Gold (n 3).} determined in line with State A’s knowledge of the relevant violations and other factors relating generally to its capacity to intervene. \footnote{As the ICJ found in relation to due diligence obligation to prevent genocide, such obligations depend on many factors including the geographical distance of the State from the relevant events and the strength of its political and other links to the relevant actors: Bosnia Genocide (n 6) [430].} More generally, positive obligations ‘must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’; \footnote{Osman v United Kingdom (n 101) [116].} therefore positive obligations are already applied in accordance with the principle of effectiveness.

6. \textit{Conclusion}

At a time when States exercise power in all parts of the world, notions of jurisdiction tied to control over an area or an individual are inadequate as they allow States to be exculpated for human rights violations where they remain able to secure these rights. International courts and treaty bodies have sought to remedy this by expanding the meaning of ‘jurisdiction’ under human rights treaties, however the existing models of extraterritorial application have been outpaced by the increased complexities of States parties’ international operations. The only way to ensure that these operations are governed by international human rights law is to deem all individuals causally affected by a State party’s act or omission to fall under its jurisdiction. A causal model, applied explicitly and in all cases, would use principles of
foresceability and remoteness and reverse the presumption that rights are not owed extraterritorially in favour of the affected individual; States would only be exculpated where they were unable to effectively secure the rights harmed, thus striking the correct balance between reasonable burdens on States parties and the principle of universality.