Well-Meant Is not Well-Done: The UN Treaty Bodies' Approach to the Extraterritoriality of Human Rights

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Abstract

In the absence of a universal human rights court, the individual communications before the United Nations (UN) treaty bodies allow for a low-threshold 'court-like' and, therefore, indispensable complaint mechanism for individuals. Notably surpassing national courts and regional mechanisms in their progressive interpretation of law, these bodies play a crucial role in expanding the extraterritorial application of human rights treaties, a

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stance that has sparked scholarly controversy. This article questions whether this progressive 'adjudication' practice by the treaty bodies is advisable. It argues that UN treaty body decisions show a pattern in their line of argumentation that has rightly been put under academic scrutiny and that the effects of this methodological inadequacy extend beyond academia, adversely affecting the legitimacy and practical implementation of their decisions.

Keywords

Extraterritoriality – Jurisdiction – Human Rights – Treaty Bodies – Legitimacy

I. Introduction

In the absence of a world court of human rights, international human rights protection is still primarily guaranteed by the UN treaty bodies[1] and the Human Rights Council.[2] For better or worse, these treaty bodies have proven to have a far-reaching and progressive (functional) understanding of human rights. The treaty bodies have been heavily criticised in part for their legal reasoning. This raises the question whether this criticism is valid and, if so, whether the alleged methodological shortcomings of the treaty bodies hold any practical relevance with regard to implementation.

To investigate these issues, the paper uses the case study of extraterritorial application of human rights treaties. The debate around the extraterritorial applicability of human rights is a promising example to delve into the issues of the treaty bodies' reasoning and its consequences, as there is a long history of practice and academic discourse around the topic. This allows a deeper analysis of the contributions made by the human rights treaty bodies in this field and the soundness of these contributions. Besides, extraterritori-

1 The Human Rights Committee (ICCPR); Committee on Economic, Social and Cultural Rights (ICESCR); Committee against Torture (CAT); Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT); Committee on Racial Discrimination (CERD); Committee on the Rights of the Child (CRC); Committee on Enforced Disappearances (ICPPED); Committe on the Elimination of Discrimination against Women (CEDAW); Committee of Migrant Workers (Migrant Workers Convention, CMW); Committee on the Rights of Persons with Disabilities (CRPD).

2 UNGA Res 60/1 of 16 September 2005, A/RES/60/1, paras 157 et seq.

ality is a reoccurring issue in international human rights law, which holds practical implications. This means that there is a dire necessity to develop a convincing and comprehensive framework to address extraterritoriality. For this analysis, one decision from the Human Rights Committee (HRC), one decision from the Committee on the Rights of the Child (CRC), and one decision from the Committee against Torture (CAT) were chosen, as they all concern the same issue (i. e. the inaction of states, which was causal for human rights violations outside of their territory) and were all rendered within a short period of time.

Overall, two central theses are put forward: First, the decisions of the treaty bodies regarding extraterritoriality are methodologically inadequate. Second, this is not only an academic debate, but has a negative impact on the legitimacy and thereby the implementation of the treaty bodies' decision. Accordingly, the paper proposes that treaty bodies must adapt their decision-making methods to ensure more effective human rights protection in the future.

II. General Assumptions on the Extraterritorial Application of Human Rights Treaties

The applicability of a human rights treaty generally requires the state party to have jurisdiction.[3] Jurisdiction is generally understood to be *primarily* territorial and thus linked to the territory of the contracting state.[4] However, it may *sometimes* be exercised outside of the national territory.[5]

On the question of when jurisdiction can be exercised extraterritorially, the European Court of Human Rights (ECtHR) largely shaped the debate with its leading decisions in *Banković* and *Al-Skeini*. Similarly to the International Court of Justice (ICJ), the ECtHR decided that the extraterritorial application of human rights is initially exceptional, i. e. that a special justifica-

3 Art. 2 para. 1 ICCPR; Art. 7 CMW; Art. 2 CAT; Art. 2 para. 1 CRC; Art. 3, 6, 14 ICERD. The remaining treaties are directly related to 'territorial' applicability, but impose more specific duties of action and implementation on the states, see e. g. on the ICESCR: Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', HRLR 11 (2011), 1-35.

4 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories,* advisory opinion of 9 July 2004, ICJ Reports 2004, 136, (para. 109); ICJ, Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), judgment of 19 December 2005, ICJ Reports 2005, 168 (para. 216).

5 ICJ, *Wall Opinion* (n. 4), para. 109.

tion is required.[6] This special justification can be based either on the fact that a state organ exercises authority and control over a person or that there is effective control over a territory (the so-called personal and spatial models).[7] A similar rule/exception ratio can be seen in the jurisprudence of the ICJ, which partially also predates the decisions by the ECtHR,[8] and by the Inter-American Court of Human Rights (IACtHR),[9] and the African Court on Human and Peoples' Rights (ACtHPR).[10] Interestingly, these different judicial bodies reference one another within their decisions. For example, the IACtHR and the ACtHPR draw heavily on the jurisprudence of the ECtHR,[11] whilst the ICJ references the HRC's decisions on the cases *Lopez* and *Lilian*.[12] So, although these are all separate treaties with distinctive jurisdictional clauses, there appears to be a shared understanding of what jurisdiction *generally* entails.

Notwithstanding some nuance in how the different courts operationalise jurisdiction,[13] there is consensus. All of these bodies of jurisprudence share

6 ECtHR, Banković v. Belgium, judgment of 12 December 2001, no. 52207/99, paras 59 et seq.; ECtHR, Al-Skeini and Others v. the United Kingdom, judgment of 7 July 2011, no. 55721/07, para. 131; similarly, the ICJ; 'jurisdiction […] may sometimes be exercised outside the national territory', ICJ, Wall Opinion (n. 4), para. 109; emphasis added.

7 On this: Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law', The Law & Ethics of Human Rights 7 (2013), 47-71 (58).

8 ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), advisory opinion of 21 June 1971, ICJ Reports 1971, 16 (para. 118), 'Physical control of a territory, and not sovereignty or legitimacy of title'; ICJ, *Wall Opinion* (n. 4), para. 109 'primarily territorial'; ICJ, *Armed Activities* (n. 4), para. 216; ICJ, Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), provisional measures of 15 October 2008, ICJ Reports 2008, 353 (paras 109, 149), 'there is no restriction of a general nature in CERD relating to its territorial application'.

9 IACtHR, *The Environment and Human Rights*, OC-23/17, advisory opinion of 15 November 2017, para. 81, 'The Court notes that the situations in which the extraterritorial conduct of a State constitutes the exercise of its jurisdiction are exceptional and, as such, should be interpreted restrictively.'

10 Although much less strict, as there is no restriction as to territory in the Banjul-Charter: ACtHPR, *Bernard Anbataayela Mornah v. Burkina Faso*, judgment of 22 September 2022, no. 028/2018, paras 146 ff., 'The Court notes that the determination of the territorial jurisdiction of international tribunals has traditionally been confined to the national boundaries of the States.'

11 IACtHR, *Environment and Human Rights* (n. 9), paras 79, 81, especially fn. 146; ACtHPR, *Mornah* (n. 10), para. 146.

12 ICJ, *Wall Opinion* (n. 4), para. 109.

13 E. g. both the IACtHR and the CRC have found jurisdiction in cases, in which there was effective control over activities taking place within its territory but having an effect on human rights outside the territory, IACtHR *Environment and Human Rights* (n. 9), para. 104h; CRC, UN Doc.CRC/C/88/D/104/2019, para. 10.7.

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the idea that jurisdiction is territorial, but may be extraterritorial in cases where there is (at the least) some level of *de facto* control or power over a person or territory[14] – more precisely *effective* control.[15] Thereby, jurisdiction can be prescriptive, executive, or adjudicative – what matters is that there is an exercise of coercion or power, which includes a normative dimension by reference to the imposition of reasons for action and the corresponding appeal for compliance (e. g. through giving instructions).[16]

This notion – and especially the more restrictive approach by the ECtHR – has, however, created substantial dissatisfaction, as it creates considerable loopholes for states allowing them to evade accountability.[17] It builds on the premise of borders and thereby favours a territorial notion of jurisdiction. Instead of ensuring that a state cannot do outside its territory, what it cannot do inside of it, the 'primarily' territorial approach perpetuates the doubts that the concept of jurisdiction goes to the detriment of victims of human rights. This creates a double standard which threatens the egalitarian dimension of human rights within each state party's practice.[18] The same dissatisfaction was also pointed out in Judge Bonello's separate opinion to *Al-Skeini*:

> 'If two civilian Iraqis are together in a street in Basra, and a United Kingdom soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of United Kingdom jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same United Kingdom soldier, same gun, same ammunition, same patch of street – same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human rights justice.'[19]

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14 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2019), 136; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011), 41.

15 IACtHR, *Environment and Human Rights* (n. 9), para. 82; African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (2015), para. 14; ECtHR, *Duarte Agostinho and others v. Portugal and 32 others*, judgment of 9 April 2024, no. 39371/20, para. 170.

16 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', LJIL 25 (2012), 857-884 (865), who describes this as effective, overall normative power or control.

17 Dalia Palombo, 'Extraterritorial, Universal, or Transnational Human Rights Law?', Isr. L. R. 56 (2023), 92-119 (98).

18 Besson (n. 16), 881.

19 See the concurring opinion of Judge Bonello in *Al-Skeini* (n. 6), 15.

III. Recent Extraterritorial Human Rights Application by the UN Treaty Bodies

In light of this criticism, the UN treaty bodies have recently tried to advance the understanding of jurisdiction, which itself can be seen as a positive development. To this end, the bodies have departed from the shared understanding of the extraterritorial application of human rights outlined above. Although there might be some divergences in the approach, overall, the very recent notion put forward by the treaty bodies (especially the HRC, CRC, and CAT) can be understood as a form of 'functional' jurisdiction. There is no clear-cut definition of functional jurisdiction. Some authors, such as *Guiffré* and *Moreno-Lax* understand functional jurisdiction to encompass all functions of a state, i. e. whenever a state's action (or inaction) is enforced through the exercise of their public powers, it shall fall within the jurisdiction of that state.[20] In my view, *Shany's* approach to jurisdiction comes the closest to the model proposed by the treaty bodies: Derived from the idea of the universality of human rights, 'a state should be obliged to respect and protect the human rights of those it is in a position to respect and protect, to the extent that [it] is in a position to do so'.[21]

This approach questions the traditional notion of effective control over a territory or authority and control over a person and reinterprets 'control' in terms of 'causality'.[22] Thereby, the jurisdictional relationship is established through the *state's ability to act* and the *causal impact of this (in)action*, which is much wider than a jurisdictional relationship because this would require the effective control of a state over an individual or territory. By referring to the mere ability to act, this is even more far-reaching, than the progressive approach taken by the IACtHR or the CRC in previous decisions, which requires that (1) a State must have effective control over activities within its territory and (2) that these activities have an effect on human rights abroad.

To grasp how the UN treaty bodies arrived at this interpretation, three key decisions by three treaty bodies, which substantially contributed to this 'functional' understanding of human rights treaty application, will be analysed. This analysis will be doctrinal in nature, since the objective of courts is

20 Mariagiulia Giuffré, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality Before the European Court of Human Rights', Quest. Int'l. L. 82 (2021), 53-80 (67); similar: Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S. S. and Others v. Italy, and the "Operational Model"', GLJ 21 (2020), 385-416 (402).

21 Shany (n. 7), 65.

22 Palombo (n. 17), 101.

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primarily to state what the law is, i. e. to employ doctrinal methods.[23] Whilst the treaty bodies are not a court *stricto sensu*, they have acquired a quasi-judicial function: All treaty bodies formulate legal consequences in their decisions,[24] and the decision-making process itself is a juridical one.[25] This was confirmed by the ICJ, which also referred to the 'jurisprudence' by the HRC.[26] Accordingly, the self-understood mandate of the treaty bodies is a judicial one. In that respect, the treaty bodies have bound themselves to honour legal doctrine, or at least the interpretative rules of international law, as laid down in the Articles 31 ff. Vienna Convention on the Law of Treaties (VCLT). After the individual decisions have been analysed, I will offer a contextualised overall evaluation of the decision-making practice.

1. *AS and Others v. Italy* Before the UN Human Rights Committee

In 2021, the HRC published two landmark decisions against Malta and Italy, which were filed by survivors of a tragic shipwreck in the Mediterranean in 2013.[27] The ship was carrying over 400 people when it began to sink. Individuals on board contacted Italian authorities and provided the ship's coordinates. When it encountered trouble, the ship was located close to Italy (in its exclusive economic zone) and also in Malta's search and rescue zone (SAR). The closest ship was part of the Italian Navy, which presumably even received the first order to move away from the scene of the accident. When no help arrived, the refugees tried to contact Italy again. Help was refused with reference to Malta's SAR. By the time Malta, and ultimately Italy,

23 See the analysis of Jan S. Smitts, 'What Is Legal Doctrine?', in: Rob van Gestel/Hans-W. Micklitz/Edward L. Rubin (eds), *Rethinking Legal Scholarship* (Cambridge University Press 2017), 207-228 (227): 'This does not mean that alternative approaches to the law are not relevant, but they all have to take the doctrinal description of the existing law as a starting point and are in that sense dependent on legal doctrine. Valuable economic, empirical or behavioural analysis of law would be impossible without first knowing *what the existing law says* […] In this respect, legal doctrine is the Alpha and the Omega of the law'; emphasis added.

24 Greta Marie Reeh, Das menschenrechtliche Prinzip des Non-Refoulement vor den Vertragsorganen der Vereinten Nationen (Duncker & Humblot 2023), 51. Meanwhile, the treaty bodies themselves also choose the term 'decisions' for their elaborations.

25 Michael Banton, 'Decision-Taking in the Committee on the Elimination of Racial Discrimination', in: Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2009), 55-78 (55).

26 ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), merits, judgment of 30 November 2010, ICJ Reports 2010, 639 (para. 66).

27 HRC, UN Doc. CCPR/C/ 130/D/3042/2017 (Italy); HRC UN Doc. CCPR/C/128/D/3043/2017 (Malta).

reached the ship (five to seven hours after the first distress call), 200 people had already died. The subsequent decision by the HRC was based on the violation of Article 6 International Covenant on Civil and Political Rights (ICCPR). According to the HRC, Italy had violated the right to life; it did not render a substantive decision regarding Malta due to a failure to exhaust domestic remedies. The two decisions regarding Malta and Italy have brought about fundamental innovations with regard to the concept of extra-territorial jurisdiction under Article 2 para. 1 of the 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 HRC commenced its legal reasoning by referencing the 'effective control test'. It stated that the 'question before the Committee is therefore whether the alleged victims could be considered to have been within the power or effective control of the State party'.[28] To answer its initial question, the HRC recalled the course of events – particularly, the close proximity of the Italian Navy's ship to the people in distress and the ongoing involvement of the Italian rescue centre in the rescue operation. It then noted that 'in the particular circumstances of the case, a *special relationship of dependency* had been established between the individuals on the vessel in distress and Italy'.[29] This particular relationship consisted of factual elements *and* relevant legal rescue obligations under the international law of the sea.[30] Jurisdiction is established since the refugees on the vessel were *directly affected* by the decisions taken by the Italian authorities in a manner that was *reasonably foreseeable* in the light of the relevant legal obligations of Italy.[31] All in all, jurisdiction was established through a legal and factual relationship of dependency that caused the individuals to be directly affected by the decisions of the State, whilst this effect had to be foreseeable. To support its argument, the HRC also referred to its own work as justification:[32] its earlier decision in the *Munaf* case[33] and its General Comment No. 36.[34]

28 HRC, UN Doc. CCPR/C/ 130/D/3042/2017 (Italy), para. 7.7.

29 HRC, UN Doc. CCPR/C/ 130/D/3042/2017 (Italy), para. 7.8; emphasis added.

30 See Art. 98 United Nations Convention on the Law of the Sea; International Convention on Maritime Search and Rescue (1979), Chapter 5.6; International Convention for the Safety of Life at Sea (1974), Art. 33.

31 HRC, UN Doc. CCPR/C/ 130/D/3042/2017 (Italy), para. 7.8.

32 HRC, UN Doc. CCPR/C/128/D/3043/2017 (Malta), para. 6.5.

33 HRC, *Munaf v. Romania*, UN Doc. CCPR/C/96/D/1539/2006.

34 HRC, General Comment No 36 on Article 6 of the ICCPR, on the Right to Life, UN Doc. CCPR/C/GC/36, para. 7.5: 'This obligation further includes protecting the right to life of persons located outside any territory effectively controlled by the state, "whose right to life is nonetheless affected […] by other [state] activities *in a direct and reasonably foreseeable manner*"', emphasis added.

In the literature, the outcome was received favourably by most, although it was subject to considerable methodological criticism.[35] Rightly so, since the idea of a 'special dependency' as developed by the HRC is difficult to understand from a methodical point of view, mainly because of its inconsistency.

First looking at the legal starting point of the HRC (effective control) and its interpretative result (special dependency relationship), the HRC actually failed to subsume under the term 'effective control'. Rather, the HRC's subsequent analysis significantly deviates from the underlying legal concept of effective control and develops a new approach. Thereby 'effective control' is nothing more but an empty shell. The authority cited by the HRC does not diminish the novelty of this approach: Previous works of the HRC, that highlighted the idea of effective control, either built on the idea of actions within a territory that had extraterritorial effect, or extraterritorial action with a direct and foreseeable effect – however, the case at hand concerned extraterritorial *in*action. This becomes apparent when looking at the two authorities cited by the HRC: The General Comment No. 36[36] and the *Munaf* case.[37]. In the latter, the HRC ruled that Romania, by handing over Mr. Munaf to the US military, was responsible for his subsequent detention and criminal trial by the US, which violated the right to a fair trial under Article 14 ICCPR.[38] This transfer took place at the Romanian embassy in Iraq. Although the Romanian embassy is obviously located abroad, the state undisputedly has full jurisdiction within the embassy.[39] In this respect, the decision is not comparable to the present situation on the high seas, in which no such jurisdiction generally exists.

Second, if the HRC opted for a factual – or functional – approach to jurisdiction building on effect and foreseeability, why would *other* legal obligations matter? Furthermore, the idea that the mere existence of *any* legal obligation should be sufficient to affirm the applicability of *another* unrelated convention has no methodological basis and entails considerable legal uncertainties. In principle, obligations under international law can be consolidated and thereby contribute to the establishment of customary inter-

35 See Silvia Dimitrova, 'Rethinking "Jurisdiction" in International Human Rights Law in Rescue Operations at Sea in the Light of AS and Others v Italy and AS and Others v Malta: A New Right to be Rescued at Sea?', Isr. L. R. 56 (2023), 120-139 (135 f.); Marko Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations', EJIL: Talk!, 16 March 2021.

36 See General Comment No 36 (n. 34), para. 63 in conjunction with para. 22.

37 HRC, *Munaf* (n. 33).

38 HRC, *Munaf* (n. 33), para. 14.2.

39 HRC, UN Doc. CCPR/C/128/D/3043/2017 (Malta), Annex I, Individual opinion of Committee member Andreas Zimmermann (dissenting).

national law (see section III. below). However, the HRC did not employ this approach. The extent to which the law of the sea has an impact on the applicability of human rights regimes remains unclear. Rather, *inter-state* obligations under the law of the sea were used to derive *individual* legal positions, which are alien to the law of the sea.[40] Similarly, substantive legal obligations were used to resolve preliminary jurisdictional issues[41] – the fact that jurisdictional requirements may vary depending on which substantive law is affected is not new to international law, e. g. from the 'divided and tailored' concept of the ECtHR.[42] However, the HRC fails to explain and justify its conflation of the extraterritorial application of the ICCPR and specific substantive obligations.

2. Repatriation Before the UN Committee on the Rights of the Child

In several decisions on the repatriation of French and Finnish children from terrorist prison camps in Kurdish-administered north-eastern Syria, the CRC has dealt with the issue of extraterritorial jurisdiction.[43] The complainants argued that the decision not to repatriate the children violated Articles 2, 3 and 6 of the CRC: The situation in the prison camps, where mainly former IS fighters and their families have been living since the end of the Syrian war, is desolate – 79 children died in one of the prison camps in 2021 alone, accounting for around 35 % of all deaths.[44] The ECtHR, which decided on a similar case, concluded that there was no jurisdiction over the French children. The ECtHR reasoned that there was neither 'effective control' over the territory or individuals concerned, nor was there a basis for any other jurisdictional link.[45]

40 Irini Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons? ', IJMCL 27 (2012), 867-874.

41 See HRC, UN Doc. CCPR/C/130/D/3042/2017 (Italy), Annex VII, Individual opinion of Committee member Hélène Tigroudja (concurring).

42 *Al-Skeini* (n. 6), para. 137.

43 The first two (particularly relevant) decisions were issued together in 2020 (CRC, UN Docs. CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019). The Committee on the Rights of the Child confirmed its view in similar cases: UN Doc. CRC/C/91/D/100/2019; UN Doc. CRC/C/85/D/77/2019.

44 Médecins Sans Frontières, 'Between two Fires – Danger and Deperation in Syria's Al-Hol camp', Report 2022, 28, available at <https://www.msf.org/danger-and-desperation-syria's-al-hol-camp-report-msf>, last access 12 September 2024.

45 ECtHR, *H. F. and others v. France*, judgment of 14 September 2022, ECHR 282 (2022), paras 189 ff.

The CRC justified its finding of extraterritorial jurisdiction in two short paragraphs with two independent arguments: Firstly, the fact that Article 2 para. 1 of the Convention on the Rights of the Child deliberately refers only to jurisdiction and not territorial jurisdiction ('States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction […]'). Secondly, the CRC emphasised the extreme vulnerability of the children, the French state's knowledge of this dire situation and the 'capability and the power' of France as a 'state of nationality' to save the children:

> 'In the circumstances of the present case […] the State party, as the State of the children's nationality, has the *capability and the power* to protect the rights of the children in question by taking action to repatriate them or provide other consular responses.'[46]

Thereby, the ability to act is mainly derived from a nationality-nexus. The CRC has thus taken a different approach from the HRC, which relied on the effect of the state's behaviour and its foreseeability. Interestingly, the CRC did not engage with the question of whether France had effective control over the children or the area, despite the state party having referred to that concept.[47] Instead, the CRC noted that 'effective control over the camps was held by a non-State actor'.[48] Thereby, apparently rejecting the concept's relevance for jurisdiction. This approach is more convincing than the extraterritorial reasoning employed by the HRC.

However, the CRC's approach is also methodologically flawed. Firstly, the Committee's argument that 'territory' was 'deliberately left out'[49] from Article 2 para. 1 of the Convention on the Rights of the Child is refuted by the preparatory documents of the treaty, contrary to what the CRC implies. The drafters merely replaced 'territory' with 'jurisdiction' in order to avoid misunderstandings with regard to children of diplomats and to consciously adopt the wording of the European Convention on Human Rights (ECHR), which is primarily territorial in nature.[50] The assumption that the wording 'jurisdiction' proves that the Convention on the Rights of the Child is not understood in territorial terms is therefore misleading.

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46 CRC, UN Docs. CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019, para. 9.7; emphasis added.

47 CRC, UN Docs. CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019, para. 9.5.

48 CRC, UN Docs. CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019, para. 9.7.

49 CRC, UN Docs. CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019, fn. 42.

50 Marius Emberland, 'The Committee on the Rights of the Child's Admissibility Decisions in the "Syrian Camps Cases" against France: a Critique from the Viewpoint of Treaty Interpretation', HRLR 23 (2023), 1-11 (6).

It is also striking that the authority cited by the CRC does not support its interpretation of the term 'jurisdiction'[51]: The General Comments no. 4 and 23[52] merely recommend that children should benefit from consular assistance, but are silent on jurisdiction. Furthermore, the interim report of the Special Rapporteur on torture simply restates that jurisdiction is not just a territorial issue, but it does not deliver relevant interpretative guidance on the question of whether extraterritorial jurisdiction exists in the case at hand.[53] The report on the Independent International Commission of Inquiry on the Syrian Arab Republic only *recommends* the repatriation of foreign nationals, dealing neither with third states' obligations nor jurisdiction.[54] The HRC[55] and CRC[56] cases cited do not support the CRC's conclusion, as the first is based on a different set of facts, considering it deals with state agents' *actions on* foreign soil and the latter does not engage with jurisdiction at all. Similarly, the joint legal analysis of the two Special Rapporteurs on extraterritorial jurisdiction in Syrian camps,[57] which was lastly referred to by the CRC, provides little guidance for the decided case as the underlying facts were very different.

Whilst the CRC draws on more authority than the HRC, here too, the legal argumentation ultimately fails to convince. The authority referenced by the CRC cannot prove the approach to be well-established in international law, whilst the CRC also failed to develop a doctrinally sound line of argumentation itself, resting its conclusions on the factual elements of the case only. However, 'facts do not make themselves relevant', but rather require a normative principle that explains their relevance.[58] In the view of *Raible*, there is disagreement about the understanding of jurisdiction because

51 See the analysis by Emberland (n. 50).

52 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/23, paras 17(e) and 19.

53 UN Doc. A/70/303, para. 33.

54 The Commission *inter alia* recommended that Syria 'cease all forms of incommunicado detention or other unlawful deprivation of liberty, including in conditions amounting to enforced disappearance' and 'disclose the locations of all places of detention', UN Doc. A/HRC/43/57, para. 103(e).

55 HRC, *Lopez Burgos v. Uruguay*, CCPR/C/13/D/52/1979.

56 CRC, Y.*B. and N. S. v. Belgium*, CRC/C/79/D/12/2017.

57 Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic, <www.ohchr.org/Documents/Issues/Terrorism/UNSRsPublicJurisdictionAnalysis2020.pdf>, last access 12 September 2024.

58 Lea Raible, 'Between Facts and Principles: Jurisdiction in International Human Rights Law', Jurisprudence 13 (2022), 52-72 (67).

jurisdiction is a normative principle that relates to facts.[59] However, explaining which facts are relevant and why necessarily requires us to identify the principle underlying the notion of jurisdiction. For instance, the notion that a state that exercises control over a territory must fulfill human rights duties towards individuals present in that territory relies on the idea that states need to be able to fulfill human rights obligations before we can impose such obligations.[60] The heart of the problem therefore lies in the values underpinning jurisdiction and human rights law more generally.[61] Transferring this idea to the CRC: The CRC has argued that the principle of jurisdiction requires the state's 'capability and power' and has identified the facts, that it deems to support this principle. It fails to explain, however, why this principle, and thereby, these facts should be decisive to confirm jurisdiction. But this is precisely where, in many cases, the disagreement about jurisdiction lies. A description of the underlying principle, meaning the function and objective of jurisdiction, would have been necessary to fully comprehend the 'capability and power'-test and apply it to future cases.

3. Repatriation Before the UN Committee Against Torture

The Committee against Torture had to decide a complaint comparable to the one before the CRC, as it also dealt with the repatriation of French women and children from prison camps in Syria. Here, the CAT decided that there was jurisdiction within the meaning of Article 22 of the Convention against Torture ('A State Party to this Convention may [declare] […] that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals *subject to its jurisdiction.*'[62]). In the view of the CAT, France violated Article 2 para. 1 in conjunction with Article 16 of the Convention when failing to protect its people from inhumane conditions abroad by not repatriating them.[63]

59 A similar stance, that highlights the normative and factual nature of jurisdiction, was taken by Besson: 'It is important not to forget, however, that while the exercise of effective, overall, and normative power in practice is a *matter of fact* that can be demonstrated or not, jurisdiction itself ought to retain its *normative dimension* of appealing to compliance and should not be reduced, for procedural reasons, to mere effective control or coercion.' (n. 16), 877 f.; emphasis added.

60 Besson (n. 16), 66.

61 Lea Raible, *Human Rights Unbound: a Theory of Extraterritoriality* (Oxford University Press 2020), 16.

62 Emphasis added.

63 CAT, UN Doc. CAT/C/75/D/922/2019, para. 8.

By referencing its own General Comments, the Committee firstly clarified that jurisdiction is not confined to the territory, but rather 'includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control'.[64] Mirroring the approach of the CRC, the CAT implicitly denies such control by France when finding that the actual control over the camps is exercised by a non-state actor (Kurdish autonomous authority AANES).[65] Nevertheless, the Committee was of the opinion that France, as the detainees' State of nationality, 'has the *capability and the power* to protect their rights by taking action to repatriate them or providing other consular responses',[66] given the circumstances of the case. These 'circumstances' included the State's knowledge of the vulnerability of its nationals and the potential irreparable harm to their physical and mental integrity.

Also, AANES had publicly communicated its inability to care for the children and women detained in the camps, and its expectation that the concerned states repatriate their respective nationals. Such repatriation is feasible – and therefore within the capability of the State – as proven by the fact that France has, by its own account, repatriated a total of 35 French minors from camps in north-eastern Syria.

By applying a 'capability and power'-criterion the CAT has adopted the same approach employed by the CRC. However, whilst the CRC found this criterion to be met merely through a nationality-nexus, the CAT actually worked with relevant facts that proved the states' capability, such as already completed and successful repatriations. On a factual basis, the CAT's reasoning is significantly more convincing than the reasoning of the CRC. However, the CAT also fails to provide the principle that informs its threshold of jurisdiction. No legal analysis took place in any form: Rather, the Committee deemed 'effective control' to be the applicable legal threshold, but never actually applied it. Thereby it remains an empty shell just as in the case of the HRC. The Committee then went on to apply – without any explanation as to its compatibility with the standard of 'effective control' – the 'capability and power'-test developed earlier by the CRC.

64 CAT, UN Doc. CAT/C/75/D/922/2019, para. 6.6.
65 CAT, UN Doc. CAT/C/75/D/922/2019, para. 6.7.
66 CAT, UN Doc. CAT/C/75/D/922/2019, para. 6.7.

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4. In Good Company? A More General Trend in the Legal Analysis of the UN Treaty Bodies

The traditional concept of jurisdiction as a primarily territorial construct that may only apply extraterritorially in exceptional cases is outdated. It no longer does justice to the increasingly global reach of state action, nor does it do justice to the victims of human rights violations. It is therefore necessary to adapt the law to this development. However, as seen above, although the concept of functional jurisdiction itself may be convincing, all decisions had considerable methodological shortcomings: The justifications of the HRC and the CRC, which at least make an attempt to provide a legal analysis, are very brief and stand out above all due to their doctrinal or citational flaws, whilst the decision of the CAT does not contain any legal analysis at all, but rather a purely fact-based one. In so far, the same critique can be directed at all treaty bodies concerned: While all decisions refer to the 'traditional' requirement of effective control in some form, they do not really engage with the concept, but rather fully reject it on closer inspection. This raises doctrinal issues, since all treaty bodies were eventually unwilling to apply the facts to the law, they identified to be relevant to the case. Moreover, none of the treaty bodies identified the values and normative considerations which underpin their understanding of jurisdiction, obscuring the meaning and function of jurisdiction and, in turn, complicating the future application of the threshold developed in the respective jurisprudence.[67] The treaty bodies almost exclusively relied on a textual argument, restating that jurisdiction is not identical to territory, which seems inadequate considering the legal controversy surrounding the issue. This lack of reasoning raises two areas of concern: legal certainty and human rights fragmentation.

a) Legal (Un)Certainty

Whilst an implicit departure from the 'effective control' doctrine may be completely justifiable in terms of the outcome, the lack of legal reasoning renders the treaty bodies' legal deviation non-comprehensible. Although there is no rule of binding precedent under international law, indicating (sound) legal reasons for a decision would have been necessary in light of the demands of legal certainty and the predictability of decisions. These princi-

67 See Raible, (n. 58 and n 61).

ples are vital to the rule of law,[68] and are thus equally vital for quasi-judicial bodies such as the UN treaty bodies[69] – especially when it concerns deviation from the bodies' established (case) law. Their relevance becomes especially obvious when looking at recent developments following the above-mentioned decisions: Just one year after the CRC rendered its opinion on extraterritorial jurisdiction in the case of repatriation, the CRC in its decision on *Sacchi* partially reversed its findings. Whilst in 2020 it held that: 'States have the obligation to respect and ensure the rights of the children within their jurisdiction' and 'that the Convention does not limit a State's jurisdiction to "territory"',[70] in 2021 it argued that 'while neither the Convention nor the Optional Protocol make any reference to "territory" in its application of jurisdiction, extraterritorial jurisdiction *should be interpreted restrictively*'.[71] Within one year the CRC thereby shifted from a generally broad to a generally restrictive understanding of extraterritoriality. In *Sacchi*, it engaged more substantially with the criteria of effective control,[72] affirming that it now understands that criteria to actually matter for the legal analysis. Whilst the decisions concerned two different issues, the repatriation of citizens abroad and the state's obligation regarding extraterritorial activities of business enterprises in relation to climate change, the Committee could have equally applied the 'capability and power' threshold, but decided to opt for a different standard, building on the climate change opinion of the IACtHR.[73] Whilst this reference is to be seen as a positive point, just two years later – in 2023 – the CRC pronounced itself on transboundary harm and climate change again; this time through General Comment no. 26.[74] Here the CRC reasoned that a 'reasonable link between the State and the conduct concerned'[75] is needed. Within three years, the CRC has thereby developed three different standards for the extraterritorial application of the Convention. Following the lack of justification in the three cases by the HRC, CRC, and CAT discussed above, this again highlights how unpredictable the legal

68 Isabel Lifante-Vidal, 'Is Legal Certainty a Formal Value?', Jurisprudence 11 (2020), 456-467 (458): '[Legal certainty] forms part of the institutional framework (the rule of law) that makes it possible to develop human rights, that is, justice.'

69 See the key proposals in the UN's 2012 report on strengthening the treaty body system: 'Ensuring Continued Consistency of Treaty Body Jurisprudence in Individual Communications', UN Doc. A/66/860, Introduction.

70 CRC, UN Docs. CRC/C/85/D/79/2019, para. 9.6.

71 CRC, CRC/C/88/D/104/2019, para. 10.3; emphasis added.

72 CRC, CRC/C/88/D/104/2019, para. 10.5.

73 IACtHR, *Environment and Human Rights* (n. 9).

74 General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26.

75 General Comment No. 26 (n. 74), paras 88, 108.

threshold applied by the treaty bodies is, which is a testimony to the lack of legal certainty provided by them. More importantly, however, this striking example also proves that treaty bodies have very different understandings of jurisdiction not *because* of their different jurisdictional clauses, but rather *irrespective* of their jurisdictional clauses.

b) Fragmentation

The argument that the treaty bodies' deviation from other judicial bodies may be explained through the different jurisdictional frameworks is not supported by actual practice. The treaty bodies have not shown that 'jurisdiction' under their respective treaty regime differs from 'jurisdiction' in other, e. g. regional human rights, frameworks. Nonetheless, the three decisions analysed above relied almost exclusively on their own preliminary work instead of building on existing legal ideas and concepts.[76] *Çalı* and *Galand* have found that this development of treaty bodies' case law through self-referential citations seems to be an overall trend; although the reasons for this practice remain unclear.[77] This stands out in comparison with other human rights bodies (see section II. above), which have engaged in lengthy debates and, more importantly, heavy cross-referencing concerning the issues of extraterritorial human rights application *despite* differences in their jurisdictional clauses. Interestingly, systematic references to regional human rights jurisprudence and cross-referencing between the treaty bodies have also been identified as a 'good practice' in a 2012 report of the United Nations High Commissioner for Human Rights.[78]

After all, cross-fertilisation or judicial dialogue by human rights bodies is preferable, not least to avoid fragmentation, which could lead to a continuous specialisation and autonomisation of these human rights frameworks. Fragmentation does not necessarily require two opposing norms; the issue can similarly arise when more than one institution aims to protect normatively

76 Critical e. g. Helen Duffy, 'French Children in Syrian Camps: the Committee on the Rights of the Child and the Jurisdictional Quagmire', Leiden Children's Rights Observatory Case Note 2021/3, available at <https://www.childrensrightsobservatory.org/case-notes/case note2021-3>, last access 12 September 2124.

77 Başak Çalı and Alexandre Skander Galand, 'Towards a Common Institutional Trajectory? Individual Complaints before UN Treaty Bodies During Their "Booming" Years', International Journal of Human Rights 24 (2020), 1103-1126 (1116).

78 United Nations reform: measures and proposals, UN Doc. A/66/860, section 4.3.2: 'To expand the practice of mutual cross-referencing of Views and Concluding Observations, when the issues and rights involved are of similar nature. Similarly, to make more systematic reference to jurisprudence of the regional systems.'

similar or identical norms.[79] Whilst this is not necessarily problematic, the multiplicity of institutions and their diverging application of legal norms reduce the predictability and reliability of the law.[80] If UN treaty bodies do not speak with 'one' voice to victims of human rights violations, it could also lend support to *substantive* fragmentation.[81] This can in turn be exploited by law-users through forum-shopping and regime-shifting.[82] Regarding *non-refoulement,* academics have previously warned that variations between different treaty bodies and other human rights bodies could lead to these institutions being pitted against each other by domestic authorities.[83] Conversely, the collective 'normative pull' of treaty bodies, with coherent jurisprudence, can significantly improve the implementation rate of interim measures.[84]

A potential remedy is judicial dialogue through a 'systemic'[85] or 'harmonious'[86] approach, as also envisioned by Article 31 para. 3c) VCLT, which takes other legal sources into account and encourages certainty and coherence in international law. It prevents adherence to one international obligation from excusing the violation of another. Moreover, '[t]he normative pull of international law is fortified by its stringency and consistency'.[87] In other words: the systemic approach supports normativity and vice versa. Therefore, the normative effectiveness of the obligation is encouraged through a systemically coherent interpretation. It follows, that a purely isolated consideration of the extraterritorial human rights application is methodologically inappropriate. Rather, norms that pertain to the issue of jurisdiction over human rights violations should be interpreted in such a way that they result in a single set of compatible obligations.[88]

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79 Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies', GLJ 21 (2020), 355-384 (357).

80 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', I.CON 15 (2017), 671-704 (679).

81 Çalı and Galand (n. 77), 1116; emphasis added.

82 Peters (n. 80), 679.

83 Çalı, Costello and Cunningham (n. 79), 383 f.

84 Reeh (n. 24), 51.

85 'Spirit of systemic harmonization' in ECHR, *Case of A-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 21 June 2016, case no. 5809/08, para. 140.

86 'Principle of harmonization' in ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.702 (2006), para. 14.

87 Peters (n. 80), 679 citing Jacques Chevallier, 'L'ordre Juridique', Le Droit en Pròces 1983, 7-49 (8).

88 See ILC, UN Doc. A/CN.4/L.702 (2006), (n. 86), para. 14.

c) Interim Conclusion

Unfortunately, the criticism developed in this section is not only limited to the area of extraterritoriality but has also been voiced before in other contexts. It applies to treaty bodies more generally.[89] For example, *Pazartzis* and *Merkouris* have previously shown that the treaty bodies' decisions contain hardly any explicit references to interpretative norms.[90] In the same vein, it has already been criticised that the treaty bodies deviate from established case law without regard to the interpretation of other courts, including regional human rights courts, and without specific justification[91] – just as in the case of extraterritorial human rights.

In light of the recent developments before the CRC and previous critiques, it appears that the three decisions by the HRC, CAT, and CRC are not 'outliers', but rather are part of a broader pattern, which speaks to the way the treaty bodies' approach (or do not approach) legal reasoning. As discussed in the beginning, the treaty bodies endeavour to perform a court-like function – still, they fail to do so in their methodology, including in their use of doctrine and sources, thereby ultimately failing to meet their own expectations. This is particularly unfortunate as the question of the extraterritoriality of human rights treaties has already been extensively discussed in both academia[92] and the judiciary. As this is not a novel issue, there would have been enough points of reference for the treaty bodies to develop a 'functional' jurisdiction using legal doctrine and viable interpretative tools.[93]

IV. Practical Implications

This section explores whether the criticism directed at the decisions is purely of academic interest, or whether it has any 'real-world' consequences. The starting point here is the effective protection of human rights: if the

89 On this: Photini Pazartzis and Panos Merkouris, Final Report on The UN Human Rights Committee and Other Human Rights Treaty Bodies (2020). University of Groningen Faculty of Law Research Paper No. 46/2020, 24, available at <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=24287&StorageFileGuid=c9f48971-97b0-4d84-8bb4-f866273942c8>, last access 12 September 2024.

90 Pazartis and Merkouris (n. 89).

91 See e. g. HRC, UN Doc. CCPR/C/123/D/2274/2013, Individual opinion (concurring) of Olivier de Frouville, para. 11; Çalı and Galand (n. 77), 1116.

92 See e. g. Violeta Moreno-Lax, who understands jurisdiction primarily as the exercise of public authority, meaning that the cumbersome distinction between territorial and extraterritorial application would then no longer be necessary (n. 20); very similar Shany (n. 7), 50.

93 Moreno-Lax (n. 20), 401 ff.

extensive interpretation practice by the treaty bodies is accepted and implemented by states, the current practice is harmless. The thesis put forward here, however, is that the way in which the decisions are rendered is ultimately counterproductive for the effective protection of human rights.

1. Compliance with Decisions Rendered by UN Treaty Bodies

It is important to realise that the implementation of individual complaints is primarily based on 'good faith' and self-criticism due to their non-binding nature.[94] The efficiency and implementation rates of individual complaints have already been criticised heavily in the literature.[95] The implementation rates to date are rather sobering: a 2010 study showed that the implementation rate with regard to individual complaints procedures before the HRC was just over 12 %.[96] In a more recent study, a compliance rate of 24 % was found for all treaty bodies.[97] Yet these numbers also vary depending on which obligation is at stake: For example, the CAT found a compliance rate of 42 % in its own report, which is probably partly due to the fact that the ban on refoulement, which often plays a role there, is practically easier to implement compared to other obligations (such as coordinated sea rescue).[98] In comparison, the overall compliance rate with 'leading judgements'[99] of the ECtHR is found to be at 51 %[100] – that is twice the compliance rate of the

94 James Crawford, 'The UN Human Rights Treaty System: A System in Crisis?' in: Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2009), 7; Dinah Shelton, 'Human Rights, Individual Communications/Complaints' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford University Press 2006), para. 48.

95 See Rosanne Van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in: Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (Cambridge University Press 2012), 356-413 (356 f.).

96 Open Society Foundation, 'From Judgment to Justice: Implementing International and Regional Human Rights Decisions', Open Society Justice Initiative Report (2010), 119 f.

97 Kate Fox Principi, 'Implementation of Decisions under Treaty Body Complaints Procedures – Do States Comply? How Do They Do It?', UNHCR Report (2017), para. 16; See Başak Çalı, 'UN Treaty Body Views: a Distinct Pathway to UN Human Rights Treaty Impact?' in: Frans Viljoen et. al, *A Life Interrupted: Essays in Honour of the Lives and Legacies of Christof Heyns* (Pretoria University Law Press 2022), 443-459 (444).

98 Claire Callejon, Kamelia Kemileva and Felix Kirchmeier, 'Treaty Bodies' Individual Communication Procedures: Providing Redress and Reparation to Victims of Human Rights Violations', Geneva Academy Report 2019, 39 f.; see also Open Society Foundation (n. 96), 126.

99 Leading judgments are those that are more complex and harder to implement, e. g. because they identify structural problems. There are around 1,3000 so-called leading judgements (see <https://www.einnetwork.org/countries-overview>, last access 12 September 2024).

100 <https://www.einnetwork.org/countries-overview>, last access 12 September 2024.

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HRC. Similarly, the IACtHR holds a compliance rate of nearly 40 % for reparations it ordered.[101]

2. Explanatory Models for the Implementation Deficit

The reasons for the lack of compliance with the recommendations are not monocausal.[102] As changes to the human rights treaties, e. g. with regard to the binding effect of decisions, are unrealistic, it seems sensible to focus on those points that *can* actually be easily implemented by the treaty bodies themselves but still boost implementation. Studies on implementation practice have identified various factors, besides the (non-)legal effect of decisions, that do, in fact, influence compliance: These include whether the state believes that the process was fair and involved an impartial and comprehensive examination of the relevant evidence and law; whether the panel's decision is convincingly reasoned; whether the decision contains a clear indication of the nature of the violation and the steps that need to be taken to remedy it; and the political and public perception of the role, competence, and legitimacy of the panel and its decisions.[103]

Two of these factors are relevant for this article. First, the analysis conducted in the foregoing sections above speaks to the second point, i. e. whether the panel's decision was convincingly reasoned. Second, implementation is said to be influenced by the legitimacy of the panel and its decision. At the same time, legitimacy has been shown to suffer, if the decisions have methodological or analytical weaknesses and lack coherence.[104] If there is a reasoning-legitimacy-nexus and such legitimacy in turn impacts implementation, the methodological aspects covered above go beyond a purely academic interest, but have real-world effects on human rights protection.

101 Aníbal Pérez-Liñán, Luis Schenoni and Kelly Morrison, 'Compliance in Time: Lessons from the Inter-American Court of Human Rights', International Studies Review 25 (2023), 1-23 (6).

102 See Mikael Madsen, who draws on the works of Max Weber for those purposes: 'The Legitimization Strategies of International Judges', in: Michael Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015), 259-278 (263 f.).

103 Andrew Byrnes, 'An Effective Complaints Procedure in the Context of International Human Rights Law' in: Anne Bayefsky, *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International 2000), 139-162 (151).

104 Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', Vand. J. Transnat'l L. 42 (2009), 905-947 (908); Thomas Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990), 16; Van Alebeek and Nollkaemper (n. 95), 382.

However, this hinges on two premises which deserve closer attention: One being that legitimacy is affected by the content of the decisions, and the other that legitimacy fosters implementation. Legitimacy can be understood in a normative or sociological sense. Whilst the former refers to the acceptability or justification of authority ('Should they comply?'), the latter pertains to the question how relevant actors (states) perceive the legitimacy ('Should they believe that they should comply?').[105] Since I engage with the issue of implementation, I will understand legitimacy in a sociological sense, meaning the acceptance of, or compliance with, a norm (i. e. the decisions by the treaty bodies) of the state parties.[106]

a) Content-Dependency of Legitimacy

How the reasoning of the interpretative institutions drives legitimacy has been widely discussed in academia. For example, regarding the Committee on Economic, Social and Cultural Rights (CESCR), *Moeckli* argues that there is neither transparency nor coherency in the interpretation of the respective treaty by that treaty body, but rather 'the reader may guess that this or that element of VCLT articles 31-33 was at play'.[107] This in turn prevents the CESCR from capitalising on the legitimacy that its reasoning could produce.[108] *Moeckli* does not favour a specific interpretative approach over another, but rather emphasises that to increase legitimacy the various interpretive elements should at least be dealt with – what matters is thus the process, so how the task of interpretation is undertaken.[109] Equally, *Keller* and *Grover* have found that treaty bodies (in this case concerning General Comments) seem to benefit from reasoned statements that, expressly or implicitly, adhere to secondary rules of interpretation.[110]

105 See Antoinette Scherz and Alain Zysset, 'Proportionality as Procedure: Strengthening the Legitimate Authority of the UN Committee on Economic, Social and Cultural Rights', Global Constitutionalism 10 (2021), 524-546 (527).

106 Scherz and Zysset (n. 105), 529. Ultimately they argue for a content-independent normative account of legitimacy; on the normative legitimacy of the treaty bodies: Andreas Føllesdal, 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory', Theoretical Inquiries in Law 14 (2013), 339-360.

107 Daniel Moeckli, 'Interpretation of the ICESCR: Between Morality and State Consent', in: Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018), 49-74 (68).

108 Scherz and Zysset (n. 105), 529.

109 Moeckli (n. 107), 66, 71.

110 Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy', in: Hellen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies* (Cambridge University Press 2012), 116-198 (167).

Additional caution on the side of treaty bodies is required, whenever the normative expansion of human rights obligations is concerned, as in our case the understanding of jurisdiction, as normative expansion can sometimes prompt states to ultimately fulfil 'less' human rights. This can happen in various ways: For example, Canada questioned the HRC's interpretation of extraterritoriality in the context of the report process and criticised the Chair's concluding remark that '[t]he final arbiter for interpreting the Covenant is the Human Rights Committee, not individual States'.[111] This so-called state 'power grab' regarding their sovereignty is becoming apparent, for example, concerning the ECtHR,[112] but has also been revealed in the *LaGrand* and *Avena* cases before the ICJ.[113] Equally, the fear that states such as Malta or Italy would ignore distress calls even more frequently than before, as they might fear that the distress call alone would establish jurisdiction between the refugees in distress and the state authority,[114] may prove to be well-founded.[115] Sociological legitimacy can be weakened if treaty bodies stretch their interpretation of the human rights obligations beyond what is acceptable based on the canons of treaty interpretation[116] – a notion, that is also reflected in General Assembly resolution 68/268 on strengthening treaty bodies, which stated that no 'new obligations for States parties' should be created.[117] After all, 'legitimacy is not consolidated once and for all, but is rather the product of continuous reinvestment and maintenance'.[118]

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111 See Joanna Harrington, 'The Human Rights Committee, Treaty Interpretation, and the Last Word', EJIL: Talk!, 5 August 2015.

112 Rob Merrick, 'Theresa May to Consider Axeing Human Rights Act after Brexit, Minister Reveals', Independent, 18 January 2019, <https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html>, last access 12 September 2024.

113 Thus, the United States of America withdrew their consent to the ICJ's the jurisdiction under the Vienna Convention on Consular Relations after the ICJ ruled against the US, See John Quigley, 'The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences', Duke J. Comp. & Int'l L. 19 (2009), 263-306 (263).

114 Nassim Madjidian, 'Mediterranean Responsibilities: Extra-territorial jurisdiction of coastal States in the context of maritime migration', Verfassungsblog, 29 January 2021, doi: 10.17176/20210129-222618-0; HRC, UN Doc. CCPR/C/130/D/3042/2017 (Italy), Annex II, Individual opinion of Committee member Andreas Zimmermann (dissenting), para. 4.

115 <https://www.dw.com/en/malta-ignores-distress-calls-from-migrants-at-sea-ngo/a-52774016>, last access 12 September 2024.

116 Geir Ulfstein, 'The Human Rights Treaty Bodies and Legitimacy Challenges', in: Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman and Geir Ulfstein (eds), *Legitimacy and International Courts – A Framework* (Cambridge University Press 2018), 291.

117 UN Doc. A/RES/68/268, para. 9.

118 Madsen (n. 102), 266.

b) Legitimacy as a Determining Factor for Implementation

Although some may be disputed,[119] there are indications that legitimacy is to some extent content-dependent.[120] On the other hand, the concepts of legitimacy and compliance, especially for courts, are linked[121] – considering the lack of possible enforcement measures, a court's authority, and the effectiveness of its decisions, depend on its legitimacy.[122] In the international context, the more 'legitimate' the court is in the eye of governments, the more member-state governments may feel obliged to comply with an adverse ruling.[123] At the same time, governments' compliance with adverse court rulings can increase the public's perception of the court's legitimacy, which can create a virtuous circle in which legitimacy enhances compliance and compliance enhances legitimacy.[124]

Under these circumstances, *how* treaty bodies interpret and adjudicate their respective conventions is crucial for legitimacy as well as for the effective protection of human rights. Additionally, the 'lack of detail in reasoning makes it difficult for the end-user communities, particularly domestic judges, to effectively use the case law of the treaty bodies',[125] thereby hindering other avenues for future implementation.

V. Conclusion: Lessons to Be Learned?

What are the implications of these findings for the future of human rights protection and the interpretive work of the UN treaty bodies? It is essential

119 Scherz and Zysset (n. 105), 531 ff.

120 For further reference on the debate see: Başak Çalı, 'The Legitimacy of International Interpretive Authorities for Human Rights Treaties: an Indirect-Instrumentalist Defence', in: Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (Cambridge University Press 2013), 141-164 (144).

121 Jams L. Gibson and Gregory A. Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice', AJPS 39 (1995), 459-489 (461).

122 Clifford James Carrubba und Matthew Joseph Gabel, 'Courts, Compliance, and the Quest for Legitimacy in International Law', Theoretical Inquiries in Law 14 (2013), 505-541 (509); Shai Dothan 'How International Courts Enhance Their Legitimacy', Theoretical Inquiries in Law 14 (2013), 455-478 (458).

123 Carrubba and Gabel (n. 122), 509.

124 Carrubba and Gabel (n. 122), 509.

125 Başak Çalı and Alexandre Skander Galand, 'Strengthening and Enhancing the Effective Functioning of the UN Human Rights Treaty Body System Individual Complaint Mechanisms – Recommendations from Members of Academia and Civil Society in View of the 2020 UN Human Rights Treaty Body Review', Report for Centre for Fundamental Rights, Hertie School (2020), 5.

that the improvement of human rights on paper, through an expansion of jurisdiction, does not lead to a deterioration of human rights protection in practice. To this end, the treaty bodies need to embrace their (self-chosen) quasi-judicial mandate fully in order to increase the coherence of their legal reasoning and foster more legitimacy for their decisions.

Whilst many insufficiencies in the treaty bodies can be traced back to a lack of funding, case-backlog, and other factors not within the power of the treaty bodies, there are some strategies that treaty bodies can implement themselves – above all, transparent and comprehensible decision-making processes. Drawing on the example of extraterritorial human rights treaty application, this article identified some of the strategies which the treaty bodies could employ to promote a better implementation practice: Since the manner in which decisions are rendered is linked to implementation practice, the treaty bodies should firstly carry out a reasonable legal analysis that extends beyond a single paragraph and considers the various arguments of the parties to avoid the impression that decisions are purely results-based. This analysis should also be coherent from the perspective of legal methodology and doctrine. Considering human rights fragmentation, the treaty bodies should furthermore consciously create human rights synergies, instead of limiting themselves primarily to their own prior works.

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