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HUMAN RIGHTS

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EXTRATERRITORIAL APPLICATION AS A PROBLEM OF THE HUMAN RIGHTS CONCEPT

INTRODUCTION. *If the legal recognition of human rights depends on belonging to "all members of the human family", then the existence of the scope of application of human rights ratione loci is logically contradictory. Either there should be no territorial restrictions on the application of human rights, or the provisions of the Universal Declaration of Human Rights are false. This contradiction affects the basic feature of human rights, and therefore, being a contradiction, in the future it may serve as a driver for transforming the concept in a dialectic vein. This article suggests imagining how this could happen and what it could entail.*

MATERIALS AND METHODS. *In this paper, an attempt is made to consider the further development of human rights in a dialectical way. Based on the existing studies of the European Court's of Human Rights (hereafter – ECtHR) practice on the extraterritorial application of the European Convention on Human Rights (hereafter – ECHR), two main approaches (territorial and personal) are described. Analysing the approaches, two statements are formulated that create an internal contradiction to a concept of the scope of application of human rights ratione loci. The contrast created by the peculiarities of the ECHR's human rights protection mechanisms, as well as the accents that were stressed by the developing functional approach, allowed us to determine which change could resolve the formulated contradiction. The analogy with Roman law, in turn, allowed for projecting possible problems of implementing such changes.*

RESEARCH RESULTS. *The dilemma of the universality of human rights and the limitations of their extraterritorial application can be resolved through the concept of natural obligations if one breaks the logically necessary link between rights and remedies, putting them under different grounds of existence. The analogy with Roman law allowed us to conclude that such a solution to the dilemma is dangerous for both obliged and entitled persons, which makes such a development unlikely. However, if the formulation of the contradiction is correct, then this path may be the only possible one.*

DISCUSSION AND CONCLUSIONS. *By placing human rights and remedies on different grounds, the problem of extraterritorial application is resolved at the cost of triggering (or exacerbating) others. The concept of human rights would go far beyond the legally relevant issues, trespassing into the domain of ethics; if one strictly follows the analogy of Roman law, a significant part of modern human rights law risks being outside the borders of jurisprudence. However, the difference between Roman law and modern international law, which consists in the absence of one common "state", may become an important incentive for adapting the idea of natural obligations. Nevertheless, this idea may make it possible to create a clear focus of international human rights law on the remedies on the international plane, diverting attention from proclaiming them; perhaps this will reduce the number of formal legal arguments in favour of human rights violations in the framework of political communication on the international arena.*

KEYWORDS: *human rights, jurisdiction, natural obligations, universalism, remedy, consequentialism, deontology*

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ЭКСТЕРРИТОРИАЛЬНОЕ ПРИМЕНЕНИЕ КАК ПРОБЛЕМА КОНЦЕПЦИИ ПРАВ ЧЕЛОВЕКА

ВВЕДЕНИЕ. *Если юридическая значимость прав человека зависит от принадлежности к «членам человеческой семьи», то объем применения прав человека ratione loci составляет логическое противоречие. Либо не должно существовать территориальных ограничений применения прав человека, либо положения Всеобщей декларации прав человека несостоятельны. Это противоречие затрагивает основание прав человека, а потому, являясь противоречием, в будущем может послужить драйвером переосмысления идеи прав человека в диалектическом ключе. Настоящая статья предлагает поразмыслить, как это могло бы произойти и к чему это могло бы привести.*

МАТЕРИАЛЫ И МЕТОДЫ. *В настоящей работе проводится попытка диалектическим способом предположить дальнейшее развитие прав человека. Основываясь на исследованиях практики Европейского суда по правам человека (далее – ЕСПЧ) по экстерриториальному применению Конвенции о защите прав человека и основных свобод, приводится описание двух основных подходов (территориального и персонального); на основе анализа подходов, предлагается формулировка двух утверждений, создающих внутреннее противоречие концепции объема применения прав человека ratione loci. Контраст, создаваемый особенностями механизмов защиты прав человека ЕСПЧ, а также акценты, возникающие при анализе разрабатываемого функционального подхода, позволили определить, какое изменение может разрешить сформулированное противоречие. Аналогия с римским правом, в свою очередь, позволила спроецировать возможные проблемы реализации таких изменений.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Дилемма универсальности прав человека и ограниченности их экстерриториального применения может быть разрешена посредством концепции натуральных обязательств, если разорвать логически необходимую связь права и его способа защиты, поставив их под разные условия существования. Аналогия с римским правом позволяет прийти к выводу, что подобное*

разрешение дилеммы опасно как для обязанных, так и для управомоченных лиц, что делает такое развитие маловероятным. Однако если сформулированное противоречие является верным, то этот путь может оказаться единственно возможным.

ОБСУЖДЕНИЕ И ВЫВОДЫ. *Поставив права человека и способ защиты под разные условия, проблема экстерриториального применения разрешается ценой создания (или усугубления) других проблем. Концепция прав человека выйдет далеко за пределы юридически значимого; если строго следовать аналогии римского права, значительная часть современного права прав человека рискует оказаться за пределами юриспруденции; однако отличие римского права от современного международного права, заключающегося в отсутствии одного общего «государства», может стать важным мотивом к адаптации идеи натуральных обязательств. Тем не менее эта идея может создать четкий акцент международного права прав человека на защите прав, отведя внимание от задачи их провозглашения; возможно, это позволит уменьшить количество формально-юридических аргументов в пользу нарушения прав человека в рамках политического общения на международной арене.*

КЛЮЧЕВЫЕ СЛОВА: *права человека, юрисдикция, натуральные обязанности, универсализм, способы защиты, консеквенционализм, деонтология*

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Автор заявляет об отсутствии конфликта интересов.

1. Introduction

A lawyer could describe human rights for a child in two veins: as something to be protected or as something that protects. It is irresponsible to nourish believe in human rights as spells against injustice. Only ensured human rights are practically useful for a person. Probably, a childish question will follow: why it should be protected by me? Human rights are not tools to create a better life for a child but a burden with little more than promise of help. The response can be a sublime duty to treat everyone equally and with respect; the desire to be treated as a human rights holder serves as a reason for this duty's existence. However, this rhetoric requires universality of human rights: one has them solely due to the universal status of a human. The problem is a long living challenge to this idea. Apart from a theoretical challenge of *cultural relativism* [See Donnelly 1984] there are practical questions proliferated out of human rights codification in treaties. The form imposes limits on the content; those borders creates a double standard [Moreno-Lax 2024:22] and a discussion in attempt to protect human rights law from marginality [Wilde 2016:127-76, 133]. The scope of human rights treaties' application is a practical problem which is tied to the core of human rights idea: it is a formal framework for a substantive discourse about the nature of human rights.

The discussion is far from settled: one side pursues universal protection, another defenses against imperialism. Perhaps the most persuasive attempt to resolve the contradiction is the idea of *relative universality;* it stands on the difference between *conceptual* and *substantive* universality. The latter is a body of particular norms and rights which is recognized as universal by a particular authority, while the former is an abstract assertion that there are some rights that are possessed by every human being [Donnelly 2007:282-283]. In other words, *conceptual* universality is an agreement that human rights do exist as universal rights, however exact *substance* of those entitlements are relative and depends on a particular culture. Enforcement of a list of concrete entitlements for a society with a different view on a human well-being is "the arrogant "universalism" of the powerful" [Donnelly 2007:305]. However, on the domestic level *substantive* universality also can be perceived as arrogance. The understanding of the human rights substance can differ not only between cultures, but also between individuals. It is important to identify someone capable to provide a list of rights for particular society with *substantive* universality;

a sovereign as a representative of people is able to assert human rights. The *relative universality* creates a room for the discussion about the human rights' substance on the international plain between different cultures at the cost of international law's ability to provide it. Only states has this ability; the role of *international* human rights law turns merely formal. Anything can be human rights if a sovereign so asserts; international law could do no more than an obligation to act in accordance with the made assertions: if a state names something as a human right, it must provide it for everyone.

The *relative universality* is a coherent explanation how universal rights might have territorial scope of application: once you leave a territory, you are not protected by a human rights provision (*substantive* universality) despite the ongoing status of a human (*conceptual* universality). However, extraterritorial application is an evolving issue and "should not be understood as some kind of natural fulfilment of the telos of human rights as a cosmopolitan constitutional law" [Bhuta 2016:19]. It is hard to consider the relativity of human rights as a factor because there is no difference between *relativity* and the *absence of universality:* it "denies that universal human rights exist" [Binderup 2022:511]; thus, *relativity* and *universality* have no contradiction. Relativity means a defeat of universal considerations; something else reasons the defeat. Therefore, a study of extraterritorial application of human rights is able to suggest another opponent for human rights universality.

The practical issue of extraterritoriality could indicate the reason behind assertions of relativity. The article submits that human rights' effectiveness is the reason, and the dilemma between universality and effectiveness could be dialectically solved with an analogy from Roman law. The solution is a far-reaching change in the concept of human rights. In the first part of the article a concept of the extraterritorial application will be described with the focus on the ECHR. The focus is due to well-developed case law [Besson 2012:860] and the ability of the ECtHR to effectively secure compliance [Milanovic 2011:4]. The second part concerns the dilemma; it proposes a description in order to consider how human rights law might develop in a dialectic way. The last part proposed an application of natural rights as a concept that could resolve the contradiction in the far future.

2. Territorial scope of application

Human rights treaties' scope of application *ratione loci* should be governed by the Art. 29 of the Vienna Convention on the Law of Treaties (hereafter – VCLT), or the same customary rule [von der Decken 2018:521-522], which does not deal with "all the delicate problems of extra-territorial competence"[1]. Despite an attempt to interpret the Art. 29 as a presumption against extraterritoriality, it is a rule for another problem of federal states and states with dependencies; it creates a presumption of a treaty's applicability to the whole territory of a state. Therefore, there is no general rule of extraterritorial application [Milanovic 2011:10-11].

Human rights treaties often contain a provision regarding their application ratione loci, which replaces the criterion of *territory* with *jurisdiction*[2]. This criterion could be applied even when a human rights treaty has no such provision [Wilde 2013:639]. In general, international law jurisdiction is a permission for a state to act[3]; it differs in human rights law. When the ECtHR interpreted the term (in Art. 1 ECHR) in the *Bancović* case accordingly to this general meaning[4], it has attracted considerable criticism [Moreno-Lax 2020:398, Vandenhole 2019:414; Milanovic 2011:27, 29-30; Raible 2016:166; Shany 2013:54-56; Rusinova 2010:36-43]. As a criterion *ratione loci* 'jurisdiction' refers not to a right to act but to a fact of action[5]; it helps to withdraw an is-

[1] ILC. Draft Articles on the Law of Treaties with Commentaries. Yearbook of the International Law Commission. 1966. Vol. II. P. 214. URL: https://doi.org/10.18356/91cc8d73-en (accessed date: 11.01.2025).

[2] For instance: "within its territory and subject to its jurisdiction" (Art. 2(2) International Covenant on Civil and Political Rights), "within their jurisdiction" (Art. 2(1) Convention on the Rights of the Child) or "within their territory or subject to their jurisdiction" (Art. 7 International Convention on the Protection of the Rights of All Migrant Workers).

[3] See for instance: Brownlie I. Principles of Public International Law. 5th ed. Oxford University Press. 1998. P. 301-302.

[4] ECtHR. Banković. Decision of 12.12.2001. Para. 59 URL: https://hudoc.echr.coe.int/eng?i=001-22099 (accessed date: 11.01.2025).

[5] For instance: UN Human Rights Committee, General comment no. 31 [80]. The nature of the general legal obligation imposed on States Parties to the Covenant. CCPR/C/21/Rev.1/Add.13. 26 May 2004. Para 10. URL: https://www.refworld.org/legal/general/hrc/2004/en/52451 (accessed date: 11.01.2025); ECtHR. Loizidou v. Turkey (preliminary objections). Decision of 23.03.1995. Para. 62. URL: https://hudoc.echr.coe.int/fre?i=002-9628 (accessed date: 11.01.2025). ECtHR. Al-Skeini. Decision of 07.07.2011. Para. 138. URL: https://hudoc.echr.coe.int/fre?i=001-105606 (accessed date: 11.01.2025).

sue of a territorial sovereignty's infringement from the rationale of human rights. Otherwise, one infringement justifies another: if a state by one action infringes sovereign's rights and human rights of individuals situated within the said territory, then a state has no jurisdiction and has no obligation towards the individuals [Milanovic 2011:26-30; Rusinova 2010:44]. Moreover, a criterion for obligations' existence must be factual[6]. In human rights law jurisdiction is a fact of control over space (territorial modus) or individuals (personal modus)[7] [Janig 2022:183, Wilde 2013:640-646; Milanovic 2011:118-120; see also Vandenhole 2019:417, 419-422; Raible 2016:161-168, De Leo 2025:109].

2.1. Territorial modus

The territorial modus is the most consistent with the treaties' texts, however, "[i]f applied too strictly, it is apologetic of state power, and allows many human rights abuses to slip through the cracks" [Milanovic 2011:119]. Question is in the term: what constitutes a territory?

This ambiguity was used to justify the «enhanced interrogation techniques» during the War on Terror within so-called "black sites"[8]. The United States argued inapplicability of Art. 16 of the United Nations Convention Against Torture for the interrogations in the black sites: "[b]y its terms, Article 16 is limited to conduct within "territory under [United States] jurisdiction". We conclude that territory under United States jurisdiction includes, at most, areas over which the United States exercises at least de facto authority as the government. Based on CIA assurances, we understand that the interrogations do not take place in any such areas. We therefore conclude that Article 16 is inapplicable to the CIA's interrogation practices and that those practices thus cannot violate Article 16"[9]. The main point is a split between *place* and *area*: interrogations occurred in places outside of areas (territory). The term territory refers to a space however big or small, but a room or building (place) is not covered. Even though this interpretation is not accepted[10], without a clear definition, the spatial modus could lead to "the collapse of the control over a place criterion into something resembling control over a mere speck or an atom of land" [Milanovic 2011:151]. A functional approach to the term could help to avoid this collapse: territory is something controlled by a state; therefore, the meaning of territory is limited to what is possible to control [Milanovic 2011:134].

2.2. Personal modus

The problem of control captures all significance when a territory is defined in the functional vein. It shifts attention from control over a territory to control over persons situated within a territory. A recourse to the notion of a territory becomes excessive[11]; it becomes less important than individuals. A territory might be used as a trigger for a presumption that a person could be affected by a state if one is within it[12]; hence, it is a procedural matter.

In the *Al-Skeini* case, the ECtHR concluded that the absence of defined borders is not an insurmountable obstacle to establishing a state's jurisdiction; "the exercise of physical power and control over the person in question" is decisive[13]. If the territorial modus starts from the point that states are bound by their obligations within their territories and only then elaborates on the exclusions of extraterritori-

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[6] However see [Besson 2012:872-874].

[7] See ECtHR. *Carter v. Russia.* Decision of 21.09.2021. Para 125.

[8] See *inter alia:* ECtHR. Husayn (Abu Zubaydah). Decision of 24.07.2014. Para 42-69. URL: https://hudoc.echr.coe.int/eng?i=001-146047 (accessed date: 11.01.2025); Rosenberg, C. What the C.I.A.'s torture program looked like to the tortured. – *The New York Times.* 2019, December 4. URL: https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.tml (accessed date: 11.01.2025); "enhanced interrogation" explained. Human Rights First website. 10.02.2016. URL: https://humanrightsfirst.org/library/enhanced-interrogation-explained/ (accessed date: 11.01.2025).

[9] Memorandum for John A. Rizo, re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees. US Department of Justice. Office of Legal Counsel. 30.05.2005. URL: https://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005.pdf (accessed date: 11.01.2025).

[10] UN. Committee against Torture. Conclusions and recommendations of the Committee against Torture: United States of America. 2006. CAT/C/USA/CO/2. Para. 15. URL: https://digitallibrary.un.org/record/580893?ln=en&v=pdf (accessed date: 11.01.2025); UN. Committee against Torture. Concluding observations on the combined 3rd to 5th periodic reports of the United States of America. 2014. CAT/C/USA/CO/3-5. Para 10. URL: https://digitallibrary.un.org/record/790513?ln=en&v=pdf (accessed date: 11.01.2025).

[11] See how a territory became irrelevant in the ECtHR' reasoning in *Carter v. Russia.* Para 125-126.

[12] ECtHR. Al-Skeini. Para. 131.

[13] Ibid. Para. 136.

ality, the personal modus stimulates to start from the opposite statement. Firstly, it acknowledges that states could be bound by human rights obligations wherever an act occurs, and only then it sets limits for the obligations relying on the notion of control[14]. Moreover, this modus stimulates to include "contactless" control (a situation where a state creates conditions for violation) or other instances of infringement without physical interaction with a victim [Moreno-Lax 2024:29-34; Janig 2022:184-186]. The personal modus avoids flaws of spatial approach and creates others.

The first problem is lack of hard-law references; the second problem is impossibility to use it with the full scope *ratione materiae*[15]. Otherwise, when a sovereign executes its powers extraterritorially, it must provide all and every benefit of human rights obligations to individuals it affects. It is utopian; even if we find this possible, it remains excessive. In the *Banković* case, the ECtHR adopted an all-or-nothing view[16], however it was overturned in the subsequent *Al-Skeini* case[17]. The third problem remains the same with the territorial modus: the concept of control is still unclear.

2.3. Control

Both approaches stand on the notion of control[18], the difference is in its object: "All have recognized that a state's extraterritorial exercise of effective control over either a person or a territory places that conduct within a state's "jurisdiction" [Cleveland 2010:248]. It could be argued that control is not a fact *sensu stricto*[19] because it is outside of the 'true-false' dichotomy; fact is an absolute term (it does not admit degrees) and *control* is a relative notion[20]. In theory it is possible to imagine a unit of control's measurement and formulate a rule that, from a certain amount, human rights obligations arise; however, it is practically impossible.

To deal with it, ECtHR elaborated *effective overall control* test[21] but a comparison between territorial and personal approaches leads to the conclusion that control is the most important factor. Before addressing the comparison, it is crucial to mention a terminological ambiguity of "control test" which could mean (1) an indication of jurisdiction, (2) a ground for attribution and (3) a test for a complaint's admissibility *ratione personae*. The three refer to one set of facts but with different functions[22]: (1) to establish obligations, (2) to attribute certain actions to a state, and (3) to meliorate a procedure with a preliminary stage. That is why the effective control test from the *Nicaragua* case[23] could be deemed irrelevant for the question of obligations' existence: this test is for attribution (part of secondary rules), and the effective overall control test serves to establish an obligation (as a part of primary rules) [Milanovic 2011:46-51; 136-137]. The last meaning is procedural and only indicates when an issue may be raised in a preliminary stage; in substance it could be an attribution or/and an establishment of obligations[24]. Metaphorically, the issue of admissibility acts as a terminological 'shaker' for primary and secondary rules; it mixes an issue of attribution, which tends to have a high standard, with an issue of jurisdiction, which tends to have a lower standard [Rusinova 2016:68]. One

[14] These limits should be sufficient to consider extraterritorial jurisdiction to be exceptional: ECtHR. *Medvedyev and others v. France.* Decision of 29.03.2010. Para. 64. URL: https://hudoc.echr.coe.int/eng?i=001-97979 (accessed date: 19.11.2025); ECtHR. Al-Skeini. Para. 131; ICJ. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 09.07.2004. Para. 109; etc.

[15] ECtHR. Banković. Para. 75.

[16] Ibidem.

[17] ECtHR. Al-Skeini. Para 137; ECtHR. *Carter v. Russia.* Para. 126.

[18] See a critique of this statement in [Besson 2013:872-874].

[19] "Something that is known to have happened or to exist, especially something for which proof exists, or about which there is information" – *Fact. Cambridge.org website.* URL: https://dictionary.cambridge.org/dictionary/english/fact (accessed date: 11.01.2025).

[20] Its "level" depends on other "factual determinations" [Janig 2022:183]. See about relative and absolute terms *inter alia* in [Unger 1971:202-207].

[21] In the Loizidou case at the preliminary objections stage the Court formulated a criteria as 'effective control', at the merits stage, it modified it to 'effective overall control' (ECtHR. *Loizidou v. Turkey* (preliminary objections); ECtHR. *Loizidou v. Turkey* (merits). Decision of 18.12.1996. Para. 56. URL: https://hudoc.echr.coe.int/eng?i=001-58007 (accessed date: 11.01.2025)).

[22] The term still serves one aim of establishing responsibility. See [De Leo 2025:107-112].

[23] ICJ. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits Judgment of 27.06.1986. Para. 109, 115.

[24] See an example of their interrelation in ECtHR. Drozd and Janousek. Decision of 26.06.1992. Para. 91. URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57774%22]} (accessed date: 11.01.2025).

must specify what exactly is being discussed (primary or secondary rules), without being distracted by the procedural reasoning. Hereinafter "the control test" as a part of primary rules is in question.

In territorial modus *effective overall control* test has three parts with an aim to broaden applicability. First is *control*, which, in accordance with the ordinary meaning, refers to the ability to execute states' will[25]. No state has total control; it constitutes a denial of humans' autonomy and free will, while human rights aim to preserve them. Consequently, any interpretation of human rights treaty as something that requires to show total control is contrary to the object and purpose of a treaty. However, it seems that control is the criterion that distinguishes states' territory *proper* from jurisdictional clause. The former can be used as the basis for the presumption of the latter [Besson 2012:876-878][26]; hence, control is the means that stretches and limits the scope *ratione loci,* while a territory serves a procedural role. The second part is *overall*, which means that applicants do not need to provide details of the respondent's exercise of control in a particular situation[27]; it is a procedural way to expand applicability. The last part is *effective*[28]. In general, effectiveness is an outcome of a comparison between real and intended results; to establish human rights obligations, "the state needs to have enough power over the territory and its inhabitants to broadly do as it pleases" [Milanovic 2011:137]. Due to the fact that the comparison is a logical operation and depends on the compared issues as inputs, it is impossible to formulate an abstract substantial definition of effective control. The only way to inquire the effectiveness of control is a case-by-case study[29]. This vein may justify an accusation in voluntarism. Only a threshold of total control can avoid this eclectic path; as mentioned earlier, it is contrary to the object and purpose of human rights treaties.

The notion of *control* in territorial modus is the only part that could be a handle to expand and to limit *ratione loci.* The other two requirements of the test only expand the scope, while the main aim of the jurisdictional clause in personal modus is the opposite; therefore, only *control* is practically relevant in personal approach.

The broadest way to define *control* over a person is to put an equal sign between control and impact: it is constituted whenever a state has an ability to substantively violate an individual's rights; this is too broad. The most promising technique to bridle personal modus is to put interaction at the forefront and set a limit based on its nature, for instance «by requiring the exercise of some sort of purported legal power over the victim of the alleged human rights violation» [Milanovic 2011:199]. However, those criteria are arbitrary.

In conclusion, the main question of human rights' scope *ratione loci* is whether a state has exercised *control*. Other qualifiers serve as an attempt to measure this concept, having the inability to use the term's absolute sense. Without a unit of measurement, the relativity of *control* creates a margin of flexibility for a court to expand or reduce human rights based on the court's evaluation of *control's* scale. It could find a state having control without detailed explanation but with general observations; there is no way to challenge such findings in a coherent objective way, because no argument can contradict to an opinion. If (1) jurisdiction in Art. 1 ECHR means effective overall control, (2) control is a relative term, and (3) it is practically impossible to define and apply control's unit of measurement, then there is no objective territorial limit of human rights obligations; ratione loci is resolved by Art. 32 ECHR, which answers the question of whose subjective assessment is decisive.

3. Further development of the jurisdictional clauses

Due to control's relativity, one cannot rely solely on objective facts, there is always a choice of an empowered adjudicator; the objectivity could influence the will but not determine it. Therefore, one should

[25] "To order, limit, or rule something, or someone's actions or behaviour" – *Control. Cambridge.org website.* URL: https://dictionary.cambridge.org/dictionary/english/control (accessed date: 11.01.2025).

[26] ECtHR. Assanidze. Decision of 08.04.2004. Para 138-139. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61875%22]} (accessed date: 11.01.2025).

[27] ECtHR. *Loizidou v. Turkey* (merits). Para. 56. However see [Moreno-Lax 2020:399-400].

[28] "Successful or achieving the results that you want" – *Effective. Cambridge.org website.* URL: https://dictionary.cambridge.org/dictionary/english/effective (accessed date: 11.01.2025).

[29] This path is taken by the Guide on Article 1 of the European Convention on Human Rights. Updated on 31.08.2024. P. 21-45. URL: https://ks.echr.coe.int/documents/d/echr-ks/guide-on-article-1-obligation-to-respect-human-rights (accessed date: 11.01.2025). See also [Janig 2022:185].

put options as a contradiction in order to inquire how the choice is made.

Let's assume there are two ways of research: one is to collect, count, and classify all cases in order to outline tendencies (it is based on quantity and induction); another is to outline the core of the options' reasoning and how they interact in a particular case (it is based on quality and deduction). The first is flawed due to required excessive effort and inductive inferences[30] (it is impossible to say when a number of cases is enough to make a justified conclusion). The second is also defective due to dependence on general starting statement of a deductive reasoning; the starting point must be obvious, unquestionable or accepted. Therefore, the second vein is more efficient on the condition that a reader could accept the following creative description of two options' reasoning. Indeed, this dilemma can be described in multiple ways, we might also agree that "[h]uman rights duties are institutional and hence necessarily bounded and, when drawing those boundaries, one can never hope for one state's institutions to respect the human rights of all" [Besson 2012:884]. However, it seems, the more abstract description is possible.

3.1. Universality as thesis of the contradiction

Since the World War II, it has been generally accepted that human rights are shackles for a sovereign. Whatever a state wants to achieve shall be accorded to human rights considerations. However, there is no clear understanding of human rights' "precise nature and role in international law" [Shaw 2021:242]. This uncertainty, at least for practical application, is overcome by treaties when human rights bodies were granted authority to declare when a sovereign's act is in breach.

However, the legitimacy of human rights is not solely derived from theoretical or philosophical reasoning but also from fear of history's repetition where "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind"[31]. Human rights do logically contradict to Leviathan's freedom to do whatever it pleases [Gabrelyan 2014:46-57]. This conflict was surpassed by the tragedy of the barbarous acts, which empowered human rights law to emerge in its contemporary plight. The core reason to expand human rights is a believe that no sovereign is free from human rights as "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family"[32].

3.2. Decisions' effectiveness as antithesis of the contradiction

When H. Kissinger described Westphalian World order, he noted that "[n]o single claim to truth or universal rule had prevailed in Europe's contests. Instead, each state was assigned the attribute of sovereign power over its territory" [Kissinger 2014:3]. It illustrates how state-centered international law conflicts with human rights [See Pribytkova 2020:408], indeed, "[l]aw cannot be sovereign without a political sovereign, and no global political sovereign is yet in the making" [Bhuta 2016:19]. This indicates the core reason for human rights limitations: sovereign's *de facto* ability to preserve its freedom. Human rights institutions could recognize a state as bound by an obligation, but a state is free to disregard the finding. Sovereigns are free to consent to human rights treaties and free to take the consent back.

One could recall the distinction between *law* and *politics* or between *due* and *given* in order to argue that for law a state is always bound: there is no ability to ignore this freedom from human rights in one dimension but there is no such thing in the other. However, human rights law would hold no value if it were non-existent in the real world and if it had no role in the political process. Fortunately, at least there is a political role of "naming-and-blaming" for human rights institutions. Although the politics of these bodies is beyond the scope of the present article, it is assumed that they consider the political effectiveness of their actions[33].

3.3. Interaction of the two statements

Above-described thesis and antithesis demand a constant search for balance between "…considerations of the universality of human rights and the limits of what states are able and – more importantly – willing to undertake…" [Janig 2022:189]. A line that delimits the scope ratione loci should be redrawn whenever political conditions allow to move further

[30] See [Henderson 2024].

[31] Preamble of the Universal Declaration of Human Rights (hereafter UDHR).

[32] Ibidem.

[33] Marko Milanovic, using the word 'effectiveness', outlined four vital considerations: flexibility, impact, regime integrity, clarity and predictability [Milanovic 2011:106-117].

to universality or demand to limit the obligations. It is clear that human rights bodies, in persuasion for legitimacy, want to make right choices. To evaluate what is right and wrong, one of two types of ethical systems could be used[34]: deontology[35] or consequentialism[36]. Deontic theories evaluate an act itself for deeming it right or wrong, they consider actions from the perspective of what we ought to do. The discourse of human rights law falls considerably under deontic narrative; it evaluates facts from the standpoint of duties; it is hard to find a place in the reasoning for consequences. On the other hand, consequentialist theories are not concerned with an act itself; for them, the rightfulness of an action depends on its consequences.

When a human rights body makes a decision regarding the treaty's scope *ratione loci,* it uses one of the two ethical systems in order to choose between *yes* and *no* as an answer for the question "is there a fact under control of the respondent-state?" The universality tends to say *yes*; probable political consequences could demand to say *no*. The consideration about a decision's effectiveness is consequentialist argument against jurisdiction; the inherent universalism of human rights is an argument for jurisdiction.

The core reason for expanding the boundaries of human rights is deontic in nature. If put in extremities, it disregards a decision's consequences; the effectiveness of human rights bodies' work is irrelevant. In contrast, the core reason to limit the boundaries is consequentialist. It stimulates to make a decision in the most politically effective way and to consider its consequences for all actors including victims. If a decision will not be implemented and will impair future decisions' power, then it must be avoided.

If we agree that "the paradox of human rights boundaries" is the contradiction between deontic and consequentialist approaches, then it might be unresolvable. It is akin to solve the Trolley Problem[37] [See Foot 1967:5-15; Thomson 1985:1395-6]; an issue of extraterritorial jurisdiction is a variant of this Problem for a human rights body. However, there is an assumption that, if considered false, could demolish this dilemma for human rights law. This assumption is better seen in the proposed path of the jurisdictional clause's development.

3.4. Functional approach

The concept of control in personal modus at some point may attract our attention to a person who controls[38]. In the functional approach[39] the main criterion is an ability of controller to perform public power [Bhuta 2016:11-12; Oberleitner 2015:167; Vandenhole 2019:421]: "Did it depend on the agents of the state whether the alleged violation would be committed or would not be committed? <…> If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the state"[40]. The object of control here is "activities that affect the enjoyment of human rights" [Janig 2022:186]. By default, it sets an equal sign between *can* and *ought* [Raible 2021:18]: if a state is able to do something, it has the jurisdiction to do so, thus human rights obligations apply. This is, indeed, too broad: if one state could end a famine in another, it is obliged to help[41]; a limit is needed[42].

The distinction between positive and negative human rights obligations was proposed as a limit [Milanovic 2011:209-219]. It holds as a premise two undeniable statements: (1) the obligation to respect requires a state to have no more than control over its

[34] For the purpose of this paper, aretaic theories and the nihilist approach are not considered, as aretaic theory focuses on the virtues of a decision-maker rather than the reasoning behind the decision, and the nihilist approach leads to the denial of the existence of human rights.

[35] See [Alexander, Moore 2024].

[36] See [Sinnott-Armstrong 2023].

[37] A thought experiment, proposed by Philippa Foot, where an observer is given a choice to save 5 people in danger of being hit by a trolley, by turning the trolley to kill just 1 person.

[38] See ECtHR. Wieder and Guarnieri. Decision of 12.09.2023. Para 87-94.

[39] See African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4). 18 November 2015. Para. 14. URL: https://www.refworld.org/legal/general/achpr/2015/en/70896 (accessed date: 11.01.2025); UN Human Rights Committee, General comment no. 36: Article 6, Right to life. 2019. Para 63. URL: https://digitallibrary.un.org/record/3884724?ln=en&v=pdf (accessed date: 11.01.2025).

[40] ECtHR. Al-Skeini. Concurring Opinion of Judge Bonello para. 16; see also ECtHR, Jaloud. Decision of 20.11.2014. Para. 152 URL: https://hudoc.echr.coe.int/fre?i=001-148367 (accessed date: 11.01.2025); ECtHR. Chiragov. Decision of 16.06.2015. Para. 169-186. URL: https://hudoc.echr.coe.int/fre?i=001-155353 (accessed date: 11.01.2025); ECtHR. *Loizidou v. Turkey* (preliminary objections); ECtHR. Andreou. Decision of 27.10.2009. Para. 25. URL: https://hudoc.echr.coe.int/eng?i=001-95295 (accessed date: 11.01.2025).

[41] However see [Moreno-Lax 2020:397-8].

[42] See ECtHR. Al-Skeini. Concurring Opinion of Judge Bonello para. 32.

agents and (2) it is reasonable to demand this from states. However, the drawback is apparent: if the limit of the scope of extraterritorial obligations is the line between positive and negative ones, then there is no extraterritorial positive obligation. Universality may stimulate to make exceptions for "prophylactic and procedural positive obligations" [Milanovic 2011:215-9; Shany 2013:61-7]. However, in certain political conditions exemptions could proliferate and water down the criterion to the point when the rule is useless.

Another proposed criteria is the existance of a political relationship between a state and a right-holder [Besson 2012:864-5; Moreno-Lax 2024:41-2; see also Ollino 2021:84-9]. However, human rights obligation itself regulates those political relations. Human rights may regulate *or* be triggered by them. Jurisdiction test must precede assessments on human rights obligation [Ollino 2021:99]. Hence, there are two possible conclusions: there are some public power relations that are not regulated by human rights or there is no territorial scope of application. Whatever is considered, however, as a prior public power relation, it must be coherent with human rights obligation as well, therefore "there is no longer a need for unjustified distinctions between territorial and exterritorial" [Moreno-Lax 2020:413]. It seems that advocates for this approach are conscious of risks, including states' withdrawal from human rights treaties [Moreno-Lax 2020:415-416].

Nevertheless, this approach highlights particular inconsistency in legal reasoning: what does a human rights treaty create? The Statute of the International Court of Justice answers this question with *rules*[43], while the VCLT refers to *rights and obligations* [Schmalenbach 2018:41-43]. The meaning of the scope *ratione loci* depends on the notion of what is limited. If a treaty creates "an accepted principle or instruction that states the way things are or should be done, and tells you what you are allowed or are not allowed to do"[44], a rule exists separately from its addressees as a criterion for actions or omissions; therefore, if an action takes place outside of the defined territory, a rule cannot be used for the evaluation. This logic does not work for rights and obligations because those concepts are not criteria for actions or omissions; they describe attributes of actions or omissions, whether real or imaginary. To say that an act is unlawful, in certain cases it should exist in reality without the property of obligation, and there should be a corresponding imaginary inaction with the property of obligation. Thus, an obligation is not a criterion for (un)lawfulness but an attribute of an imaginary action or omission that is compared to reality.

It is hard to perceive the territorial scope of an obligation. If we assume that an obligation of an international treaty has the same roots as an obligation raised by a private contract, the contradiction becomes more prominent[45]. The most laconic definition of an obligation is *'juris vinculum'*[46]: a contract binds a debtor and a creditor. If a legal bond has a territorial scope for validity, it creates a discrepancy: you could vow to do something, but you can always pass through the territorial border to escape the ties. An obligation bounds a person to a person, but not a person to a territory. The ability of a debtor to "play hide and seek" with his creditor cannot be genuinely perceived as lawful.

The VCLT uses the term *consent to be bound* as a core element of any international treaties to be valid [Schmalenbach 2018:42]. In human rights law, the "bifurcation of the rights-holder and the rights-enforcer" [Engle 2015:72] was described with a concept of third-party beneficiary [Henkin 1981:257-280]: treaties create legal relations between states where individuals are passive right-holders. The functional approach stresses this perception: a treaty makes legal relations between controlling and controlled persons when actions of the former are attributed to an obliged state.

[43] Art. 38 (1a).

[44] Rule. Cambridge.org website, URL: https://dictionary.cambridge.org/dictionary/english/rule (accessed date: 11.01.2025).

[45] Hereinafter, Roman law will be used for purposes of analogy, without implying its intellectual background as a normative argument, even though it could be used in discussions about rights and obligations in international human rights law. This analogy only has the analytical aim of describing issues of human rights law that are similar to those dealt with by Roman law.

[46] Inst. 3.13: "Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei secundum nostrae civita-tis jura" – "An obligation is a bond of law by which we are reduced to the necessity of paying something in compliance with the laws of our state" (the translation is from: S. P. Scott, The Civil Law, II, Cincinnati, 1932. URL: https://droitromain.univ-grenoble-alpes.fr/Anglica/just3_Scott.gr.htm#XIII (accessed date: 11.01.2025)).

The assumption is that obligations are created from scratch and an effective remedy logically required. If we assume this statement as false, then it is possible to split the question of extraterritorial application between universality and effectiveness. Instead of resolving the philosophical dilemma human rights law could elaborate a theory, where two questions are answered separately.

4. Human rights obligations

Obligation (*obligatio*) is a legal relation of inequality between two persons: one is entitled, another is indebted [Savigny 2004:51-52]. If an interaction can be qualified as *obligatio*, then a state's consent to be bound grants an entitlement to everyone with a status of a human; however, a remedy does not derive from this status. Every state has its own human rights implementation mechanisms and policies. A split between an entitlement and a remedy is the division between natural (*naturalis obligatio*) and civil (*civilis obligatio*) obligations. In contrast to *civilis obligatio, naturalis obligatio* is an obligation without a possibility of enforcement via the action in court [Savigny 2004:66-73; Vindsheid 1875:97; Khvostov 1898:1-62, Pokrovskij 1917:232]. F. C. von Savigny considered them as derived from different sources: a civil obligation is from *ius civile* as a result of the law prescription, while a natural obligation derives from *ius gentium* as from *ratio* [Savigny 2004:60-63]. In roman law an obligation derived from *ius gentium* often was granted protection by *ius civile* [Savigny 2004:66-73; Vindsheid 1875:84], and natural obligations might preserve legal character [Golevinskij 1872:156, 164; Vindsheid 1875:83-85]. This logic can be applied to human rights by splitting the question of their existence and their enforcement. One could be answered in a universal and deontic vein; another could be answered with consequences and effectiveness as the main criteria.

The idea of natural obligation recognizes inability to fulfil all human rights towards everyone without deeming them non-existent by complicating human rights into *obligatio* and *actio*. It resolves without derogations the question of human right's universal existence in affirmative, instead it applies the limit *ratione loci* to the enforcement. In other words, the scope ratione loci determines when the obligations are ensured by a particular enforcement mechanism.

However, it necessitates to reconsider the role of domestic courts as *gatekeepers* or *compliance partners* [Kunz 2019:1139-1149] for decisions of human rights bodies. The concept of obligation requires clear indication of a debtor and a creditor. Treaties answer clearly: a state is a debtor; a human is a creditor. A domestic court as a body of a state cannot adjudicate a dispute about international human rights obligation because *nemo judex in causa sue:* a court is a body of a debtor; if it finds an obligation in contradiction with domestic law, it changes nothing more than the reason for a violation. If a content of domestic law depends on state's will[47] as well as a consent to be bound by a treaty, then there is a conflict between two wills of one state. Indeed, a domestic court could well-ground a breach of obligation, but it should be perceived as a debtor's assertion that a breach is excused. However, it gives too much a role to human rights bodies with few methods of coercion; their decision might be declared non-enforceable or unconstitutional [Kunz 2019:1155]. When a domestic court refuses to comply with a decision of a human rights institution only community of states or general public can decide what it was: a breach of the international obligation or wrong decision of an adjudicator. The authority of a human rights body comes from a status of adjudicator, therefore a decision perceived as wrong will damage the institution's legitimacy.

This framework passes political responsibility from human rights bodies to member states; the *raison d'être* of a human rights treaty is to establish a regime where an infringement of human rights is treated as a legal wrong. A human rights body strives to cover all natural obligations by authority of a treaty, while a sovereign tends to avoid compulsory obligations. If a jurisdiction clause is a line between natural and civil obligations, the category of *control* is a tool in the hands of a human rights institution not to extend rights extraterritorially but to cover them with protection. If control is sufficient to require a state to comply with a natural human right obligation, then *actio* could be granted. The role of jurisdiction changes from a criterion of a norm's application *ratione loci* to a political justification: it attempts to predict whether the member states and general public would find a defendant state with enough power to consider it responsible[48].

[47] PCIJ. Certain German Interests in Polish Upper Silesia (Merits). Judgment of 25.05.1926. pP. 19. URL: https://www.icj-cij.org/pcij-series-a (accessed date: 19.11.2025)

[48] See for example: Human Rights Committee. *Yassin et al. v. Canada.* Communication No. 2285/2013. UnDoc: CCPR/C/120/D/2285/2013 (adopted 26 July 2017). Para. 6.7.

If the provided description of the contradiction is right, then there are only two ways of development: to solve the Trolley Problem or to complicate the issue in order to separate two oppositions. However, the most probable variant is the absence of any development: it is unlikely that the philosophical dilemma will be solved, and the breakup between right and remedy creates danger for all parties.

For states (debtors), it challenges their legitimacy. If there are natural human rights obligations derived from *ratio*, then their existence and content are independent from sovereigns' will; it might be used as a ground of critique for states actions. Realpolitik might stand before the court of public opinion without legal cover. In the nineteenth century, enlightened absolutism mitigated this danger by granting human rights before they were demanded. It increased sovereign's legitimacy and altered discussion about human rights from a contention to a plea[49]: if a state grants us human rights, then, it is implicit, we should be grateful. However, if a human's entitlement against a sovereign derives via *ratio* from the status of a creditor and not from the consent of a debtor, then the equality, proclaimed in the UDHR, is enough to establish natural human rights obligations. The treaties become guidelines or clarifications for the preexisting obligations and only able to grant *actio*.

For creditors, it creates an additional task. Any denial of remedy would not automatically tantamount to denial of human rights; the logical link between *right* and *remedy* (as a whole and a part) could have helped to establish a cause of action[50]. The split of human rights into *obligatio* and *actio* loosens the moral constraint, because it logically affords to say "we refuse to grant a remedy but we consider it a violation of human rights". However, it is doubtful that human rights instruments provide an *actio* in a material sense [Khvostov 1898:508] at all. If a state grants a remedy, it is not an *actio* but a fulfillment of an international obligation. In that sense international obligations lack *actio* by default because there is no adjudicator with compulsory universal jurisdiction; therefore, natural human rights obligations would have more in common with the majority of international obligations. It would be too ambitious to apply this classification somewhere beyond human rights law; however, this helps to emphasis that human rights law's distinguished feature is not the proclamation of rights and equality (*naturalis obligatio*), but an idea that a human being could demand something as a remedy from a sovereign (*civilis obligatio*). Acknowledgement of human rights' existence as natural obligations of states is a start for a political discussion about ways to provide relief on an international plane. Natural obligation does not provide any protection but reminds that a person could claim, demand, and even fight for their own good; a human rights body, from this standpoint, is an institution that helps to stop on "claim" and prevents from going to "fight". That is the reason to look mainly at the ECtHR – it certainly does provide *actio* due to its power to create a new obligation[51], while the Human Rights Committee, for instance, could be considered as a human rights body without such power[52].

However, this framework ultimately blurs distinction between law and ethics to the point when one could legitimately refuse to consider at least some human rights as legal[53]. In the end natural human rights obligations might be found legally relevant only when they are fulfilled; it is so in private law [Khvostov 1898:469-472; Vindsheid 1875:86-89]. However, the concept could also provide a framework to develop. It is not obligatory to follow Roman law; moreover, ignored human rights (as natural obligations or not) sometimes could lead to unwanted political turmoil, therefore it is possible to find a way to argue legal relevance of natural human rights obligations as the necessity.

5. Conclusion

Sometimes it is apparent that concept of human rights is put in the narrative of *damsel in distress:* it is often considered as something to be saved, defended, guarded and provided. Harsh reality leads this plot to

[49] See about humans' status as a defining criteria between police law (police state) of nineteenth century and administrative law (a state with the rule of law) in [Elistratov 1914:1-17; 1922:5-36]

[50] See Supreme Court of Canada. *Nevsun v. Araya.* Judgrmrnt of 28.02.2020. Para 118. URL: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do (accessed date: 11.01.2025).

[51] Art 41 ECHR.

[52] UN Human Rights Committee. General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights. 2009. Para. 3, 4, 6-8, 11. URL: https://digitallibrary.un.org/record/659368?ln=en&v=pdf (accessed date: 11.01.2025).

[53] With respect to natural obligations see the proposed divide between *debita naturalia* and *obligatio naturalis* with subjective right as a criterion [Khvostov 1898:486-490].

despair. Stories of human rights usually are tragedies, but there might be a change in the future: human rights could be considered as something like "law-in-waiting". Human rights could be an inspiration for right-holders instead of a moral demand against right-enforcers.

This change of mindset could be achieved with more sophisticated understanding of human rights. Not as a set of rules created by sovereigns, aimed to halt their acts and limited by their domains, but as multiple natural obligations. When we derive them from *ius gentium,* then a breach of such obligations may create a demand of a right-holder to recognizit by *ius civile.* This understanding could come from the problem of human rights' extraterritorial scope of application. Incompatibility between the universality of the treaties' content and the territorial limit can be solved in a dialectical vein. The question of an obligation's existence could be detached from the limits of its enforcement by accepting that human rights treaties do not create them from the scratch but only add certain effects to the pre-existent natural obligations. Those enhancements constitute the feature and value of human rights law, and only that feature has territorial scope of application. However, it is about the little possibility in the distant future, and it would trigger other contradictions and problems, including the line between law and ethics in human rights.

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