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The Extraterritorial Application of Multilateral Environmental Agreements

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The present Article discusses whether the notion of extraterritorial application of treaties, widely debated and disputed in the context of human rights treaties, is also a viable concept in the context of multilateral environmental agreements. This Article will explore whether there are specific elements governing an extraterritorial application of environmental treaties. While this question has not yet attracted much attention in the literature on international environmental law, it will be argued that more questions of extraterritoriality will arise in the context of international environmental law and that these can be appropriately resolved through multilateral environmental agreements. While environmental treaties may, at the moment, be considered less "mature" than human rights treaties in terms of their extraterritorial potential, most obstacles for such an application can be overcome.

INTRODUCTION

The present Article addresses whether multilateral environmental agreements ("MEAs"),[1] as distinctive international legal instruments, can give rise to an extraterritorial application and thus create extraterritorial obligations. This Article will first provide a preliminary outline of what is understood by an "extraterritorial application" of MEAs (Part I). It will then look into the framework of general international law, in order to inquire the extent to which fundamental principles of international law and treaty law determine the extraterritorial application of treaties (Part II). The Article will then briefly sketch out relevant developments of extraterritorial application in the context of human rights law (Part III). On that basis, it will be possible to discuss the circumstances and extent to which MEAs may apply extraterritorially (Part IV), before some concluding observations are made (Part V).

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1. For the purposes of the present Article, multilateral environmental agreements, or "MEAs," encompass all formal multilateral legal instruments dealing with some aspects of environmental protection. Due to space constraints, the present discussion does not extend to substantive obligations under the law of the sea instruments (*e.g.*, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]; specific fisheries or marine pollution treaties). However, the Article may refer to some law of the sea aspects.

First, however, it is important to clarify how the issue of extraterritorial application relates to the broader framework of international environmental law ("IEL"), why the question is considered to be of both practical and theoretical relevance, and what aspects will be left aside. As will be further specified below,[2] the framework of IEL has initially evolved around the customary rules on the prevention of significant transboundary harm. In addition, several other legal principles have emerged, some of which are now widely recognized (like the principle of cooperation), while the legal status and content of others (like sustainable development or precaution) have remained contentious. The present Article, however, is not directly concerned with the customary rules of IEL, but focuses on multilateral environmental treaties and, more specifically, their territorial scope of application. There are now a great many environmental agreements, addressing issues as diverse as climate change, the regulation of trade in endangered species, or the conservation of species and their habitats. The adoption of an increasing number of MEAs has pushed IEL beyond the confines of a narrow "outward-looking" international regime focusing on transboundary issues,[3] to an increasing international "inward-looking" regulation of the domestic environment of states. The present Article seeks to bridge the divide between these two strands of developments. It will be argued that MEAs can, and should, look "outward" as well and give rise to extraterritorial obligations.

Several factors arguably indicate that the idea of an extraterritorial application of MEAs awaits further exploration.[4] On a conceptual level, the problems associated with a strictly territorial application, already visible in the context of human rights treaties, arguably are further intensified in the context of MEAs. It is almost a truism that the focus on territoriality is an inherent conceptual problem of IEL regimes, as environmental concerns are rarely territorially confined, but instead transcend political boundaries.[5] An increasing reliance on extraterritorial obligations might thus bring MEAs more in line with calls for a greater ecological orientation of environmental

2. The customary rules will be further discussed *infra* Section IV.A.

3. *See* Penelope Simons, *Selectivity in Law-making: Regulating Extraterritorial Environmental Harm and Human Rights Violations by Transnational Extractive Corporations*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 473, 484 (Anna Grear & Louis J. Kotzé eds., 2015) ("outward-looking" nature of IEL).

4. It is worth noting the incisive remark by Manfred Lachs during the course of the Vienna Convention on the Law of Treaties deliberations, considering that "extremely interesting theoretical and practical" issues may be raised "by the problem of how treaties regulate events taking place outside the actual physical territory of a party." *Summary Records of the Eighteenth Session, 851st Meeting*, [1966] 1 Y.B. Int'l L. Comm'n, pt. 2, 53, ¶ 57, U.N. Doc. A/CN.4/SER.A/1966.

5. See, for early accounts, Günther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50, 53–54 (1975); Luzius Wildhaber, *Sovereignty and International Law*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 425, 444 (Ronald St. J. McDonald & Donald M. Johnston eds., 1986). This is both true for the environmental goods worth protecting (for example, migratory species), as well as the nature of threats to the environment (for example, long-range transboundary pollution). Both aspects are addressed in CMS, Res. 10.4, UNEP/CMS/Resolution 10.4 (Nov. 20–25, 2011) (on "marine debris") under the Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333 [hereinafter CMS].

treaties and (emerging) normative concepts like the "ecosystem approach."[6] While the recognition of this problem has often led observers to argue for increasing cooperation between states in the sphere of transboundary or global challenges,[7] it has not yet triggered a comprehensive discussion of the extraterritorial scope of MEAs.[8] Furthermore, the inclusion of provisions directly related to the question of territorial application in more recent MEAs like the African Convention on the Conservation of Nature ("Maputo Convention")[9] and the Convention on Biological Diversity ("CBD")[10] highlights that states parties are well aware of the need to address the problem.[11] Similarly, MEA treaty bodies have already dealt with activities that impact the environment outside the state's territory and thus raise, although perhaps not expressly discussed that way, questions of extraterritorial application.[12] With a view to the broader framework of IEL, there are arguably considerable shortcomings of the customary rules on transboundary harm, which leave room (and potentially call) for an increasing reliance on MEAs in extraterritorial constellations. In addition, the extraterritorial application of MEAs is not only a question of substantive treaty law; it also has a strong institutional connotation in that it decides whether MEA treaty bodies, notably Conferences of the Parties ("CoP"), have the authority to address issues of an extraterritorial reach.

Furthermore, the concept of extraterritorial obligations under MEAs might also give new impetus to efforts to address certain environmental problems more effectively.[13] Three examples may illustrate the problems that are at issue: first, in the context of climate change, states have adopted measures to mitigate their emissions, which, however, may have negative

6. *See, e.g.*, Jutta Brunnée & Stephen Toope, *Environmental Security and Freshwater Resources: A Case for International Ecosystem Law*, 5 Y.B. Int'l Envtl. L. 41, 55–76 (1994).

7. *See, e.g.*, Alexandre Kiss & Dinah Shelton, International Environmental Law 151–53 (1991); *see also infra* Section IV.A.

8. A notable exception is Michael Bowman, Peter Davies & Catherine Redgwell, Lyster's International Wildlife Law 325–26, 424–26 (2d ed. 2011).

9. (Revised) African Convention on the Conservation of Nature and Natural Resources, July 1, 2003, http://www.au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version [hereinafter Maputo Convention]. According to its Article XXXVIII, the convention enters into force "on the thirtieth day following the date of deposit of the fifteenth instrument of ratification, acceptance, approval or accesson." The fifteenth instrument of ratification was deposited by Benin on June 10, 2016. The convention thus entered into force on July 10, 2016.

10. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

11. Furthermore, the United Nations Environment Programme ("UNEP") guidance materials for negotiators now indicate that treaty practitioners are already aware that extraterritorial issues may arise under MEAs. UNEP, Glossary of Terms for Negotiators of Multilateral Environmental Agreements 38 (2007).

12. *See infra* Section IV.C.

13. Extraterritorial application could help address what has also been described as "governance gaps." In the present context, the idea of governance gaps refers to instances wherein harmful environmental activities are insufficiently addressed by existing treaties, treaty bodies, or formal/informal organizations, and this gap is inadequately compensated for by (fragile) domestic laws and authorities. *See* Penelope Simons & Audrey Macklin, The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage (2014) (for a discussion of governance gaps in the human rights context).

environmental repercussions abroad. The biofuels example discussed below[14] will highlight how the far-reaching impacts of domestic policy decisions call for the elaboration of extraterritorial obligations through MEAs. Second, states seeking to protect vulnerable habitats and ecosystems have often struggled to do so once such areas extend beyond national territories. The recent establishment of the most comprehensive marine protected area currently in existence, in the Antarctic Ross Sea,[15] indicates that a more intensive use of MEAs can be made in establishing protected areas that lie outside or transcend national territories. Third, an extraterritorial application may help to address issues wherein the traditional mode of international law implementation appears to fail. While MEAs primarily rely on implementation and enforcement by the state party in whose territory harm occurs (the "host state"), a more promising venue for establishing effective constraints upon harmful practices might lie in the imposition of extraterritorial obligations upon the state in which the relevant non-state actors are domiciled (the "home state").[16] Progressive tendencies in more recent economic partnership agreements concluded by the European Union may shed some light on the future development in this regard.[17] In turn, this might also shift the perspective from protracted discourses like "investment and environment" to an alternative (and perhaps more productive) approach that addresses environmental issues "head on," through the lens of MEAs. Instead of focusing on (potentially conflicting) host state duties under IEL and other areas of international law (like trade law or investment law), and belaboring the concepts of "integration" and "harmonization,"[18] the concentration on extraterritorial obligations under MEAs may help enhance the overall effectiveness of the IEL system.

Finally, it should be noted that while the notion of extraterritorial application may be associated with a whole range of different legal phenomena, not all of these are at issue in this Article. First, the following discussion is neither directly concerned with the extraterritorial application of domestic environmental law,[19] nor with the question of whether domestic courts may

14. *Infra* Section IV.F.4.

15. *Infra* note 252.

16. The prime example will be the activities of private investors abroad. *See infra* Section IV.F.4.

17. *See infra* note 444.

18. Jorge Viñuales apparently has a similar "change of perspective" in mind when discussing a "progressive approach" to investment disputes that, rather than conceiving environmental measures as exceptions to a pro-investment paradigm, instead measures investment decisions against the normative standard of environmental law (which may in turn implement MEAs). *See* Jorge E. Viñuales, *The Environmental Regulation of Foreign Investment Schemes under International Law*, *in* HARNESSING FOREIGN INVESTMENT TO PROMOTE ENVIRONMENTAL PROTECTION 273, 274–75 (Pierre-Marie Dupuy & Jorge Viñuales eds., 2011). Note, however, that he still focuses on the position of the host state. *Id.*

19. Indirectly, of course, this issue is of considerable importance when it comes to the implementation of any (extraterritorial) MEA obligations by states parties through domestic measures, and the question of whether such domestic measures are permissible under the rules of jurisdiction. The present Article, however, focuses primarily on the question of whether there are such extraterritorial MEA obligations. On the constraints established by the rules on jurisdiction, see *infra* Sections I.A, IV.F.

have jurisdiction to settle transboundary environmental disputes. Second, the present Article does not seek to further pursue the "human rights and the environment" debate, including the question of extraterritorial protection of environmental goods through human rights law.[20] Third, the possibility of limiting the territorial application of treaties to areas like metropolitan territories (and thereby excluding others, such as overseas territories) will be left aside.[21] Fourth, this paper is not concerned with "soft" environmental standards (and their potential extraterritorial reach) elaborated by, or applicable to, non-state actors such as international financial institutions.[22] Finally, this Article does not pursue the idea of establishing basic extraterritorial obligations through a reinterpretation of the concept of sovereignty,[23] but starts with the premise of the existing notion, the status quo, of sovereignty.

I. Preliminary Definition of "Extraterritorial Application" of MEAs

There are a multitude of activities and impacts that may give rise to (or at least warrant) the extraterritorial application of MEAs. For the purpose of this Article, most existing definitions of extraterritorial application prove unsuitable as they are either too general[24] or focus on the specific characteristics of human rights law.[25]

The (extra-)territorial application of treaties is distinct from questions relating to the personal, substantive, and temporal scope of application.[26] However, as will be seen below, the territorial and substantive scopes of application are not always easily separated, not least in the MEA context. MEAs (or provisions of these) may apply extraterritorially irrespective of whether they expressly relate to extraterritorial activities or impacts, or are

20. *See* Human Rights Council Res. 7/23, U.N. Doc. A/HRC/7/78, at 65 (July 14, 2008); Human Rights Council Res. 10/4, U.N. Doc. A/HRC/10/29, at 11 (Nov. 9, 2009); Rep. of the Office of the U.N. High Comm'r for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009); Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 Eur. J. Int'l L. 613, 633–40 (2012).

21. *See* Vienna Convention on the Law of Treaties art. 29, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Syméon Karagiannis, *The Territorial Application of Treaties*, *in* The Oxford Guide to Treaties 305, 309–16 (Duncan B. Hollis ed., 2012).

22. Strictly speaking, this is a problem of MEAs' scope *ratione personae*, as international financial institutions are usually not parties to, and thus not bound by, the relevant treaties. However, there is a certain overlap with the present question in the context of how states are expected to exercise their influence within the decision-making bodies of international financial institutions. *See infra* Sections III.D.1–2 (human rights law), and Section IV.F.5 (MEAs).

23. *See, e.g.*, Eyal Benvenisti, *Sovereigns as Trustees of Humanity*, 107 Am. J. Int'l L. 295 (2013).

24. UNEP defines "extraterritorial" as a "[s]et of measures or laws that apply beyond a State's jurisdiction." *See* UNEP, *supra* note 11.

25. *See* Mark Gibney, *On Terminology: Extraterritorial Obligations*, *in* Global Justice, State Duties 32, 45 (Malcolm Langford et al. eds., 2013) (finding that "[i]n each case, what the author is speaking about is a diagonal relationship between one State and the citizens of some other State or States").

26. On the different dimensions of a treaty's scope of application, see *infra* Section II.C.2.

formulated neutrally. Furthermore, even if included in MEA language, the concept of "transboundary harm"[27] is not congruent with extraterritorial impacts, but constitutes only one possible example.[28] The extraterritorial application of MEAs may thus concern (i) *activities* (acts and omissions) by states parties or non-state entities (e.g. corporations) that are performed outside the state's territory; and (ii) *areas* outside a state's territory, wherever the impacts upon the environment of such areas are caused.[29]

In the broader framework of state responsibility, the present Article focuses on the level of primary norms, i.e. whether there are extraterritorial obligations.[30] The question of whether such extraterritorial obligations under MEAs may then conflict with other treaties (and if so, how these conflicts should be resolved) is outside the scope of this Article.[31]

II. The General International Law Framework

Before delving into the specific example of human rights law, it should be clarified to what extent fundamental principles of international law may determine the extraterritorial reach of treaties. Of primary importance are thus the customary rules on state jurisdiction, the notions of territory and (territorial) sovereignty, and the rules of internatonal treaty law on the territorial scope of application.

A. Relevance of the Traditional Jurisdiction Rules?

Rules on "jurisdiction" can have several meanings, depending on their specific context. As regards the jurisdiction of states,[32] the concept usually

27. *See infra* Section IV.A. In the present Article, "transboundary" refers to impacts from one state's territory upon any other state's territory or common areas; "crossborder" refers, more narrowly, to impacts from one state's territory upon a neighbouring state's territory; and "transfrontier" refers to areas that extend beyond the territory of one state, or which are in some way jointly managed by neighbouring states. All these concepts should be seen as possible examples of an extraterritorial application of MEAs.

28. *See infra* Sections IV.A, IV.E.1.

29. One highly specific category of "extraterritoriality" will be left aside, namely "extra-terrestrial" aspects. *See* Frans von der Dunk, *Sovereignty and Space: When and Where Shall the Twain Meet?*, *in* State, Sovereignty, and International Governance 463 (Gerard Kreijen ed., 2002).

30. Other questions of state responsibility (like attribution) are beyond the scope of this Article.

31. *See* VCLT, *supra* note 21, arts. 30, 41, 58. These provisions, however, do not resolve all issues that may arise in such settings. *Cf.* Jan Klabbers, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, *in* The Law of Treaties Beyond the Vienna Convention 192, 194 (Enzo Cannizzaro ed., 2011); Christopher J. Borgen, *Treaty Conflicts and Normative Fragmentation*, *in* The Oxford Guide to Treaties 448, *supra* note 21. Express conflict provisions can be found in a number of MEAs (such as, CBD, *supra* note 10, art. 22, Maputo Convention, *supra* note 9, art. XXXV, and CMS, *supra* note 5, art. XII) and related treaties (such as LOSC, *supra* note 1, art. 311); *see, e.g.*, Nele Matz, Wege zur Koordinierung völkerrechtlicher Verträge [Ways of Coordinating International Agreements] 190–94 (2005) (on CBD, art. 22).

32. In a similar fashion, the notion of "jurisdiction" is used to circumscribe the competence of international courts and tribunals, international organizations, and treaty bodies. *See, e.g.*, Statute of the International Court of Justice, art. 36(1), Oct. 24, 1945, *in* 39 Am. J. Int'l L. Supp. 190, 215 (1945) (jurisdiction of the ICJ). For a judicial treatment of the territorial jurisdiction of the Oder Commission,

refers to the authority of a state (i) to apply its laws to issues that have a certain nexus to that state, usually defined as "territoriality," (active and passive) "personality," and—in a limited fashion—"universality"; (ii) to adjudicate disputes under these laws; and (iii) to enforce them against violations (hereinafter the "traditional jurisdiction rules").[33] In the environmental context, no specific jurisdiction rules have so far emerged;[34] states thus need to resort to the general rules of jurisdiction, notably the territoriality principle, in order to regulate and control, for example, the activities of foreign companies.[35] By contrast, the jurisdiction concept has acquired a specific meaning in the context of the law of the sea, wherein states may still enjoy a certain amount of functional jurisdiction in maritime areas outside national territory.[36] The emergence of another, context-specific understanding of "jurisdiction" can also be observed in the context of international human rights law.[37]

The traditional jurisdiction rules are, at least initially, separate from (and irrelevant for) the determination of the territorial scope of treaties and the question of whether there are extraterritorial obligations.[38] However, they retain their importance when it comes to the discharge of obligations: whenever states should be required, e.g., to take positive actions in the extraterritorial sphere, the legality of such actions is determined, *inter alia*, by the rules on jurisdiction.[39]

B. Territory (and Sovereignty) in General International Law

Notwithstanding a large number of theoretical attempts to topple and disaggregate sovereignty as the foundational concept of the international le-

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see Territorial Jurisdiction of Int'l Comm'n of River Oder (U.K. v. Pol.), Judgment, 1929 P.C.I.J. (Ser. A) No. 23 (Sept. 10).

33. *See generally* Malcolm N. Shaw, International Law 469–505 (7th ed. 2014); James Crawford, Brownlie's Principles of Public International Law 456–86 (8th ed. 2012).

34. An example of such a specific jurisdictional principle may be seen in the (unsuccessful) U.S. argument in the Behring Sea Fur Seals Arbitration (U.K. v. U.S.), Award, XXVIII R.I.A.A. 263, 269 (Aug. 15, 1893).

35. The weakness of such approaches, for instance in the context of developing countries facing multinational corporations, necessitates "inversed" approaches, such as attempts to oblige home states (rather than host states) to regulate non-state actor activities. *See infra* Sections III.D.2 (human rights), IV.F.4 (MEAs).

36. LOSC, *supra* note 1, art. 56(1)(a) (for the "sovereign rights" of coastal states in the Exclusive Economic Zone "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed"); *see also* Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bah.), 2001 I.C.J. Rep. 40, ¶ 170 (Mar. 16); Maria Gavounelli, Functional Jurisdiction in the Law of the Sea (2007); Alexander Proelss, *Article 56, in* United Nations Convention on the Law of the Sea: A Commentary 418, 426, ¶ 13 (Alexander Proelss ed., 2017).

37. *See infra* Section III.C.

38. *See* Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, *in* Extraterritorial Application of Human Rights Treaties 73–81 (Fons Coomans & Menno T. Kamminga eds., 2004) (for a critique of the European Court of Human Rights' approach). *But see* Bankovic v. Belgium, App. No. 52207/99, Eur. Ct. H. R. 2001-XII, ¶¶ 59–61.

39. This understanding will be further developed below. *See infra* Section IV.F.3.

gal order,[40] it is arguably still the necessary starting point of any positivist account of international law.[41] State territory, then, serves as the fundamental determinant in traditional international law to define the realm in which the state holds this exclusive sovereignty.[42] Territory in this sense traditionally comprises the terrestrial area delimited by the boundaries towards other land territories, the superjacent airspace,[43] and the subjacent soil/subsoil.[44] A state's territory is further delimited towards the sea.[45] Problematic issues can emerge in the context of waters forming a "fluvial" boundary between states[46] and the delimitation of the reach of state sovereignty in marine areas.[47] In the environmental context, the general concept of sovereignty is complemented by the notion of "permanent sovereignty over natural resources," an idea that will recur below.[48] Furthermore, the notions of state territory and territorial sovereignty are linked to the ideas of formal equality

40. *See* Jean L. Cohen, *Whose Sovereignty? Empire versus International Law*, 18 ETHICS & INT'L AFF. 1, 12–13, 21 (2004) (considering that sovereignty has remained the "default position" under the U.N. Charter and current international law despite different theoretical attempts to displace it).

41. As Alfred van Staden and Hans Vollaard further note, irrespective of theoretical departures from the sovereignty concept, developing states have often insisted on the idea of sovereignty. *See* Alfred van Staden & Hans Vollaard, *The Erosion of State Sovereignty: Towards a Post-Territorial World?*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 29, at 165, 171. On the ongoing relevance of sovereignty as a "shield" on the part of "weaker" states against forcible influence by more powerful states, *see also* Cohen, *supra* note 40, at 15–16.

42. *See, e.g.*, Island of Palmas (Neth. v. U.S.), Award, II R.I.A.A. 829, 838 (Apr. 4, 1928); *see also* van Staden & Vollaard, *supra* note 41, at 166.

43. Territorial sovereignty generally extends to the airspace above state territory. *Cf.* LOSC, *supra* note 1, art. 2(2) (for territorial waters); Convention on International Civil Aviation, art. 1 (Dec. 7, 1944), 19 U.S.T. 7693 [hereinafter CICA]; SHAW, *supra* note 33, at 391–92. By contrast, it excludes the "outer space," i.e. where airspace "meets space itself," the exact boundary of which is, however, not clearly defined. SHAW, *supra* note 33, at 393. Note also that the airspace and the outer space are to be distinguished from the notion of the "atmosphere," for which the determination of the proper legal status is much more difficult. *Cf. First Report on the Protection of the Atmosphere* (Shinya Murase), U.N. Doc. A/CN.6/667, ¶¶ 79–90 (Feb. 14, 2014).

44. *See, e.g.*, CICA *supra* note 43, art. 2; *see also* SHABTAI ROSENNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW §§ 7.01, 7.02, 8.02, 9.01, 9.04 (2004).

45. Territory includes internal waters; the sovereignty of coastal states further extends to the territorial sea and, if applicable, archipelagic waters, as well as the airspace above, and the bed or subsoil below. *See* LOSC, *supra* note 1, arts. 2(1), 2(2), 49(1), 49(2). By contrast, coastal states merely enjoy "sovereign rights" over the continental shelf. *See id.*, art. 77.

46. An example is Lake Constance, within which the boundary question in the "upper lake" between Austria, Germany, and Switzerland has never been officially settled. Nevertheless (or perhaps for that reason), there is an International Commission for the Protection of Lake Constance ("IGKB") in place. *See* Joachim Blatter, *Performing Symbolic Politics and International Environmental Regulation: Tracing and Theorizing a Causal Mechanism Beyond Regime Theory*, 9 GLOBAL ENVTL. POL. 81, 83 (2009); *see also* SHAW, *supra* note 33, at 384–85 (discussing boundary rivers).

47. On the concept of "functional jurisdiction" within the Exclusive Economic Zone, see *supra* note 36.

48. *See* G.A. Res. 626, ¶ 7 (Dec. 21, 1952); G.A. Res. 1803, ¶ 17 (Dec. 14, 1962); G.A. Res. 3281, Charter of Economic Rights and Duties of States, art. 2(1) (Dec. 12, 1974) (for early expositions of the notion); *see also* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997); Jérémie Gilbert, *The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?*, 31 NETH. Q. HUM. RTS. 314, 318–21 (2013); *infra* Section IV.G.

of states and the prohibition of intervention in the internal affairs of the state.[49]

From the perspective of traditional international law, the *domestic* human rights or environmental record of states was not considered to be of genuine international concern. While human rights law later started to bring internal human rights violations into international scrutiny, IEL largely focused on transboundary issues.[50] It is only more recently that human rights law has turned to effects outside state territory, and IEL to the regulation of domestic aspects of the environment.[51]

C. *"Territorial" and "Extraterritorial" Application in the Framework of Treaty Law*

In their most basic form, MEAs are legal instruments[52] in the form of international treaties. The starting point for an assessment of the extraterritorial applicability of MEAs is thus treaty law, as embodied in the VCLT and customary law.[53]

1. *VCLT Article 29 and Its (Limited) Relevance in the Present Context*

Article 29 of the Vienna Convention[54] is often considered to reveal little as regards the issue of extraterritorial application. The provision reads as follows: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." In the drafting stage of the convention, two proposals were made by the Netherlands[55] and the United States[56] to clarify the issue of territorial application. Further questions were discussed as to how treaties regarding

49. *See, e.g.*, U.N. Charter, art. 2(1); *see also* Cohen, *supra* note 40, at 13–17.

50. *See* Simons, *supra* note 3.

51. *See also* André Nollkaemper, *Sovereignty and Environmental Justice in International Law*, *in* Environmental Law and Justice in Context 253, 254–57, 261 (Jonas Ebbesson & Phoebe Okowa eds., 2009).

52. Literature on the nature of treaties as legal instruments is quite rare, with some exceptions, notably Rosenne, *supra* note 44, at 343. *See also* Shabtai Rosenne, Breach of Treaty 3–4 (1985) (noting that "the focus of the codification of the law of treaties is the instrument in which an international obligation is expressed and not the obligation itself"). Rosenne perceived the formal rules on the instrument as opposed to the "law of obligations" governed by the law of state responsibility. *Id.* at 5.

53. That the VCLT does not comprehensively codify the law of treaties is indicated by its text itself. VCLT, *supra* note 21, arts. 3, 73.

54. The provision is entitled "territorial scope of treaties." For the preceding drafts, see *infra* note 59 (1964 draft) and *infra* note 60 (final ILC draft).

55. Note the addition to then draft art. 57, according to which treaties would apply to "the entire territory of each party, and beyond it as far as the jurisdiction of the State extends under international law, unless the contrary appears from the treaty" or the consent to be bound expressed by the state. *See* Sir Humphrey Waldock (Special Rapporteur on the Law of Treaties), *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly, A/CN.4/186 and Add.1-7: Sixth Report on the Law of Treaties*, [1966] 2 Y.B. Int'l L. Comm'n, 64–65, U.N. Doc. A/CN.4/SER.A/1966/Add [hereinafter Waldock, *Sixth Report*].

56. The proposed second paragraph to then draft Article 57 stated that "[a] treaty also applies beyond the territory of each party whenever such wider application is clearly intended." *Id.* at 65.

Antarctica, for example, would fit into the draft's conception of territorial application. Special Rapporteur Sir Humphrey Waldock perceived Antarctica as the "object" of the treaty, not as a definition of its territorial scope.[57] While the Special Rapporteur's reasoning seemed to downplay some problems[58] and he later softened his position,[59] neither the U.S. "clear intention" nor the Dutch "jurisdiction" proposals eventually found their way into the text.[60] The wording finally adopted at the UN Conference on the Law of Treaties, with its slight shift in emphasis from "application" to "binding . . . in respect of territory"[61] further weakened the relevance of Article 29 in the present context. Although it remained unclear during the deliberations whether the draft article governed the question of extraterritorial application, the ILC commentary made it clear that (draft) Article 25 was not "intended to cover the whole topic of the application of treaties from the point of view of space."[62] The commentary at least clarifies that "the law regarding the extra-territorial application of treaties [cannot] be stated simply in terms of the intention of the parties or of a presumption as to their intention."[63]

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57. *See* Sir Humphrey Waldock (Special Rapporteur on the Law of Treaties), *Documents of the Sixteenth Session Including the Report of the Commission to the General Assembly*, *Document A/CN.4/167 and Add.1-3: Third Report on the Law of Treaties*, [1964] 2 Y.B. Int'l L. Comm'n 12, cmt. 1, U.N. Doc. A/CN.4/SER.A/1964/ADD.1 (commentary to then draft art. 58); *see also Summary Records of the Sixteenth Session*, [1964] 1 Y.B. Int'l L. Comm'n 46, ¶ 2, U.N. Doc. A/CN.4/SER.A/196 ("[T]he real problem was that of the territory with regard *to which the treaty was binding*, rather than the territory *in which it was to be performed*.") (emphasis added).

58. Notably, there is a certain danger of confounding the *personal* scope (i.e. the question of which parties are bound by a treaty) and the *territorial* scope of application. This is perhaps also what Grigory Tunkin had in mind when criticizing the 1964 draft. *See* [1964] 1 Y.B. Int'l L. Comm'n, *supra* note 57, at 49, ¶ 32. He suggested it be made "clear that not all the obligations deriving from a treaty had any direct connexion with the territory of a State." *Id.* at 52, ¶ 72.

59. *See* Waldock, *Sixth Report*, *supra* note 55, at 66, ¶ 3 (considering that the then draft art. 57 "hardly seem[ed] open to the construction that by implication it excludes the application of a treaty beyond the territories of the parties"); *see also Summary Records of the Second Part of the Seventeenth Session* [1966] 1 Y.B. Int'l L. Comm'n, pt. 2, *supra* note 4, at 54, ¶ 64. The mentioned 1964 version of the article read as follows: "A treaty applies to each party with respect to its entire territory unless a contrary intention appears from the treaty of the circumstances of its conclusion." [1964] 1 Y.B. Int'l L. Comm'n, *supra* note 57, at 167.

60. *Cf.* Waldock, *Sixth Report*, *supra* note 55, at 66; [1966] 1 Y.B. Int'l L. Comm'n, pt. 2, *supra* note 4, at 46–47 ¶ 89. The final ILC draft art. 25 reads: "Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party." [1966] 2 Y.B. Int'l L. Comm'n 213, U.N. Doc. A/CN.4/SER.A/1966/Add. 1; *see also* U.N. Conference on the Law of Treaties, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, 1st Session*, 162–71, 428–29, U.N. Doc. A/CONF.39/C.1/SR.30 (1968); *2d Session*, 55, U.N. Doc. A/CONF.39/SR.13 (1969) (for the consideration in the Meeting of the Whole and Plenary Meetings).

61. *Compare* the ILC's final draft, *supra* note 60, *with* VCLT, *supra* note 21, art. 29.

62. *Documents of the Second Part of its Seventeenth Session and on Its Eighteenth Session*, [1966] 2 Y.B. Int'l L. Comm'n, *supra* note 55, at 213, art. 25 cmt. 5. Instead, the Commission felt it necessary to leave that point aside, as it would raise difficult problems and the presented draft formulations were judged "unsatisfactory." *Id.*

63. *Id.* at 214, art. 25 cmt. 5.

2. *A "Territorial Imperative"? The Idea of Treaties' Primarily Territorial Application and Its Limits*

A treaty's territorial scope of application—scope *ratione loci*—delineates where its provisions apply. It is distinct from its substantive, personal and temporal scope (*ratione materiae, personae* and *temporis*). Keeping in mind the link between territory and sovereignty, territorial application could be considered "genetic and ineradicable"[64] to the idea of the treaty: States bind themselves (only) for the area in which they enjoy, under the principle of territorial sovereignty, the exclusive authority to implement the treaty provisions.[65] In this sense, treaty norms apply to all elements *ratione materiae* located within the state's territory. While in a "perfect world" of Westphalian international law, treaties would probably be confined to such a strict territorial application, in our less-than-perfect international legal order there are a number of reasons to extend the scope of application into extraterritorial spheres. Notably, forcible measures taken by states on foreign soil have caused human rights bodies to consider the applicability of human rights treaties to such actions.[66] Any strict territoriality paradigm in treaty application would further encounter severe problems when trying to explain treaties concluded by non-territorial subjects of international law like the Holy See[67] or international organizations.[68] As pragmatic instruments of international relations, treaties are thus capable of extending their territorial scope outside the territory of parties;[69] state territory and territorial scope of application are no longer, if they ever were, necessarily convergent.

Instead, the territorial scope of application of a treaty may easily "fray" at the margins of the state party's territory, or "decouple" from it entirely.[70] Beyond the limited clues that can be gleaned from the VCLT, the question

64. *Cf.* Robert Ardrey, The Territorial Imperative: A Personal Inquiry into the Animal Origins of Property and Nations 116 (1967) ("The territorial nature of man is genetic and ineradicable.").

65. *But see*, VCLT, *supra* note 21, art. 29 (on the possibility to exclude certain areas).

66. *E.g.*, de Lopez v. Uruguay, Communication No. 52/1979, ¶¶ 11.2, 12.1–3, U.N. Human Rights Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981) (on the abduction of a Uruguayan national in Buenos Aires, Argentina, by Uruguayan security forces); *see also infra* Section III.C.2.

67. Note, however, that under the Lateran Pacts, Italy–Holy See (Feb. 11, 1929), 1929 Am. J. Int'l L. Supp. 187, the Holy See enjoys "full possession and exclusive power and sovereign jurisdiction" over the territory of the Vatican City state. *See id.* art. 3(1).

68. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1986, U.N. Doc. A/CONF.129/15 [hereinafter VCLT-IO] (not yet in force). VCLT-IO art. 29 (corresponding provision to art. 29 VCLT) suggests that in the context of IOs it would be difficult to speak of "territorial" application of treaties. *Cf. Report of the Commission to the General Assembly on the Work of the Thirty-Fourth Session,* [1982] 2 Y.B. Int'l L. Comm'n, pt. 2, 40, cmt. 2, U.N. Doc. A/37/10.

69. *Summary Records of the Eighteenth Session,* [1966] 1 Y.B. Int'l L. Comm'n, pt. 2, *supra* note 4, at 53, ¶ 59 (statement by Lachs noting that territorial application is nothing more than a "point of departure").

70. *See* Cohen, *supra* note 40, at 5–11 (in the discourse on sovereignty); *see also* van Staden & Vollaard, *supra* note 41, at 173–77 (on the idea of treaties as a form of "non-territorial governance").

of extraterritorial application then turns into one of treaty interpretation.[71] Whether treaties apply extraterritorially and, if so, which obligations flow from this, is thus not predetermined by factors external to the treaty, but instead depends on the construction of the specific treaty and its relevant provisions.[72] On the basis of Article 31(3)(a) and (b) of the VCLT, a treaty may also receive a considerable extraterritorial shape through the conduct of, for example, a treaty body created by that instrument.

3. *Remaining General Signposts for the Extraterritorial Application of Treaties*

Notwithstanding the limits of Article 29 VCLT and the general openness of treaty law for an extraterritorial application, other general considerations arguably apply to all kinds of treaties.

First, an extraterritorial application is *not* dependent on the inclusion of a specific "jurisdiction" clause in the treaty.[73] Irrespective of whether such a provision exists,[74] it is a logical necessity to determine whether a treaty applies *ratione loci*, in order to assess potential violations of its provisions. This is not only true for the classical system of state responsibility wherein the finding of a "breach" of a primary norm requires knowledge of whether a provision applies, but also the more informal mode of compliance management that is regularly exercised by treaty bodies or specialized non-compliance mechanisms.

Second, in the context of interpretation of the relevant provisions, it can be asked to what extent the "nature" or "character" of the treaty informs its extraterritorial scope of application. While there have been numerous theoretical attempts to classify treaties into categories like "contractual" treaties (*traités-contrat*) and "law-making" treaties (*traités-loi*),[75] or even "objective

71. *See* VCLT, *supra* note 21, arts. 31–33 (largely considered to express rules of customary law). *See, e.g.*, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. Rep. 6, ¶ 41 (Feb. 3); Oil Platforms (Iran v. U.S.), Preliminary Objections, 1996 I.C.J. Rep. 803, ¶ 23 (Dec. 16). The ILC's commentary to the final ILC draft stated that parties' *intentions* are not the sole determinant of a treaty's extraterritorial application. *See* [1966] 2 Y.B. Int'l L. Comm'n, *supra* note 55, at 214, art. 25 cmt. 5.

72. *Cf.* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro), 2007 I.C.J. 43, ¶¶ 153–54 (Feb. 26) (wherein the court stated that the question of the territorial scope of that convention was not *res iudicata* under its 1996 Order (Bosnia and Herzegovina v. Serbia and Motenegro (Preliminary Objections) 1996 I.C.J. 616, ¶ 31) and it had not yet "rule[d] on the territorial scope of each particular obligation arising under the Convention").

73. *See, e.g.*, Marko Milanovic, Extraterritorial Application of Human Rights Treaties 17 (2011); *infra* Sections III.C.1 and V.E.3.

74. As included in most human rights treaties and some MEAs. *Infra* Sections III.C.1 and IV.E.3.

75. Such treaties have also been called "normative," "legislative," "law-making" or "integral" treaties. *See* Arnold McNair, *The Function and the Differing Legal Character of Treaties*, XI Brit. Y.B. Int'l L. 104 (1930); Maarten Bos, *Theory and Practice of Treaty Interpretation (Part 2)*, 27 Neth. Int'l L. Rev. 135, 155–69 (1980); Catherine Brölmann, *Law-Making Treaties: Form and Function in International Law*, 74 Nordic J. Int'l L. 383, 400–03 (2005); Martin Scheinin, *Impact on the Law of Treaties*, *in* The Impact of Human Rights Law on General International Law 23, 27–28 (Menno T. Kamminga

regimes,"[76] they are rarely linked to the issue of extraterritorial application. Instead, discussions have focused, especially in the human rights context, on the postulation of a specific "human rights approach" to treaty law. According to such conceptions, the general rules contained in the VCLT or customary treaty law are either modified or replaced by special rules governing specific types of treaties.[77] Although this idea is only marginally present in the VCLT,[78] it has recurred regularly in debates surrounding, for example, the rules of interpretation, as the traditional focus on illuminating the intent of states parties may be less appropriate in the context of law-making treaties.[79] It is quite evident from the inclusion of the "object and purpose" formula into Article 31(1) VCLT that there is indeed considerable room for the nature of a treaty to influence the interpretive outcome.[80] It will be seen below to what extent the specific nature of human rights treaties or MEAs can actually influence their extraterritorial reach.[81]

Finally, it should also be observed that the question of the scope of application is distinct from the question of which *obligations* arise in the extraterritorial context. Namely, the extraterritorial application of a treaty does not necessarily imply that *all* obligations under a treaty apply in this sphere.[82] Interestingly, the nature of "obligations" under international law has, so far, not attracted much attention. Outside the basic distinctions between the law of treaties and the "law of obligations" (understood as the law of state responsibility),[83] and obligations of "conduct" and "result," human rights law appears to be the only field of international law that has developed an elaborate typology of obligations.[84]

& Martin Scheinin eds., 2009). For critique, see Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 Receuil des cours 229, 335 (1994).

76. *E.g.*, Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, 6 Max Planck U.N.Y.B. 37, 66–83 (2002).

77. Interestingly, it appears that so far there have been no comprehensive scholarly attempts to follow the path of human rights and WTO lawyers and explore the idea of a *subject-specific* relationship between environmental treaties (MEAs) and treaty law in general (for example, regarding questions of interpretation, the admissibility of reservations, the application of Article 60 of VCLT, etc.). *Cf.* Scheinin, *supra* note 75, at 27, 32 (for a "modified" and against a "dogmatic" application of the VCLT rules in the human rights context); Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 Eur. J. Int'l L. 489 (2000).

78. *E.g.*, VCLT, *supra* note 21, art. 5 (treaties constituting IOs); *id.* art. 20(3) (treaties adopted within IOs); *id.* art. 60(5) (treaties of a "humanitarian character").

79. *See, e.g.*, Bos, *supra* note 75, at 162–63; *cf.* Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 Int'l & Comp. L. Q. 217, 219–30 (2007).

80. *Cf.* Rosenne, *supra* note 44, at 355.

81. *See infra* Sections III.B, IV.E.2.

82. *See infra* Sections III.D (human rights law), IV.F.3 (MEAs).

83. *See supra* note 52.

84. On the typology of duties to "respect," to "protect," and to "fulfill," see *infra* note 140.

III. The Extraterritorial Application of Human Rights Treaties

The question of whether treaties should apply in an extraterritorial setting has featured particularly prominently in the context of international human rights law. A recapitulation of the elaborate responses developed by human rights bodies might help charting the waters for an extraterritorial application of MEAs.

A. Rationale for a Human Rights Doctrine of Extraterritoriality

Underlying the development of a specific human rights approach to extraterritoriality is the tension between the ideal of universal realization of human rights and the territorial nature of the states parties to human rights treaties, which may come to the fore, for example, when states carry out activities on foreign territory, as in the context of military operations.[85] The human rights notion of extraterritoriality is thus linked to two of the classical paradigms of human rights law, namely the universality and indivisibility of human rights.[86] On the basis of the universality paradigm, it can be argued that it would be a mistake to construe human rights as having a primarily territorial application, with extraterritorial application being "exceptional" or "extraordinary."[87] The idea of human rights being indivisible highlights the question of which rights apply in the extraterritorial context. Building on the doctrine of indivisibility, the European Court of Human Rights ("ECtHR") first relied on the non-divisibility of human rights as an argument against an extensive extraterritorial application.[88] By contrast, the court later accepted that in the extraterritorial context rights could be "divided and tailored" according to the specific needs of the situation.[89] A further underpinning rationale can be seen in the notion of non-discrimination,[90] which is included into specialized anti-discrimination treaties[91] and almost every major human rights document[92] or treaty.[93] The prohibition of discrimination based on "nationality" provides a further

85. *See, e.g.*, de Lopez v. Uruguay, *supra* note 66.

86. *See, e.g.*, World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc. A/CONF. 157/23 (June 25, 1993) [hereinafter Vienna Declaration]; G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 121, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); *see also* Christian Tomuschat, Human Rights: Between Idealism and Realism 55–56 (3d ed. 2014); Milanovic, *supra* note 73, ch. 3.

87. *See* Sigrun Skogly, *Global Responsibility for Human Rights*, 29 Oxford J. Legal Stud. 827, 834 (2009); Gibney, *supra* note 25, at 40. *But see* Bankovic, *supra* note 38, ¶ 61.

88. *Cf.* Bankovic, *supra* note 38, ¶ 75.

89. Al-Skeini and Others v. United Kingdom, App. No. 55721/07, Eur. Ct. H. R. 2011-IV, ¶ 137 (2011).

90. *See, e.g.*, Skogly, *supra* note 87, at 834.

91. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

indication that legal differentiations between human rights impacts occurring in the territorial and the extraterritorial sphere are in need of justification.[94]

B. Determinants of a Human Rights Notion of Extraterritoriality

Human rights lawyers have often been particularly confident to assert the "specialty" of international human rights law as a particular branch of international law and set it apart from the broader framework of "general international law."[95] For example, it is apparent that the idea of human rights treaties as "normative" treaties is linked to the conception of treaty obligations as "objective obligations."[96] This builds on the understanding that said treaties are more than a mere (contract-like) "network" of bilateral, reciprocal[97] undertakings between states parties.[98] Rather, they endow individuals with rights that states commit to respect. Further elements regularly referred to as reasons for a "special status" of human rights treaties are the generally high number of states parties; the creation of autonomous monitoring mechanisms; and, most aspirational, the idea of human rights being part of an international "constitutional" order.[99] The link to the notion of extraterritoriality becomes evident if one considers the ECtHR's assumption

92. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 7 (Dec. 10, 1948); Vienna Declaration, *supra* note 86, ¶¶ 15, 18–22.

93. *See*, *e.g.*, International Covenant on Civil and Political Rights, arts. 2(1), 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

94. The Inter-American Commission of Human Rights reasoned that "in certain cases, the exercise of . . . jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules," referring to the rights under the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 144 [hereinafter ACHR], being proclaimed "on the basis of *equality* and *nondiscrimination*" and as "inherent to the human being." Alejandre v. Cuba, Case 11.589, Inter-Am. Comm'n H. R., Report No. 86/99, OEA/Ser.L./V/II.106 doc. 6 rev. ¶ 23 (1999) (emphases added).

95. *See* Frédéric Vanneste, General International Law Before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law (2010). By asserting such speciality, human rights law may contribute to further entrenching the "fragmentation" of the international legal order. *See* Craven, *supra* note 77, at 497–99.

96. *See* The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Art. 74–75), Advisory Opinion OC-2/82, Inter-Am. Ct. H. R. (Ser. A) No. 2, ¶ 29 (Sept. 24, 1982); Ivcher-Bronstein v. Peru (Competence), Inter-Am. Ct. H. R. (Ser. C) No. 54, ¶¶ 42–45 (Sept. 24, 1999). For the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5 [hereinafter ECHR], see, e.g., Austria v. Italy (No. 788/60), 4 Y.B. Eur. Conv. H. R. 116, 138, 140 (1961); Ireland v. United Kingdom (No. 5310/71), Eur. Ct. H. R. (Ser. A) No. 25, ¶ 239 (1978); *see also* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, ¶ 23 (May 28); Human Rights Comm., General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶ 17 (Nov. 4, 1994).

97. *See* Craven, *supra* note 77, at 498–99 (identifying the notion of "non-reciprocity" as the "key" to the "puzzle of human rights treaties").

98. *See supra* note 96. *But see* Simma, *supra* note 75, at 373, 401; Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 Eur. J. Int'l L. 483, 527 (2006).

99. *Cf.* Scheinin, *supra* note 75, at 28–31.

that it is the specific object and purpose of the European Convention of Human Rights ("ECHR") that justifies its extraterritorial application.[100]

C. *Triggers for the Extraterritorial Application of Human Rights Treaties*

1. *The Presence (and Absence) of "Jurisdiction Clauses" in Human Rights Treaties*

When considering the extraterritorial application of treaties like the ECHR, the International Covenant on Civil and Political Rights ("ICCPR")[101] or the American Convention on Human Rights ("ACHR"),[102] human rights bodies can rely on express provisions.[103] For example, ECHR Article 1 requires that "[t]he High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention."[104] As will be further specified below, this human rights notion of "jurisdiction" departs from the traditional jurisdiction rules and refers to a certain factual relationship or nexus[105] between the state and the individual affected.[106] Jurisdiction in this sense is further distinct from the question of whether the activities at issue are attributable to the state.[107]

By contrast, a large number of other human rights treaties lack a specific jurisdiction clause.[108] Like Article 2(1) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), such treaties often refer, if at all, only to the importance of "international assistance."[109] Although such language could be read as mere reference to the very specific idea of financial/technical assistance by developed states (i.e. one specific form of extra-

100. *See* sources cited *supra* note 96. *See also* Loizidou v. Turkey (Preliminary objections), App. No. 15318/89, Eur. Ct. H. R. (Ser. A) No. 310, ¶ 62 (1995) ("[b]earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory"); Cyprus v. Turkey (Decision), App. Nos. 6780/74, 6950/75, Eur. Ct. H. R. (D. R.) No. 2, 125, 136 (1975).

101. ICCPR, *supra* note 93.

102. ACHR, *supra* note 94.

103. *See* ACHR, *supra* note 94, art. 1(1); ECHR, *supra* note 96, art. 1; ICCPR, *supra* note 93, art. 2(1).

104. ECHR, *supra* note 96, art. 1 (emphasis added).

105. Or, in the language of the ECtHR, a "threshold." *See, e.g.*, Al-Skeini, *supra* note 89, ¶ 130.

106. John H. Knox, *Diagonal Environmental Rights*, *in* Universal Human Rights and Extraterritorial Obligations 82, 88 (Mark Gibney & Sigrun Skogly eds., 2010).

107. Although the ECtHR has recently emphasised this distinction explicitly (for example, Catan and Others v. Moldova and Russia, App. Nos. 43370/04, 8252/05 and 18454/06, Eur. Ct. H. R. 2012-V, Judgment, ¶ 115 (Oct. 19, 2012); Jaloud v. the Netherlands, App. No. 47708/08, Eur. Ct. H. R. 2014-VI, Judgment, ¶ 154 (Nov. 20, 2014)), this was not always entirely clear in the court's jurisprudence, and has accordingly been criticised. *Cf.* Milanovic, *supra* note 73, at 41–52.

108. For example, the ICESCR, CERD, CEDAW, and CRPD (economic, social and cultural rights); the CRC (both civil and political, and economic, social and cultural rights).

109. Article 2(1) of the ICESCR stipulates, in full: "Each State Party to the present Covenant undertakes to take steps, *individually and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." ICESCR, *supra* note 93, art. 2(1) (emphasis added). Similar language can be found in *id.*, arts. 11(1), 23; CRPD, *supra* note 91, art. 32(1)(d).

territorial obligations), it is often interpreted as incorporating the concept of extraterritorial application.[110] The absence of an explicit territorial limitation may thus imply that said treaties can apply extraterritorially.[111]

In case a treaty is considered to have potential extraterritorial effect, the question then arises whether there is nonetheless a certain threshold requirement to be met.[112] The International Court of Justice ("ICJ") answered this affirmatively in the occupation context when it read a "jurisdiction" requirement into the ICESCR.[113] Similar positions can be found in some strands of the practice of the Committee on Economic, Social and Cultural Rights ("CESCR"),[114] and the language of some Optional Protocols to human rights treaties.[115] However, both the ICJ and the CESCR have later departed from attempts to "align" all human rights treaties to a common jurisdiction concept.[116] The 2011 Maastricht Principles on Extraterritorial Obligations similarly retain the "jurisdiction" notion but broaden its con-

110. *See, e.g.*, Malcolm Langford, *A Sort of Homecoming: The Right to Housing*, *in* UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS, 166, 171, *supra* note 106; Malcolm Langford, Fons Coomans & Felipe Gómez Isa, *Extraterritorial Duties in International Law*, *in* GLOBAL JUSTICE, STATE DUTIES, *supra* note 25, at 51, 60. It is worth noting that *only* ICESCR Article 14 contains an explicit territorial limitation. *See* Wouter Vandenhole, *Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy*, 76 NORDIC J. INT'L L. 73, 88 (2007).

111. *Cf.* Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, 2008 I.C.J. 353, 386, ¶ 109 (Oct. 15); Application of the Genocide Convention, *supra* note 72, ¶ 183.

112. *See*, *e.g.*, Langford, Coomans & Gómez Isa, *supra* note 110, at 57–62.

113. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 36, ¶ 112 (July 9) ("The [ICESCR] contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees *rights which are essentially territorial*. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State *exercises territorial jurisdiction*.") (emphasis added). *But see* Comm. on Econ., Soc. & Cultural Rights, General Comment No. 24, U.N. Doc. E/C.12/GC/24, ¶ 27 (2017) [hereinafter CESCR General Comment 24] (observing that Covenant rights are "expressed without any restriction linked to territory or jurisdiction").

114. *Cf.* Comm. on Econ., Soc. & Cultural Rights, General Comment No. 12, U.N. Doc. E/C.12/1999/5, ¶ 14 (1999) [hereinafter CESCR General Comment 12] (right to adequate food); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14, U.N. Doc. E/C.12/2000/4, ¶¶ 12(b), 51 (2000) [hereinafter CESCR General Comment 14] (right to highest attainable standard of health); Comm. on Econ., Soc. and Cultural Rights, General Comment No. 15, U.N. Doc. E/C.12/2002/11, ¶¶ 12(c), 44(b), 53 (2003) [hereinafter CESCR General Comment 15] (right to water). Note also that the CESCR sometimes explicitly states that some obligations have "no express jurisdictional limitation." *See, e.g.*, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 19, U.N. Doc. E/C.12/GC/19, ¶ 36 (2008) [hereinafter CESCR General Comment 19] (regarding the non-discrimination obligation under ICESCR art. 2(2) in the context of the right to social security); General Comment 24, *supra* note 113, ¶ 27.

115. The language of the Operational Protocols regularly restricts the justiciability of violations in individual communications procedures to persons subject to state "jurisdiction." *See, e.g.*, G.A. Res. 63/117, annex, Optional Protocol to the ICESCR, art. 2 (Dec. 10, 2008) [hereinafter OP ICESCR]. For critique, see Christian Courtis & Magdalena Sepúlveda, *Are Extraterritorial Obligations Reviewable under the Optional Protocol to the ICESCR?*, 27 NORDIC J. HUM. RTS. 1 (2009).

116. *Cf.* Application of CERD and Application of the Genocide Convention, *supra* note 111 (both leaving aside any specific reference to the jurisdiction concept). For the practice of the CESCR, see *infra* note 132.

tent.[117] The recently adopted General Comment No. 24 appears to adopt a similar stance.[118] Such constructions have in common that they effectively limit the extraterritorial applicability to instances where states parties exercise "jurisdiction" and thus shift the question to the definition of what amounts to jurisdiction in this sense.[119]

2. *Approaches to "Jurisdiction" in the Context of Civil and Political Rights*

The basic position of the ECtHR in its extraterritorial jurisprudence is the assumption of a link between the traditional jurisdiction rules and "jurisdiction" as included in Article 1 of ECHR. Jurisdiction thus relates to territorial application as its basic principle, and certain (exceptional) categories of extraterritorial application.[120] The ECtHR focused, in its early case law, on cases in which the state "exercises effective control of an area outside its national territory."[121] In contrast, the Human Rights Committee's conception of jurisdiction built on the relationship between the state and the individuals affected.[122] The Inter-American Commission on Human Rights similarly rejected that jurisdiction would be "merely coextensive with national territory," and noted that it might extend to "acts and omissions of [the state's] agents which produce effects or are undertaken outside that state's own territory."[123] The ECtHR now regularly focuses on two strands of extraterritorial application, i.e., state agent "authority and control" over individuals, and the "effective control" over extraterritorial areas.[124] Commentators have deplored the ECtHR's reliance on a "territorial principle"

117. The (formally non-binding) Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights [hereinafter Maastricht Principles] were adopted by a (non-governmental) expert consortium. *See*, ETO Consortium, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), *reprinted in* Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084 (2012). *See infra* note 134 (discussing Principle 9(b)).

118. *Cf.* CESCR General Comment 24, *supra* note 113, ¶¶ 26–28.

119. What is to be understood under "jurisdiction" in this sense will be addressed *infra* Sections III.C.2–3; for the related questions in the MEA context, see *infra* Section IV.F.2..

120. This understanding was apparently also endorsed by the ICJ in Construction of a Wall, *supra* note 113, ¶ 109 ("The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.").

121. Loizidou, *supra* note 100, ¶ 62.

122. De Lopez v. Uruguay, *supra* note 66, ¶ 12.2; *see also* Human Rights Comm., General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 10 (May 26, 2004).

123. The Commission further endorsed the concepts of "authority and effective control." Saldaño v. Argentina, Petition, Inter-Am. Comm'n H.R., Report No. 38/99, OEA/Ser.L/V/II.95, Doc. 7 rev., ¶¶ 17, 19 (1999); *see also* Coard et al. v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106 Doc. 3 rev. ¶ 37 (1999).

124. Al-Skeini, *supra* note 89, ¶¶ 130–42. Note also that the court explicitly upheld the general "territorial principle" and maintained the reference to the notion of a convention-specific "legal space" (*espace juridique*). It did not clarify whether it maintained its formerly restrictive approach to single incidents of interference with foreign sovereignty. *Cf.* Bankovic, *supra* note 38, ¶¶ 74–82 (wherein the court considered that single incidents of bombings in Kosovo by NATO air planes did not meet the threshold of ECHR art. 1); *see also* Alejandre, *supra* note 94, ¶ 25 (for the contrasting approach taken by the Inter-American Commission on Human Rights).

and argued that human rights guarantees should apply, in principle, whenever individuals are affected by state activities; differentiations should only be made on the basis of whether negative or positive obligations are concerned.[125]

3. *"Jurisdiction" in the Context of Economic, Social and Cultural Rights*

The basic idea that states carry extraterritorial obligations at least when they have sufficient control over territories or individuals is now also applied in the context of economic, social and cultural ("ESC") rights, as both the ICJ[126] and the CESCR[127] have found in the context of the Palestinian Territories.[128] This general idea is also confirmed by the Maastricht Principles.[129] Traces of a more specific ESC rights approach to extraterritoriality have emerged from some of the CESCR General Comments.[130]

First, the mere *creation of effects* on the extraterritorial enjoyment of rights may be sufficient for triggering extraterritorial obligations.[131] Instead of requiring individuals (or territory) to be subject to state jurisdiction, the

125. *Cf.* MILANOVIC, *supra* note 73, at 209–22; Vandenhole, *supra* note 110, at 88.

126. Construction of a Wall, *supra* note 113, ¶ 112 (finding that said territories "have for over 37 years been subject to [Israel's] territorial jurisdiction as the occupying Power" and Israel is thus "bound by the provisions of the [ICESCR]" in the exercise of its powers under the occupation regime). Note also that questions concerning the relationship between humanitarian and human rights law are left aside in the present context.

127. Comm. on Econ., Soc. & Cultural Rights, Concluding Observations: Israel, ¶¶ 15, 31, U.N. Doc. E/C.12/1/Add.90 (June 26, 2003) (noting that the Covenant applies "to all territories and populations under [the state's] effective control"); *see also* Comm. on Econ., Soc. & Cultural Rights, Concluding Observations: Israel, ¶ 8, U.N. Doc. E/C.12/ISR/CO/3 (Dec. 16, 2011). For the related practice under the ICCPR, see Human Rights Comm., Concluding Observations: Israel, ¶ 5, U.N. Doc. CCPR/C/ISR/CO/4 (Nov. 21, 2014); for the U.N. Special Rapporteurs, see Human Rights Council, *Human Rights Situation in Palestine and Other Occupied Arab Territories*, ¶ 20, U.N. Doc. A/HRC/10/22 (May 29, 2009) (combined report of several Special Rapporteurs).

128. The findings of these bodies are of course still disputed by a number of states and authors, both on the grounds of the applied legal standard and the facts. *See, e.g.*, Michael J. Dennis & Andre M. Surena, *Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap between Legal Theory and State Practice*, 6 EUR. HUM. RTS. L. REV. 714 (2008) (with a view to the ICCPR).

129. Maastricht Principles, *supra* note 117, princ. 9(a) ("situations over which [the state] exercises *authority or effective control*, whether or not such control is exercised in accordance with international law") (emphasis added).

130. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 3, U.N. Doc. E/1991/23, ¶¶ 13, 14 (1990) (nature of states parties' obligations); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 4, U.N. Doc. E/1992/23, ¶ 19 (1991) (right to adequate housing); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 8, U.N. Doc. E/C.12/1997/8, ¶¶ 11–14 (1997) (relationship between economic sanctions and the realization of economic, social and cultural rights); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 11, U.N. Doc. E/C.12/1999/4, ¶ 9 (1999) (plans of action for primary education); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13, U.N. Doc. E/C.12/1999/10, ¶ 56 (1999) (right to education); CESCR General Comment 12, *supra* note 114, ¶¶ 36–41; CESCR General Comment 14, *supra* note 114, ¶¶ 38–42, 45; CESCR General Comment 15, *supra* note 114, ¶¶ 30–36, 38; CESCR General Comment 19, *supra* note 114, ¶¶ 54–58.

131. This categroy is not concerned with cases where state acts executed within its territory interfere with the rights of individuals that were still present in the territory or within the jurisdiction of the state when the act was carried out (for example, in extradition cases). *See, e.g.*, Soering v. the United Kingdom, App. No. 14038/88, Eur. Ct. H. R. (Ser. A) No. 171, ¶¶ 81–91 (July 7, 1989).

CESCR has referred to "activities undertaken within the State party's jurisdiction" which impact upon victims abroad,[132] thus shifting emphasis from jurisdiction over persons or territory to jurisdiction *over harmful activities*. This includes state activities performed within a state's territory ("intraterritorial acts") that impact individuals neither present in the state's territory nor subject to state jurisdiction in the sense of "authority and control." The CESCR denounced, for example, the exportation of heavily subsidized agricultural products into developing countries in the context of the right to food.[133] The Maastricht Principles arguably adopt an even more extensive approach, as they refer to any situation "over which State acts or omissions bring about foreseeable effects on the enjoyment of [ESC rights], whether within or outside [their] territory."[134] Second, the ability to *exercise influence* on international decision-making processes may equally suffice as a trigger. This was affirmed, in recommendatory language,[135] by the CESCR in the context of other international agreements[136] and international organizations,[137] and is now also included in the Maastricht Principles.[138] Third, according to the recent General Comment No. 24, an extraterritorial application is also triggered when a state party has the ability to

> influence situations located outside its territory, consistent with the limits imposed by international law, by *controlling the activities of corporations* domiciled in its territory and/or under its jurisdic-

132. CESCR General Comment 15, *supra* note 114, ¶ 31; CESCR General Comment 19, *supra* note 114, ¶ 53.

133. *See, e.g.*, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations: Germany, ¶ 9, U.N. Doc. E/C.12/DEU/CO/5 (July 12, 2011).

134. Maastricht Principles, *supra* note 117, princ. 9(b).

135. The use of "should" in these and other parts of the general comment indicates that governments that do not accept the comment in its entirety are not necessarily in breach of their obligations under the ICESCR. *See* Amanda Cahill, *Protecting Rights in the Face of Scarcity: The Right to Water*, *in* UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 194, 204–05 (Mark Gibney & Sigrun Skogly eds., 2011).

136. CESCR General Comment 15, *supra* note 114, ¶ 35 (noting that states "should ensure that the right to water is given due attention in international agreements" and "should take steps to ensure" that such other agreements "do not adversely impact upon the right to water"); CESCR General Comment 19, *supra* note 114, ¶¶ 56–57; *see also* Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law,* 70 MOD. L. REV. 598, 621–23 (2007).

137. CESCR General Comment 15, *supra* note 114, ¶ 36 (considering that states "should [further] ensure that their actions as members of international organizations take due account of the right to water" and referring, in particular, to IFIs like the International Monetary Fund, the World Bank and regional development banks); *cf. also* CESCR General Comment 19, *supra* note 114, ¶ 58. Compare the stronger wording in CESCR General Comment 14, *supra* note 114, ¶ 39 ("have an obligation to ensure that their actions as members of international organizations take due account of the right to health").

138. Maastricht Principles, *supra* note 117, princ. 9(c) ("[S]ituations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to *exercise decisive influence* or to take measures to realize [ESC] rights extraterritorially, in accordance with international law.") (emphasis added).

tion, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.[139]

D. Obligations Arising in the Extraterritorial Context

Once it is affirmed that extraterritorial obligations of a state party have been triggered, the question arises as to *which obligations* the state is expected to discharge. Extraterritorial obligations may, at least in principle, arise for all negative and positive dimensions of human rights obligations.[140]

1. *Duty to Respect*

As regards the obligation to "respect," states are required to "refrain from actions that interfere, directly or indirectly, with the enjoyment of [ESC rights] in other countries"[141] and from "obstruct[ing]" other states from complying with their human rights obligations.[142] This was apparently also assumed by the ICJ in *Construction of a Wall*,[143] wherein the court observed that Israel "is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities."[144] Similar arguments apply in the context of embargoes or other economic sanctions,[145] and the voting behavior of states within international organizations.[146]

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139. CESCR General Comment 24, *supra* note 113, ¶ 28 (emphasis added).

140. On the concept of a tripartite framework of obligations (to "respect," to "protect," and to "fulfill") that applies, in principle, to *all* human rights, *see* the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶ 6, U.N. Doc. E/C.12/2000/13 (Oct. 2, 2000); *see also* CESCR General Comment 12, *supra* note 114, ¶ 15. For a critical account see, for example, Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?* 5 HUM. RTS. L. REV. 81 (2005).

141. CESCR General Comment 15, *supra* note 114, ¶ 31 (in the context of the right to water); *see also* CESCR General Comment 14, *supra* note 114, ¶ 39; CESCR General Comment 12, *supra* note 114, ¶ 36.

142. CESCR General Comment 24, *supra* note 113, ¶ 29.

143. Construction of a Wall, *supra* note 113, ¶¶ 133–34. Although the court does not provide a very detailed reasoning, it seems to base its findings of certain violations of a number of ESC rights on the impacts of the Israeli "wall" and the associated legal regime (for example, impacts on the use of agricultural land, access to health and education services, primary sources of water and infrastructure like electricity networks, and the alteration of the "demographic composition of the Occupied Palestinian Territory").

144. *Id.* ¶ 112; *cf.* CESCR General Comment 15, *supra* note 114, ¶ 31 (referring to "activities undertaken within the State party's jurisdiction [which] should not deprive another country of the ability to realize the right to water for persons in its jurisdiction").

145. *See* CESCR General Comment 15, *supra* note 114, ¶ 32 (observing that states "should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water"); *see also* CESCR General Comment 8, *supra* note 130, ¶¶ 11–14; CESCR General Comment 12, *supra* note 114, ¶ 37; CESCR General Comment 14, *supra* note 114, ¶ 41.

146. *See, e.g.*, Vandenhole, *supra* note 110, at 94–98. This "duty to respect" argument complements similar arguments pertaining to a "duty to protect" individuals against the acts taken by autonomous bodies of international organizations. *Id.* at 96. On the latter, see also the references *infra* note 162.

2. *Duty to Protect*

Obligations to protect relate to the extent to which states parties are expected to prevent, regulate, or control harmful activities by non-state actors impacting upon rights-holders. The problem is not whether non-state actors (like multinational corporations) are *themselves* bound by human rights,[147] but whether there are obligations on the part of the "home state" (i.e. the state of nationality or incorporation)[148] regarding the monitoring, regulation and control of such activities abroad, and the prevention of violations.[149] In the right to water context, the CESCR stated that "[s]teps should be taken by States parties to *prevent their own citizens and companies* from violating the right to water of individuals and communities in other countries."[150] This recommendatory language is mirrored in the famous "Ruggie Report" which assumed that there would be *no* general duty of the home state to regulate the extraterritorial conduct of enterprises "domiciled in [its] territory and/or jurisdiction."[151] However, the General Comment on the right to health contains stronger, mandatory language[152] and is supported by a considerable body of opinion that states are under a duty to regulate and control, as much as possible, companies domiciled in their jurisdiction, as well as their subsidiaries, that carry out potentially harmful activities in foreign territory.[153] This position was again confirmed, and further developed, in the recent General Comment No. 24.[154] Arguably, the obligation even arises

147. There is now a considerable body of literature on this issue. *E.g.*, ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); Sarah Joseph, *Liability of Multinational Corporations*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 613 (Malcolm Langford ed., 2008).

148. Such obligations on the part of the *territorial* state to protect rights holders vis-à-vis private actors are, from the human rights perspective, largely undisputed. *See*, *e.g.*, John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, princ. 1, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011). However, questions may arise as to whether the territorial state is actually willing and capable to enforce human rights against powerful private actors. The territorial state's capability may even be constrained by other areas of international law like international investment law. *See supra* note 18.

149. This question can easily be conflated with other problems of state responsibility (for example, whether private acts are attributable to the state, or whether states incur responsibility through their "complicity" with private actors). However, the present paper is solely concerned with the obligations of states as regards the activities of non-state actors abroad. *See supra* Part I. For further discussion, see McCorquodale & Simons, *supra* note 136, at 606–15.

150. CESCR General Comment 15, *supra* note 114, ¶ 33 (emphasis added); *see also* CESCR General Comment 19, *supra* note 114, ¶ 54.

151. Ruggie Report, *supra* note 148, princ. 2 and commentary thereto; *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (James Anaya), ¶ 47, U.N. Doc. A/HRC/24/41 (July 1, 2013); *see also* Simons, *supra* note 3, at 479–80 (with further references).

152. CESCR General Comment 14, *supra* note 114, ¶ 39 (states "have . . . to prevent third parties from violating the right in other countries"); *cf.* CESCR General Comment 15, *supra* note 114, ¶ 33.

153. *See* Cahill, *supra* note 135, at 198; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 157–69 (3d ed. 2010) (providing a cautious discussion of home state obligations); *cf.* Concluding Observations: Germany, *supra* note 133, ¶¶ 10–11 (on national investment policies and development cooperation policies).

154. *See* CESCR General Comment 24, *supra* note 113, ¶¶ 30–35.

when the states did not foresee the specific harmful impact, "provided such a violation was reasonably foreseeable."[155]

As both the ICJ and the CESCR have observed, the duty to protect is limited to a duty of conduct, i.e. an obligation to exercise *due diligence*.[156] As the court further specified in the context of the duty to prevent genocide, states are expected "to employ all means reasonably available to them, so as to prevent genocide as far as possible."[157] What can be expected of a state will depend on various factors, notably its "capacity to influence effectively the action" of the actors on the ground[158] and the legal constraints imposed by international law.[159] By contrast, the ICJ accorded no relevance to claims that the state would be unable to avoid the harmful outcome; rather, it emphasized that "the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result . . . which the efforts of only one State were insufficient to produce."[160] The obligation to exercise due diligence also requires states to screen and monitor private activities and carry out impact assessments, among other things.[161]

As regards the activities of international financial institutions, the CESCR remarked that states would be required "to do all they can" in order to ensure that policies and decisions are in line with the state's obligations under the ICESCR.[162] Although it is not entirely clear what is meant by the

155. *Id.* ¶ 32.

156. For the "duty to prevent" under the Genocide Convention, see Application of the Genocide Convention, *supra* note 72, ¶ 430. In the ESC rights context, the duty is limited in a similar fashion. *See* CESCR General Comment 14, *supra* note 114, ¶ 39; CESCR General Comment 15, *supra* note 114, ¶ 33; CESCR General Comment 24, *supra* note 113, ¶ 32 (failure of the state party "to take reasonable measures that could have prevented the occurrence of the event").

157. In other words, responsibility will only be incurred if the state "manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide." Application of the Genocide Convention, *supra* note 72, ¶ 430.

158. In that case, "persons likely to commit, or already committing, genocide." *Id.* ¶ 430. This capacity in turn depends, *inter alia*, on "the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events." *Id.*

159. *Id.* ¶ 430. This refers, *inter alia*, to the traditional jurisdiction rules (*supra* Section II.A). However, the principle of "(active) personality" should allow, in most cases, for the regulation of activities of enterprises incorporated in the respective state. Difficulties are likely to arise in cases concerning the activities of foreign subsidiaries of "corporate nationals," in which case states' obligations are arguably limited. *See* CESCR General Comment 24, *supra* note 113, ¶ 33 (providing that "in discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries . . . or business partners . . ., respect Covenant rights."); *cf.* McCorquodale & Simons, *supra* note 136, at 615–23 (arguing that states' obligations are limited to instances where they have "sufficient" or "constructive knowledge" of the potential human rights violations).

160. Application of the Genocide Convention, *supra* note 72, ¶ 430.

161. *See* McCorquodale & Simons, *supra* note 136, at 623–24.

162. *See* Langford, Coomans & Gómez Isa, *supra* note 110, at 103–04 (noting that this practice was largely abandoned after 2002); *cf., e.g.*, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations: Italy, ¶ 20, U.N. Doc. E/C.12/1/Add.43 (May 23, 2000); Comm. on Econ., Soc. & Cultural Rights, Concluding Observations: Germany, ¶ 31, U.N. Doc. E/C.12/1/Add.68 (Sept. 24, 2001); Comm. on Econ., Soc. & Cultural Rights, Concluding Observations: United Kingdom, ¶ 26, U.N. Doc.

state's duty "to do all it can," this is arguably more than a mere negative duty.[163]

3. *Duty to Fulfill*

The obligation to fulfill,[164] due to its conception as an obligation of "progressive realization" that is constrained by the maximum of the state's available resources,[165] is arguably the most controversial element[166] in the extraterritorial sphere. For example, the General Comment on the right to water is cautious in this regard and provides that states "should *facilitate* realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required."[167] The CESCR further states, in an almost Solomonic manner, that "economically developed States parties have a special responsibility and interest to assist the poorer developing States."[168] As a baseline, it assumed particular duties for assistance regarding the implementation of "minimum core obligations."[169] The CESCR also developed more concrete guidelines regarding spending on official development assistance, which should progressively be increased so as to reach the (politically agreed) amount of 0.7 per cent of GNP.[170] It has been suggested that an extraterritorial duty to fulfill can be understood in terms of a shared responsibility between the territorial state and international community, with the former having the primary responsibility, and other states being obliged to

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E/C.12/1/Add.79 (June 5, 2002). Still, the formula also resembles the language used by the ICJ in the Application of CERD order, *supra* note 111, ¶ 144 and *dispositif*, A.3, A.4.

163. Magdalena Sepúlveda, *Obligations of 'International Assistance and Cooperation' in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 24 NETH. Q. HUM. RTS. 271, 283–84 (2006).

164. Sometimes broken down into further sub-elements like duties to "facilitate," "provide" and "promote." *Cf.* Koch, *supra* note 140, at 86, 91; Sepúlveda, *supra* note 163, at 285–89; CESCR General Comment 15, *supra* note 114, ¶ 25.

165. ICESCR, *supra* note 93, art. 2(1).

166. *Cf.* Vandenhole, *supra* note 110, at 89–90. This is not least due to the problem that such a duty might come into conflict with the principle of territorial sovereignty. *Cf.* Cahill, *supra* note 135, at 198.

167. CESCR General Comment 15, *supra* note 114, ¶ 34 (emphasis added). This language partly draws on CESCR General Comment 12, *supra* note 114, ¶ 36; *cf. also* CESCR General Comment 14, *supra* note 114, ¶ 39.

168. CESCR General Comment 15, *supra* note 114, ¶ 34; *see also* CESCR General Comment 14, *supra* note 114, ¶ 40.

169. CESCR General Comment 15, *supra* note 114, ¶ 38; *see also* Comm. on Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the ICESCR, U.N. Doc. E/C.12/2001/10 (May 10, 2001). On the concept of minimum core obligations, see also Katherine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

170. *See* Comm. on Econ., Soc. & Cultural Rights, Concluding Observations: Italy, ¶ 13, U.N. Doc. E/C.12/ITA/CO/5 (Oct. 28, 2015); Comm. on Econ., Soc. & Cultural Rights, Concluding Observations: Belgium, ¶ 9, U.N. Doc. E/C.12/BEL/CO/4 (Dec. 23, 2013). Langford, Coomans & Gómez Isa, *supra* note 110, at 109–11 rightly note, however, that the mere amount of official development assistance tells little about the actual realization of ESC rights.

support the fulfillment of the right.[171] More specifically, states would be required to "facilitate" the fulfillment of ESC rights, i.e. to cooperate in order to provide "an enabling environment that allows the realization of the right to food in all countries,"[172] and to "provide assistance, according to available resources, when individuals are suffering in another country, such as a situation of widespread famine."[173] With a view to the conclusion of other treaties, like trade or investment agreements, it has been argued that states should refrain from concluding, and pressing other states to conclude, "agreements that will render impossible the adoption of policies that move towards the full realization of human rights."[174]

IV. The Extraterritorial Application of MEAs

Having outlined the quite elaborate human rights approach to the question of the territorial scope of application and the extent of extraterritorial obligations, the central interest of this paper lies in the analogous question in the context of environmental agreements. In order to approach the issue, the framework of customary IEL rules will be outlined (A), before possible rationales for an extraterritorial application of MEAs are discussed (B). There are already some traces of extraterritoriality in MEA treaty practice (C) and some agreements even address the issue expressly (D). In addition, some potential elements of a general framework for an extraterritorial application of MEAs should be considered (E). Finally, a cautious overview of the different modalities of an extraterritorial application of MEAs will be provided (F), and the limits to such an application be discussed (G).

A. The Customary Rules on Transboundary Harm and Their Shortcomings

The core of the traditional rules of IEL is arguably the customary duty to prevent transboundary harm, or the "no-harm rule."[175] The no-harm rule, whose customary status has been regularly affirmed, is now typically expressed as the "responsibility to ensure that activities within [states'] juris-

171. *See Report of the Special Rapporteur on the Right to Food* (Jean Ziegler), ¶¶ 47, 48, 56–59, U.N. Doc. E/CN.4/2005/47 (Jan. 24, 2005); *cf.* Comm. on the Rights of the Child, Day of General Discussion on "Resources for the Rights of the Child – Responsibility of States", ¶ 51 (Forty-Sixth Sess.) (Oct. 5, 2007).

172. Ziegler, *supra* note 171, ¶ 57 (referring, *inter alia*, to facilitation through development cooperation).

173. *Id.* ¶ 58.

174. *Report of the Special Rapporteur on the Right to Food* (Olivier de Schutter), ¶¶ 2.4, 2.6, U.N. Doc. A/HRC/19/59/Add. 5 (Dec. 19, 2011).

175. *See generally* Patricia Birnie, Alan Boyle & Catherine Redgwell, International Law & the Environment 137 (3d ed. 2009); Günther Handl, *Transboundary Impacts*, *in* The Oxford Handbook of International Environmental Law 531 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007). Terminology in this context is not always clear; one may also speak of a "principle of prevention" or, in a more traditional fashion, the "no-harm rule." The latter term will be used as shorthand in the present context.

diction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[176] It is noteworthy that the duty to prevent transboundary harm has gradually extended its scope. The 1941 arbitral award in *Trail Smelter*[177] still focused on rather narrowly defined instances of crossborder air pollution between Canada and the United States. The tribunal found that under, *inter alia*, "the principles of international law,"[178] no state had

> the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[179]

More recent formulations of the no-harm rule suggest that many of the limitations built into the *Trail Smelter* formulation are no longer valid under the current rule of customary law. Furthermore, building on the ICJ's 1949 judgment in *Corfu Channel*,[180] in which the court emphasized "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States," it is now widely accepted that the no-harm rule also extends to harm flowing from non-state activities within the territory, jurisdiction or control of the state.[181]

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176. See, for example, the second element of Rio Principle 2 and Stockholm Principle 21. United Nations Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development, Annex I: Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992); United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1. (June 5–16, 1972). For similar restatements, see also G.A. Res. 37/7, annex, World Charter for Nature, princ. III.2(d) (Oct. 28, 1982); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 193 (Apr. 20); *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, *Report of the International Law Commission on the Work of its Fifty-Third Session*, [2001] 2 Y.B. Int'l L. Comm'n, pt. 2, 146, art. 3, U.N. Doc. A/56/10.

177. Trail Smelter Arbitration (U.S. v. Can.), Award, III R.I.A.A. 1905, 1938 (March 11, 1941).

178. *Id.* at 1965. It has been questioned whether *Trail Smelter* offers a good example of an international no-harm rule, as it also based its finding on "the law of the United States." *Id.*; *cf.* Russell A. Miller, *Trail Smelter Arbitration*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 7 (2007).

179. Trail Smelter, *supra* note 177, at 1965. Note that the relevance of territorial sovereignty in the emergence of the no-harm rule was two-fold, as it operates on the side of both the "polluting" and the victim state. *Cf.* Rüdiger Wolfrum, *Purposes and Principles of International Environmental Law*, 33 GERMAN Y.B. INT'L L. 308, 310–11 (1990).

180. Corfu Channel Case (U.K. v. Alb.) 1949 I.C.J. Rep. 4 (Apr. 9). The case concerned two British warships being struck by mines in Albanian territorial waters in late 1946. While it could not be established that Albania had itself laid the mines, or colluded in a Yugoslavian minelaying operation, the court still found that the laying of the minefield "could not have been accomplished without the knowledge of the Albanian Government." *Id.* at 22. In such a situation, the court considered Albania to be under an obligation to notify the British ships of the existence of a minefield and to issue a warning to them. *Id.* at 22–23.

181. Referring to *Corfu Channel*, the court held in *Pulp Mills* that "[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." Pulp Mills, *supra* note

It was noted above that this specific origin has led to IEL being described as an "outward-looking" regime that is focused on transboundary issues.[182] While such characterizations struggle to grasp fully the normative richness of the current state of IEL,[183] they still serve as a useful reminder that the need for an extraterritorial application of environmental treaties might not be as "natural" as it was perhaps in the human rights context.[184] It could be argued that the customary no-harm rule already provides a sufficient normative response to all instances of extraterritorial environmental harm and, consequently, the discussion of an extraterritorial application of MEAs would be superfluous.[185] However, the relationship between MEAs and the customary no-harm rule is not as straightforward as it might appear. While there is indeed considerable overlap between MEAs and the no-harm rule,[186] there are also some substantial limits to the latter. First, what exactly is understood as activities within the state's "jurisdiction or control" is rarely defined. The 2001 ILC Draft Articles on Transboundary Harm provide that "transboundary harm" means "harm *caused in the territory of or in other places under the jurisdiction or control of a State* other than the State of origin, whether or not the States concerned share a common border."[187] If this is true, how-

176, ¶ 101. The limitation to damage to "the environment of another State" was probably motivated by the specific needs of that case. It is in contrast to the broader understanding the court adopts from *Legality of the Threat or Use of Nuclear Weapons*. *Id.* ¶ 193.

182. Simons, *supra* note 3.

183. To be sure, this is not to suggest that IEL is not concerned with states' domestic environment. It should be emphasised that a large number of MEAs, notably in the biodiversity and nature conservation context, have of course been motivated by attempts to "break into" the domestic affairs of states and regulate how states make use of their domestic "natural resources." Hence, treaties like the Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 246 [hereinafter Ramsar Convention]; the CMS, *supra* note 5; the Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, Eur. T.S. No. 104 [hereinafter Bern Convention]; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 244 [hereinafter CITES] leave aside any reference to Rio Principle 2, *supra* note 176. *But see*, *e.g.*, Maputo Convention, *supra* note 9, pmbl.; CBD, *supra* note 10, art. 3.

184. In other words: The "inward-looking" nature of the latter necessitated the emergence of a doctrine of extraterritoriality when, for example, states parties engaged in military operations outside their territory. *See supra* note 66.

185. *See* Cahill, *supra* note 135, at 202 (assuming that "general principles such as the prohibition of causing significant harm [under watercourse law] can correspond to the extraterritorial human rights obligation to respect the right to water in other states.").

186. With MEAs either building on it, or incorporating it as a substantive norm. *E.g.*, United Nations Framework Convention on Climate Change, pmbl., May 9, 1992, 1771 U.N.T.S. 107 [hereinafter FCCC]; UNECE Convention on Long-Range Transboundary Air Pollution, pmbl., Nov. 13, 1979, 1302 U.N.T.S. 218 [hereinafter LRTAP Convention]; Vienna Convention for the Protection of the Ozone Layer, pmbl., Mar. 22, 1985, 1513 U.N.T.S. 324 [hereinafter Ozone Convention]; UNECE Convention on the Transboundary Effects of Industrial Accidents, pmbl., Mar. 17, 1992, 2105 U.N.T.S. 457 [hereinafter Industrial Accidents Convention]; G.A. Res. 51/229, Convention on the Law of the Non-Navigational Uses of International Watercourses, art. 7 (July 8, 1997) [hereinafter UN Watercourses Convention]; *see also infra* Section IV.C.1.

187. *Draft Articles on Transboundary Harm*, *supra* note 176, art. 2(c) and cmt. 9 (emphasis added); *see also* Pulp Mills, *supra* note 176, ¶ 101 ("A State is . . . obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.").

ever, some categories of extraterritorial environmental impacts may escape its scope, such as environmental impacts caused by non-state actors acting on foreign territory. Second, the no-harm rule rests on a certain *de minimis* threshold of (for example, "significant") harm,[188] and the obligations it creates are limited to duties of conduct, namely to exercise due diligence.[189] States are thus expected to "to use all the means at [their] disposal"; to "deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain" the required result; or to "[adopt] appropriate rules and measures" and exert "a certain level of vigilance in their enforcement and the exercise of administrative control."[190] Third, a major disadvantage of the customary rules arguably lies in their abstract and general nature. Unless further concretized, the duty to prevent transboundary harm will often lack a sufficiently detailed and easily operable normative standard for specific categories of transboundary impacts.[191] Substantive obligations under MEAs may add a more specific, and potentially also more ambitious, element to the (extraterritorial) obligations of states. Notably, substantive MEA obligations usually refrain, as will be seen below, from including a minimum threshold requirement of harm, and instead focus directly on broad kinds of impacts.

The substantive no-harm rule is supplemented by a number of procedural obligations,[192] primarily the general principle of cooperation between states in the environmental context.[193] Again, the general duty to cooperate may overlap with potential extraterritorial obligations under MEAs, but does not render them superfluous. In any event, it will be seen below that the duty to cooperate retains its importance for the implementation of extraterritorial obligations for which the territorial state has insufficient power under the

188. On this element see, for example, *Draft Articles on Transboundary Harm*, *supra* note 176, art. 2(a) and cmts. 3–7; BIRNIE, BOYLE & REDGWELL, *supra* note 175, at 186–88.

189. *See generally Draft Articles on Transboundary Harm*, *supra* note 176, art. 3, cmts. 7–18; *see also* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT'L L. 9 (1992). A more general concept of "due diligence" arguably also underlies the very idea of the no-harm rule. *Cf.* Pulp Mills, *supra* note 176, ¶ 101 ("[T]he principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory."). In the human rights context, see *supra* note 156.

190. *See* Pulp Mills, *supra* note 176, ¶ 101 (in the context of the general no-harm rule), ¶ 197 (in the context of obligations under art. 41 River Uruguay Statute); Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 10, ¶¶ 110–13 (Feb. 1) (with a view to, *inter alia*, LOSC art. 194(2)).

191. *Cf. also* Michael J. Bowman, *The Ramsar Convention Comes of Age*, 42 NETH. INT'L L. REV. 1, 16 (1995) (in the context of the Ramsar Convention, which will be discussed below).

192. These include, for example, duties of notification, consultation, and information-exchange in case of transboundary risks. *See Draft Articles on Transboundary Harm*, *supra* note 176, arts. 8, 9, 12. On the related duty to execute an environmental impact assessment, see Pulp Mills, *supra* note 176, ¶ 204; Certain Activities Carried Out by Nicaragua in the Border Area & Construction of a Road in Costa Rica Along the San Juan River (Costa Rica v. Nicar. & Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16); Activities in the Area, *supra* note 190, ¶¶ 147–50.

193. *See generally* BIRNIE, BOYLE & REDGWELL, *supra* note 175, at 175–76.

traditional jurisdictional rules, and can only be required to cooperate with other states.

B. Rationale for an Extraterritorial Application of MEAs

As in the above context of human rights law, one may enquire as to what might serve as the underpinning rationale for an extraterritorial application of MEAs. It was noted above that a central piece in the human rights doctrine of extraterritoriality is the claim to universality: the idea that every person (whatever her location) enjoys (the same) human rights. By contrast, in the context of IEL, it is much less certain whether constitutive documents like the Rio and Stockholm Declarations have infused IEL with a concept comparable to that of universality. While the universality notion itself is actually visible in documents that have a clear anthropocentric thrust or follow a human rights approach,[194] it is less present (and probably less suitable) in more eco-, bio-, or physiocentric conceptions of IEL. Instead, an element coming close to the universality claim can be seen in the interdependence[195] or interrelatedness of humanity and nature, or different elements of the environment.[196] Similarly, it is a common feature for IEL instruments to ascribe a certain value to environmental goods, irrespective of their "nationality."[197]

C. Traces of Extraterritorial Application in the Practice of MEAs

Although language comparable to that of Article 1 ECHR is sparse in the context of MEAs,[198] a large number of MEAs already include elements that explicitly or implicitly relate to the question of their (extra-)territorial scope of application. However, the legal concepts used to govern such application (like "jurisdiction" or "scope") are employed in a highly diverse manner. Traces of an extraterritorial application of MEAs can be found in most areas of IEL, for example agreements seeking to prevent or control transboundary impacts (1) and, to some extent, also in the climate change regime (2). The peculiarities of a specific MEA notion of extraterritoriality are particularly visible in the context of agreements on the polar regions (3) and watercourse

194. *E.g.* Rio Declaration, *supra* note 176, princ. 1; *see also* Stockholm Declaration, *supra* note 176, princ. 1 (featuring a less explicit anthropocentric connotation).

195. *See, e.g.*, Rio Declaration, *supra* note 176, princ. 25 (positing the "interdependen[ce]" between "peace, development and environmental protection").

196. *See, e.g.*, World Charter for Nature, *supra* note 176, pmbl., princ. I.4; Ramsar Convention, *supra* note 183, pmbl.

197. *See, e.g.*, Ramsar Convention, *supra* note 183, pmbl.; Convention for the Protection of the World Cultural and Natural Heritage, pmbl., Nov. 16, 1972, 1037 U.N.T.S. 152 [hereinafter WHC]; CITES, *supra* note 183, pmbl.; CMS, *supra* note 5, pmbl.; CBD, *supra* note 10, pmbl.; *see also* Bowman, Davies & Redgwell, *supra* note 8, ch. 3 (discussing the notion of values in the IEL context); Michael Bowman, *The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law*, *in* International Law and the Conservation of Biological Diversity 5, 14–31 (Michael Bowman & Catherine Redgwell eds., 1996).

198. On the few examples, see *infra* Section IV.D.

agreements (4). Ambitious examples of an extraterritorial application can also be seen in the context of biodiversity treaties relating to the terrestrial environment (5), the marine environment (6), and the specific question of trade in endangered species (7).

1. *Prevention of Transboundary Impacts*

Several MEAs build on the customary duty to prevent transboundary harm and seek to apply it to subject-specific settings, for example air-borne pollution, industrial accidents, or the transboundary movement of waste. Environmental agreements focusing on such instances of transboundary harm regularly incorporate the "(national) jurisdiction" concept of the customary no-harm rule, already encountered above,[199] or include similar references to activities within the "jurisdiction and control" of states parties.[200]

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("Basel Convention")[201] may serve as an example in this regard. The convention applies, in the specific context of transboundary movement of hazardous or other wastes, to the movement of wastes

> from an area under the national jurisdiction[202] of one State to or through an area under the national jurisdiction of another State or

199. *See, e.g.*, LRTAP Convention, *supra* note 186, arts. 1(b), 3 (regarding the "discharge of air pollutants"). The protocols to the convention usually provide that the parties are to reduce "their" (or "its") emissions in certain substances. *See, e.g.*, Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least 30 Per Cent, art. 2, July 8, 1985, 1480 U.N.T.S. 215; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, art. 2(1) and (2), Nov. 18, 1992, 2001 U.N.T.S. 187; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, art. 3(1), June 24, 1998, T.I.A.S. No. 12,966, 2237 U.N.T.S. 79; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, art. 3(1), Nov. 30, 1999, T.I.A.S. No. 13,073, 2319 U.N.T.S. 81; *see also* Industrial Accidents Convention, *supra* note 186, arts. 1(d) and (g), 4(1), 6(2), March 17, 1992, 2105 U.N.T.S. 457 (requiring State action regarding hazardous activities); ASEAN Agreement on Transboundary Haze Pollution, art. 1(13), June 10, 2002, http://haze.asean.org/?wpfb_dl=32 (defining transboundary haze pollution as having its "physical origin . . . wholly or in part within the area under the national jurisdiction of one Member State"); Convention on Environmental Impact Assessment in a Transboundary Context, art. 1(ii) and (viii), Feb. 25, 1991, 1989 U.N.T.S. 309.

200. *See, e.g.*, Ozone Convention, *supra* note 186, art. 2(2)(b) (requiring states parties to "[a]dopt appropriate legislative or administrative measures . . . to control, limit, reduce or prevent human activities under their jurisdiction or control"); *see also* Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, art. 1(1), Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 45 [hereinafter PTBT]. While usually not considered an MEA in the strict sense, the PTBT establishes a certain protection of the atmosphere from nuclear testing and is thus sometimes discussed in the environmental context. *See, e.g.*, THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 399–405 (1995).

201. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention].

202. Defined as "any land, marine area or airspace *within which a State exercises administrative and regulatory responsibility in accordance with international law* in regard to the protection of human health or the environment." *Id.* art. 2(9) (emphasis added); *see also* Bamako Convention on the Ban of the Import

> to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement.[203]

The above definition of "areas under national jurisdiction" also indicates that the convention applies to all maritime areas within national jurisdiction. However, Article 4(12) of the Basel Convention expressly clarifies that the rights under the law of the sea remain untouched.[204] As regards the persons whose activities states parties have to regulate, they are partly limited to persons subject to national "jurisdiction" (e.g. exporters and importers),[205] while for other categories there is a broader understanding.[206] In a similar fashion, jurisdiction requirements are also built into a number of substantive obligations.[207] Still, extraterritorial dimensions of states obligations under the Basel Convention are clearly visible in Article 4(8), which provides that parties shall "require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner in the State of import or elsewhere."[208] Furthermore, Article 8 stipulates that where a transboundary movement "cannot be completed . . . , the State of export shall ensure that the wastes in question *are taken back into the State of export*, by the exporter, if alternative arrangements cannot be made for their disposal in an environmentally sound manner."[209] A similar duty of the state of export to ensure that wastes are "taken back" or otherwise disposed of can be seen in Article 9(2) in cases of "illegal traffic."[210] Finally, the Basel Con-

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into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, art. 1(11), Jan. 30, 1991, 2101 U.N.T.S. 177 [hereinafter Bamako Convention] (identical definition).

203. Basel Convention, *supra* note 201, art. 2(3); *see also* Bamako Convention, *supra* note 202, art. 1(4) (identical language).

204. Basel Convention, *supra* note 201, art. 4(12). States have differed in their views about the extent to which Article 4(12) maintains, for example, the right of innocent passage even in case of ships transporting dangerous substances. *See* BIRNIE, BOYLE & REDGWELL, *supra* note 175, at 479.

205. Basel Convention, *supra* note 201, arts. 2(15)–(16), 4(7)(a); *see also* Bamako Convention, *supra* note 202, arts. 1(17)–(18), 4(3)(m).

206. *See* Basel Convention, *supra* note 201, arts. 2(17)–(19) ("carriers," "generators," and "disposers" of waste).

207. *See* Basel Convention, *supra* note 201, art. 4(2)(a) (providing that parties shall take appropriate measures to "[e]nsure that the generation of hazardous wastes and other wastes *within it* is reduced to a minimum" (emphasis added)), arts. 4(2)(b)–(c). The equally authentic French version (*id.* art. 29) of the unusual wording in italics is: "à l'intérieur du pays."

208. Basel Convention, *supra* note 201, art. 4(8); *see also id.*, art. 4(2)(e) (providing the duty not to allow the export of hazardous or other wastes if the state party "has reason to believe that the wastes in question will not be managed in an environmentally sound manner"); Basel Declaration on Environmentally Sound Management, adopted by Conference of the Parties Decision V/1 (1999), and Conference of the Parties Decision V/33 (1999) (regarding the notion of environmentally sound management); Rep. of the Fifth Meeting of the Conference of the Parties to the Basel Convention, U.N. Doc. UNEP/CHW.5/29, at 33, 60–65, 85–87 (Dec. 10, 1999).

209. Basel Convention, *supra* note 201, art. 8 (emphasis added).

210. *See* Basel Convention, *supra* note 201, art. 9(2)(a) (take back to state of export); *id.* art. 9(b) (on disposal); *id.* art. 9(3) (on the state of import); *id.* art. 9(1) (defining "illegal traffic"); *see also* BIRNIE, BOYLE & REDGWELL, *supra* note 175, at 478 (referring to this provision as a possible example of an

vention provides for specific protection of the Antarctic Treaty area in its Article 4(6).[211]

2. *Addressing Climate Change*

Unlike the aforementioned MEAs focusing on instances of transboundary harm, the 1992 Framework Convention on Climate Change ("FCCC"),[212] the 1997 Kyoto Protocol,[213] and the 2015 Paris Agreement[214] do not explicitly include a reference to the notion of "jurisdiction (and control)" over harmful sources. For example, the FCCC refers to duties of any Annex I party to take measures "on the mitigation of climate change, by limiting *its* anthropogenic emissions . . . and protecting and enhancing *its* greenhouse gas sinks and reservoirs."[215] While such wording might suggest that parties primarily had emissions caused within their relevant territories in mind,[216] problems have arisen regarding the allocation or apportionment of emissions from fuel used for international aviation and maritime transport ("international bunker fuels"). While the text of the FCCC left this question open,[217] the Conference of the Parties ("CoP") endorsed the Intergovernmental Panel on Climate Change ("IPCC") reporting guidelines[218] and thus excluded such emissions from the national totals.[219] The Kyoto Protocol further pro-

"extraterritorial protective jurisdiction over foreign nationals engaged in the illegal export of hazardous waste to a country which has prohibited its import").

211. Basel Convention, *supra* note 201, art. 4(6).

212. *Supra* note 186 and accompanying text.

213. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

214. FCCC, Paris Agreement, Dec. 12, 2015, Annex to Decision 1/CP.21, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016), 2016 E.U. O.J. (L 282) 4 [hereinafter Paris Agreement].

215. FCCC, *supra* note 186, art. 4(2)(a) (emphasis added). The provisions on national communications in Article 12(1)–(2) of the FCCC do not further clarify this. *See* Kyoto Protocol, *supra* note 213, art. 3(1) (providing that Annex I parties shall "ensure that *their* aggregate anthropogenic carbon dioxide equivalent emissions . . . do not exceed *their* assigned amounts") (emphasis added). Article 4(2) of the Paris Agreement is equally ambiguous in this regard. Paris Agreement, *supra* note 214, art. 4(2).

216. The 2014 International Legal Association Draft Principles Relating to Climate Change, while not directly concerned with the climate change treaty regime, are equally ambiguous in that they provide for an extensive scope, but make an explicit connection to the general duty to prevent transboundary harm and thus incorporate a limitation to "activities within their jurisdiction or control." Int'l L. Assoc., Declaration of Legal Principles Relating to Climate Change, draft arts. 1(1) and 7A(1), ILA Res. 2/2014 (Apr. 11, 2014).

217. FCCC, *supra* note 186, art. 4(1)(c) (providing merely that mitigation actions should cover the "transport" sector as well).

218. Intergovernmental Panel on Climate Change, *Revised 1996 Guidelines for National Greenhouse Gas Inventories*, vol. 1, ch. 1.4 (1996), http://www.ipcc-nggip.iges.or.jp/public/gl/guidelin/ch1ri.pdf; Intergovernmental Panel on Climate Change, *2006 Guidelines for National Greenhouse Gas Inventories*, vol. 2, ch. 3.5, 3.6 (2006), http://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/2_Volume2/V2_3_Ch3_Mobile_Combustion.pdf. These guidelines follow a "territorial system boundary" model that generally "apportions emissions to the state in which productive activities take place," rather than the state in which consumption takes place. *See* Joanne Scott, *The Geographical Scope of the EU's Climate Responsibilities*, 17 Cambridge Y.B. Eur. Leg. St. 92, 100–01 (2015).

219. *See* Guidelines for the Preparation of National Communications by Parties Included in Annex I to the Convention, Part I: UNFCCC Guidelines on Reporting and Review, Decision 3/CP.5, ¶ 1, U.N. Doc. FCCC/CP/1999/6/Add.1 (Feb. 2, 2000) and U.N. Doc. FCCC/CP/1999/7, 3–13 (Feb. 16, 2000).

vides, in its Article 2(2), that Annex I parties "shall pursue limitation or reduction of emissions . . . from aviation and marine bunker fuels, working through the International Civil Aviation Organization [ICAO] and the International Maritime Organization [IMO], respectively." The Paris Agreement does not expressly address the topic.[220] While its text does not clarify whether parties are under an obligation to include such emissions into their nationally determined contributions ("NDCs"),[221] it has been suggested that the silence of the agreement indicates a further shift in regulatory authority to ICAO and IMO.[222]

The climate change regime is further noteworthy in that its own policy efforts might call for the elaboration of extraterritorial standards through *other* MEAs. In an attempt to make developing countries undertake voluntary mitigation efforts, or to achieve their NDCs under the Paris Agreement, states parties developed the Reducing Emission from Deforestation in Developing Countries ("REDD") framework.[223] REDD, or REDD+, as it is now called, aims at setting incentives for developing countries to reduce emissions from deforestation and forest degradation, conserve and enhance forest carbon stocks, and manage forests in a sustainable manner, through payments for these "ecosystem services" by, *inter alia*, developed states.[224] Due to the specific mandate of the climate change regime, the REDD/REDD+ scheme largely focuses on the achievement of mitigation benefits through forests as "carbon sinks" and does not necessarily pay much attention to the biodiversity impacts of such projects. While efforts have been made to introduce biodiversity "safeguards" into the REDD/REDD+

For the revised guidelines, see Decision 24/CP.19, ¶ 34, U.N. Doc. FCCC/CP/2013/10/Add.3 (Jan. 31, 2014).

220. For a review of the (limited) progress within ICAO and IMO and the Paris Agreement, see Beatriz Martinez Romera, *The Paris Agreement and the Regulation of International Bunker Fuels*, 25 Rev. Eur. Comp. & Int'l Envtl. L. 215 (2016).

221. Romera argues that while the Paris Agreement "does not exclude IBF [international bunker fuel] from its long-term mitigation aims (Articles 2.1(a) and 4.1), the mitigation tools (national pledges) chosen to achieve these goals are not thought to address IBFs." *Id.* at 221 n.84. Based on her interpretation, she further considers that IBFs are governed only by the FCCC (and the restrictive Article 2(2) of the Kyoto Protocol), parties to which could choose to address IBFs. *Id.* at 221.

222. Effective action regarding IBFs may thus hinge on *unilateral* actions. *See id.* at 224–26.

223. *See, e.g.*, Rep. of the Conference of the Parties on its Thirteenth Session, Bali Action Plan, Decision 1/CP.13, ¶ 1(b)(iii), U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008); Rep. of the Conference of the Parties on its Thirteenth Session, Reducing Emissions from Deforestation in Developing Countries, Decision 2/CP.13, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008); Rep. of the Conference of the Parties on its Sixteenth Session, The Cancun Agreements, Decision 1/CP.16, ¶¶ 68–79, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter Cancun Agreements]; Paris Agreement, *supra* note 214, art. 5(2); Rep. of the Conference of the Parties on its Twenty-First Session, Adoption of the Paris Agreement, Decision 1/CP.21, ¶ 54, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

224. *See, e.g.*, Cancun Agreements, *supra* note 223, ¶¶ 70(a)–(e). With the inclusion of the latter aspects, REDD is now widely known as REDD+. *See* Annalisa Savaresi, *A Glimpse into the Future of the Climate Regime: Lessons from the REDD+ Architecture*, 25 Rev. Eur. Comp. & Int'l Envtl. L. 186, 187 n.8 (2016); Annalisa Savaresi, *Reducing Emissions from Deforestation in Developing Countries under the UNFCCC: Caveats and Opportunities for Biodiversity*, 21 Y.B. Int'l Envtl. L. 81, 89, 101–03 (2010).

framework,[225] it is far from clear whether the rather "soft" formulation of such safeguards can address the problem thoroughly. Instead, other MEAs might usefully complement the climate change instrument through the formulation of standards applicable to domestic funding decisions that potentially affect the environment abroad.

3. *Environmental Protection in the Polar Regions*

The instruments of the Antarctic Treaty System ("ATS")[226] are of particular interest in the present context in that they define a "geographical coverage" which is largely independent from the territory of states parties.[227] The 1959 Antarctic Treaty ("AT"), which provides the basic framework for Antarctica as an area "used for peaceful purposes only,"[228] sets out the basic definition of the "Antarctic Treaty area."[229] While the AT contains few provisions dealing with environmental matters, it was supplemented by the so-called Agreed Measures[230] and the 1972 Convention for the Conservation of Antarctic Seals ("CCAS").[231] The Agreed Measures expressly followed the 1959 AT's geographic coverage, and the CCAS' territorial reach clearly resembles the concept of the Antarctic Treaty area.[232] The 1992 Protocol on Environmental Protection ("Madrid Protocol"),[233] which designated Antarctica "a natural reserve, devoted to peace and science"[234] and set up a compre-

225. *See* Harro van Asselt, *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*, 44 N.Y.U. J. INT'L L. & POL. 1205, 1236–43 (2012).

226. The ATS includes all of the Antarctic instruments discussed, although they may not have been adopted in the formal context of the Antarctic Treaty. *See* Matthew Howard, *The Convention on the Conservation of Antarctic Marine Living Resources: A Five-Year Review*, 38 INT'L & COMP. L. Q. 104, 105–06 (1989) (with a view to the Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, 1329 U.N.T.S. 48 [hereinafter CCAMLR]).

227. Note that territorial claims in Antarctica are neither settled nor resolved through the ATS. Instead, under Article IV of the Antarctic Treaty, all existing and new claims are effectively "frozen." Antarctic Treaty, art. IV, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 72 [hereinafter AT].

228. *Id.* art. I(1).

229. *Id.* art. VI (providing that the "provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves").

230. Agreed Measures for the Conservation of Antarctic Fauna and Flora, June 2, 1964, ATCM Rec. III-X, 17 U.S.T. 991 [hereinafter Agreed Measures]. *But see* Antarctic Treaty Consultative Meeting, 34th Meeting, Decision 1, ¶ 1 (2011) (according to which, *inter alia*, the Agreed Measures are "no longer current" and do not require "further action by the Parties"). Large parts of the Agreed Measures are now effectively incorporated into Annex II to the Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, (1998) A.T.S. 6, 30 I.L.M. 1455 [hereinafter Madrid Protocol].

231. Convention for the Conservation of Antarctic Seals, June 1, 1972, 29 U.S.T. 441, 1080 U.N.T.S. 176 [hereinafter CCAS]. Note that the convention's mandate was never fully used, as no substantial exploitation of seals took place. *See* Howard, *supra* note 226, at 112–13.

232. *Cf.* Agreed Measures, *supra* note 230, art. I(1)–(2); CCAS, *supra* note 231, art. 1(1); *see also* DONALD R. ROTHWELL, THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW 319–23 (1996).

233. Madrid Protocol, *supra* note 230. The protocol is supplemented by six annexes, the first four of which were adopted and entered into force together with the protocol (Annex I: EIA; Annex II: fauna and flora; Annex III: waste disposal; and Annex IV: marine pollution), the fifth being adopted separately and now in force (Annex V: protected areas), and the sixth not yet in force (Annex VI: liability).

234. *Id.* art. 2.

hensive framework of environmental stipulations,[235] is similarly based on the concept of Antarctic Treaty area.[236] As regards the specific environmental obligations, the Madrid Protocol provides, for example, that parties "commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems";[237] that "all activities in the Antarctic Treaty area" are in some way regulated[238] and subject to an Environmental Impact Assessment ("EIA");[239] and that certain areas in Antarctica are accorded special protection.[240] Under the protocol, the parties thus have comprehensive obligations for the entire "Antarctic treaty area," and perhaps also the entire Antarctic environment,[241] including both terrestrial and marine[242] areas.

The 1980 Convention for the Conservation of Antarctic Marine Living Resources ("CCAMLR")[243] follows a more ecological conception and extends its territorial scope into the "Antarctic Convergence" zone.[244] The convention seeks to establish a regime for the conservation and rational use of Antarctic "marine living resources,"[245] based on a progressive set of conservation principles.[246] These general principles are mainly concretized through "conservation measures" adopted by the convention's central decision-making body, the "Commission."[247] By virtue of Article IX(2), the Commission

235. On the relationship of the protocol with other component of the ATS, see *id.*, art. 4.

236. *See id.* arts. 1(b), 3(2)–(4). *But see infra* note 241.

237. Madrid Protocol, *supra* note 230, art. 2.

238. Additionally, all "mineral resource activities" are prohibited. *Id.* arts. 3(2)–(4), 7. More specifically regarding the taking of, and interference with, fauna and flora, see *id.* annex II, art. 3.

239. *See id.* art. 8, annex I.

240. *See id.* annex V (providing for the establishment of "Antarctic Specially Protected Areas" [ASPAs] and "Antarctic Specially Managed Areas" [ASMAs]).

241. Due to the inclusion of the notion of the "Antarctic environment and dependent and associated ecosystems" into Articles 2 and 3(1), it can be argued that obligations under the Madrid Protocol effectively extend beyond the AT area referred to in Article 1(b) of the protocol. *See* ROTHWELL, *supra* note 232, at 381; Davor Vidas, *The Polar Marine Environment in Regional Cooperation*, *in* PROTECTING THE POLAR MARINE ENVIRONMENT 78, 97–99 (Davor Vidas ed., 2000).

242. *But see* AT, *supra* note 227, art. VI (providing that "nothing in the [AT] shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area").

243. CCAMLR, *supra* note 226.

244. CCAMLR, *supra* note 226, art. I(1) stipulates that the convention applies to "the Antarctic marine living resources of the area south of 60° South latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem." *See also id.* art. I(3)–(4) (on the notions of "Antarctic marine ecosystem" and the "Antarctic Convergence"); *id.* Statement by the Chairman of the Conference (on waters adjacent to certain islands in the CCAMLR area); BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 361; Denzil G.M. Miller, Eugene N. Sabourenkov & David C. Ramm, *Managing Antarctic Marine Living Resources: The CCAMLR Approach*, 19 INT'L J. MARINE & COASTAL L. 317, 350 (2004) (on jurisdictional implications of the just-mentioned statement).

245. *See* CCAMLR, *supra* note 226, arts. I(2), II(1)–(2). On the relationship with the International Convention for the Regulation of Whaling ("ICRW") and the CCAS, see *id.* art. VI.

246. *See id.* art. II(3) (on the multi-species, ecosystem-oriented approach of the convention); *see also* Howard, *supra* note 226, at 113–14.

247. *See* CCAMLR, *supra* note 226, art. VII; *see also id.* art. IX(1)(f) (on the formulation, adoption, and revision of conservation measures).

is mandated to adopt a broad range of conservation measures.[248] Most of the conservation measures regulate the general conditions of fishing in (parts of) the treaty area, and the avoidance of incidental impacts of fishing.[249] Due to the focus on activities impacting upon marine species, notably fisheries, the convention as well as conservation measures regularly refer to jurisdiction requirements incorporated from the law of the sea.[250] More recently, however, the Commission also succeeded in devising a general framework for Marine Protected Areas ("MPAs") within the CCAMLR area of agreement,[251] and designated the sizeable Ross Sea region MPA.[252] Again, however, the convention organs have been cautious to include clauses seeking to ensure compatibility with the "rights or obligations of any State under international law, including as reflected in the United Nations Convention on the Law of the Sea."[253]

The Arctic region[254] is neither governed by a comprehensive treaty, nor a general environmental protection agreement.[255] Still, the Polar Bears Agreement,[256] which is one of the few dedicated international environmental instruments for the Arctic, again highlights the potentially extensive territorial reach of MEAs. While the agreement does not expressly define a

248. CCAMLR, *supra* note 226, art. IX(2).

249. In the latter context, see CCAMLR Conservation Measures 25-02 (2015) and 25-03 (2016) (on longline fishing and trawl fishing); see generally Miller, Sabourenkov & Ramm, *supra* note 244, at 323–43 (for an overview of conservation measures).

250. *See*, *e.g.*, CCAMLR Conservation Measure 10-02 (2016); *cf.* CCAS, *supra* note 231, art. 2(1); CCAMLR, *supra* note 243, art. XXI(1) (providing that each party "shall take appropriate measures *within its competence* to ensure compliance with the provisions of this Convention and with conservation measures") (emphasis added); Howard, *supra* note 226, at 139–40 (on the background to the formulation of CCAMLR Article XX(1)).

251. CCAMLR Conservation Measure 91-04 (2011); *see also* CCAMLR Conservation Measure 91-02 (2012) (on the relationship with ASPAs and ASMAs under the Madrid Protocol).

252. CCAMLR Conservation Measure 91-05 (2016). The conservation measure is initially designated for a period of 35 years and will enter into force on 1 December 2017. For background of the measures, see, for example, Elizabeth Nyman, *Protecting the Poles: Marine Living Resource Conservation in the Arctic and Antarctic*, Ocean & Coastal Manag. (forthcoming 2017), manuscript at 2, https://doi.org/10.1016/j.ocecoaman.2016.11.006; see also CCAMLR Conservation Measure 91-03 (2009) (establishing "South Orkney Islands southern shelf" MPA).

253. CCAMLR Conservation Measure 91-05, ¶ 2 (2016); *see also* CCAMLR Conservation Measure 91-04, ¶ 1 (2011).

254. Unlike the Antarctic, the Artic is not a continental landmass. The Arctic region may be defined as "the area to the north of the tree-line," the area "north of the 10° isotherm in July," or the area "north of the Arctic Circle (66.5° latitude)." It encompasses land territories of seven Arctic states, parts of five Arctic states' respective maritime zones, and high seas areas. *See* Michael Byers, *Artic Region*, *in* Max Planck Encyl. of Pub. Int'l L. ¶¶ 1, 2 (2010); Ingvild Ulrikke Jakobsen, *Extractive Industries in Arctic: The International Legal Framework for the Protection of the Environment*, Nordisk miljörättslig tidskrift 39, 40–41 (2014).

255. Still, the eight "Arctic states" agreed on the Arctic Environmental Protection Strategy, June 14, 1991, 30 I.L.M. 1627 [hereinafter AEPS]. While the legal form of the AEPS has sometimes been disputed, both the absence of the formal elements of a treaty and the lack of prescriptive wording indicate that it falls short of a treaty. *Cf.* Rothwell, *supra* note 232, at 239–40.

256. Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 13 I.L.M. 13 [hereinafter Polar Bears Agreement]. The Interim Convention on the Conservation of North Pacific Fur Seals, Feb. 9, 1957, 314 U.N.T.S. 106, which applies, according to its Article III, to sealing "in the Pacific Ocean north of the 30th parallel of north latitude," has effectively fallen into abeyance and will be left aside.

specific "treaty area" in which to apply,[257] its Article II imposes broad obligations by requiring states parties to "take appropriate action to protect the ecosystems of which polar bears are a part" and to "manage polar bear populations," indicating that states parties have extensive obligations regarding the entire territorial reach of the relevant "bear populations" and their "ecosystems."

4. *Protection of Watercourse Ecosystems*

International watercourses[258] have traditionally been governed by general or watercourse-specific treaties,[259] but are now increasingly addressed by other MEAs as well.[260] The development of international watercourse law[261] is of interest in the present context as it relates to a "resource" that may straddle (several) national boundaries, form a boundary between states, and may be part of an even broader environment or ecosystem (possibly extending to large watersheds). In the transboundary setting, it is thus often assumed that watercourses are not just partitioned between states but form a kind of "joint" or "shared resource"[262] united by the "community of interest" of riparian states.[263]

The 1966 ILA Helsinki Rules on the Use of the Water of International Rivers, which are often considered to have provided an accurate account of

257. *But see* Bilateral Agreement on the Conservation of the Porcupine Caribou Herd, art. 1, U.S.-Can., July 17, 1987, 1987 C.T.S. 31. The "Arctic Council" operates on the basis of national "Arctic" definitions. *See* BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 348.

258. Article 2 of the UN Watercourses Convention defines watercourses as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus." Such a system of waters and groundwaters constitutes an "international watercourse" if parts of it "are situated in different States." *See* UN Watercourses Convention, *supra* note 186, art. 2(a)–(b).

259. For a comprehensive general treaty setting out to regulate the "non-navigational uses of international watercourses," see the 1997 UN Watercourses Convention, *supra* note 186. Watercourse-specific treaties include, amongst many others, the Great Lakes Water Quality Agreement, U.S.-Can., Nov. 22, 1978, 1153 U.N.T.S. 187; Convention on the Protection of the Rhine, Apr. 4, 1999, E.U. O.J. (L 289/31); Convention on Cooperation for the Protection and Sustainable Use of the Danube River, June 29, 1994, E.U. O.J. (L 342/19); Agreement on the Nile River Basin Cooperative Framework, May 14, 2010, not yet in force, http://www.nilebasin.org/index.php/nbi/cooperative-framework-agreement. Apart from such treaties there is, of course, the long-standing body of customary rules, as expressed, for example, in the International Law Association's Helsinki Rules on the Uses of the Water of International Rivers, Int'l L. Assoc., Rep. of the Fifty-Second Sess. (1966) [hereinafter Helsinki Rules], or the more recent Berlin Rules on Water Resources, Int'l L. Assoc., Rep. of the Seventy-First Sess. (2004).

260. *See, e.g.*, Ramsar Convention, *supra* note 183, Res. VIII.1, VIII.34, VIII.40 (Nov. 18–26, 2002) (on the allocation and management of water and agriculture, wetlands and water resource management, and use of groundwater); Res. IX.3 (Nov. 8–15, 2005) (on the relationship with other treaties).

261. Other aspects of "international water law" will be left aside in the present context, notably the regulation of transboundary aquifers.

262. *See, e.g.*, STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 112–74 (1st ed. 2001) for a comprehensive discussion. The ICJ affirmed this without enquiring further into the concept in general. Pulp Mills, *supra* note 176, ¶¶ 81, 86, 173, 177, 203–04.

263. Territorial Jurisdiction of the Oder Commission, *supra* note 32, at 27 (using this notion in the context of navigation rights, as the "basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others").

the applicable customary rules,[264] based its legal regime on the notion of the "drainage basin"[265] and thus already provided a potentially very far-reaching concept for the territorial reach of state obligations. However, it has been observed that recent watercourse agreements have not followed up on the notion of the "drainage basin," but instead based their regulatory approaches on the concept of "international watercourses"[266] or "transboundary waters."[267] While these concepts might seem, at their face value, more restrictive than the notion of the "drainage basin," the difference should not be overstated. Namely, more recent watercourse agreements are far more explicit in their application not only to the watercourse, understood narrowly, but to the entirety of the watercourse "environment" or "ecosystem."[268] As in the Antarctic context, such an extensive conception of the territorial scope highlights that (both riparian and other)[269] states parties may have obligations relating to the preservation of the entire water environment or ecosystem, rather than the mere respective territories of other (riparian) states.[270]

5. *Protection of Terrestrial Species, Their Habitats and Ecosystems*

Approaches focusing on the protection of specific sites can be seen in the 1971 Ramsar Convention on Wetlands ("Ramsar Convention")[271] and the 1972 World Heritage Convention ("WHC"),[272] both of which are amongst the oldest MEAs of modern character. The Ramsar Convention initially sought to protect wetlands[273] primarily as the habitat of waterfowl,[274] al-

264. Helsinki Rules, *supra* note 259; *see also* VED P. NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY 301–02 (2d ed. 2013) (considering the Helsinki Rules an "authoritative statement" of the respective customary rules).

265. Helsinki Rules, *supra* note 259, art. I. The definition provided in Article II of the Helsinki Rules indicates the very extensive reach of the concept, when it refers to the "geographical area extending over two or more States *determined by the watershed limits* of the system of waters, including surface and underground waters, flowing into a common terminus." Helsinki Rules, *supra* note 259, art. II (emphasis added).

266. UN Watercourses Convention, *supra* note 186, art. 1(1); *see also supra* note 258 (definition of "international watercourses").

267. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 1(1), Mar. 17, 1992, 1936 U.N.T.S. 269 [hereinafter Helsinki Convention].

268. *See, e.g.*, UN Watercourses Convention, *supra* note 186, art. 20. *But see* Pulp Mills, *supra* note 176, ¶ 180 (eventually rejecting a similar Argentinian argument under Article 35 of the 1975 River Uruguay Statute).

269. This is captured, for example, in the Helsinki Convention's differentiation between "provisions relating to all parties" (Part I), and "provisions relating to riparian parties" (Part II). Helsinki Convention, *supra* note 267.

270. *But see* UN Watercourses Convention, *supra* note 186, art. 7 (demonstrating that the classical logic of "no-harm" is still visible in the regulatory regimes of modern watercourse treaties).

271. Ramsar Convention, *supra* note 183.

272. *Supra* note 197.

273. On the notion of "wetlands," see Ramsar Convention, *supra* note 183, art. 1(1) (defining wetlands as "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres").

though the convention organs later began to focus on the protection of wetlands more generally.[275] Both treaties base large parts of their regulatory approach on the listing[276] of "wetlands of international importance" and "cultural" or "natural heritage" which are meant to be given special protection.[277] Listed Ramsar and World Heritage sites now include areas as diverse as freshwater lakes;[278] artificial water reservoirs;[279] inter-tidal ecosystems;[280] and national parks.[281] For those wetlands or sites of cultural or natural heritage *not* listed, both treaties still prescribe certain basic obligations for their protection.[282]

Both the Ramsar Convention and the WHC lack express provisions on their territorial scope.[283] While Articles 4 and 5 of the WHC focus on obligations of a state party regarding heritage sites "situated on its territory," the convention also emphasizes that other states parties are still required to

274. *See* Ramsar Convention, *supra* note 183, art. 2(2); *see also* Michael J. Bowman, *The Ramsar Convention on Wetlands: Has it Made a Difference?* Y.B. Int'l Coop. Envtl. Dev. 61, 62 (2002/2003) (noting that the focus on waterfowl conservation was "never [meant] to exclude or deny other wetland values, and more recently there has been a concerted attempt to de-emphasize the avian aspect to some extent, not least in order to attract the participation of developing countries, for whom the protection of waterfowl is unlikely to be considered the highest priority").

275. For an example of the current approach, see the "criteria for the designation of wetlands of international importance," as formulated in Ramsar Convention, Res. XI.8, *Strategic Framework and Guidelines for the Future Development of the List of Wetlands of International Importance of the Convention on Wetlands – 2012 Revision*, annex 2, at 25–53 (July 6–13, 2012).

276. Note that under the World Heritage Convention, the ultimate decision on listing is left to the World Heritage Committee, although a listing decision shall not be made against the will of the territorial state. *See* WHC, *supra* note 197, art. 11(3). By contrast, under the Ramsar Convention, the listing of sites is essentially based on unilateral designations by states parties. *Cf.* Ramsar Convention, *supra* note 183, art. 2(1); *see also* Bowman, *supra* note 191, at 23. Still, the Ramsar CoP has sought to provide comprehensive substantive guidance for states parties making designations. See the list of criteria mentioned *supra* note 275.

277. *See* Ramsar Convention, *supra* note 183, art. 2(1); WHC, *supra* note 197, art. 11. The central feature of cultural and natural heritage in the sense of the WHC is their being of "outstanding universal value." *Id.* arts. 1, 2. In the Ramsar context, the central feature is a wetland's "international significance in terms of ecology, botany, zoology, limnology or hydrology" or its importance to waterfowl. Ramsar Convention, *supra* note 183, art. 2(2). Note also that both treaties each operate another list containing sites threatened by destruction, namely the "Montreux Record" and the "List of World Heritage in Danger." *See* Ramsar Convention, *Guidelines for the Operation of the Montreux Record*, Res. VI.1, annex, ¶ 3 (Mar. 19–27, 1996); WHC, *supra* note 197, art. 11(4).

278. *E.g.*, Lake Chiemsee in Germany, Ramsar site no. 95, designated Feb. 25, 1976. *Information Sheet on Ramsar Wetlands* (May 1992), https://rsis.ramsar.org/RISapp/files/RISrep/DE95RIS.pdf.

279. *E.g.*, Rutland Waters in the U.K., Ramsar site no. 533, designated Oct. 4, 1991. *Rutland Water*, https://rsis.ramsar.org/RISapp/files/RISrep/GB533RIS.pdf.

280. *E.g.*, the Wadden Sea in Denmark, Germany, and the Netherlands, which was recently added to the World Heritage List (except for the Danish part). *See* World Heritage Committee, *Nominations to the World Heritage List*, Doc. WHC-09/33.COM/8B.4 (Jun. 22–30, 2009) (submitted by the Netherlands and Germany). Note that the Wadden Sea is also protected through a transboundary network of 13 Ramsar sites in Denmark, Germany, and the Netherlands. *See, e.g.*, Netherlands Wadden Sea, Ramsar site no. 289, designated May 2, 1984, https://rsis.ramsar.org/RISapp/files/RISrep/NL289RIS_1504_en.pdf.

281. *E.g.*, the Great Smoky Mountains National Park in the United States. *See* World Heritage Committee, *Report of the Rapporteur*, Doc. SC/83/CONF.009/8, at 5, 7 (Jan. 1984).

282. *See* Ramsar Convention, *supra* note 183, arts. 3(1), 4(1), 4(4); WHC, *supra* note 197, arts. 4–5.

283. Both also assure states parties of their sovereign rights over the respective sites even in case they are listed. *See* Ramsar Convention, *supra* note 183, art. 2(3); WHC, *supra* note 197, art. 11(3).

cooperate, to "give their help," and to avoid "deliberate measures which might damage directly or indirectly" cultural or natural heritage located in foreign territories.[284] Article 3(1) of the Ramsar Convention stipulates that states shall "formulate and implement their planning so as to promote the conservation of the wetlands *included in the List*, and as far as possible the wise use of wetlands in their territory."[285] The absence of the qualifier "in their territory" in the first clause, relating to listed sites, thus signals a certain extraterritorial element.[286] Read together with the coordination duty under Article 5, this can be interpreted as an indication that states parties are under an obligation to avoid causing harm to listed sites outside their territories.[287] Support for this can now also be found in the *Certain Activities in the Border Area/Construction of a Road* dispute, which concerned, *inter alia*, the impacts of the disputed measures upon two wetlands—that is, the Costa Rican *Humedal Caribe Noreste*, listed in 1996, and the Nicaraguan *Refugio de Vida Silvestre Río San Juan*, listed in 2001—both either bordering or including the San Juan River.[288] In that case, Judge *ad hoc* Dugard (but not the court) endorsed the concept of extraterritorial obligations.[289] In his separate opinion, he found that

> when Nicaragua planned its dredging programme in 2006 and carried out an environmental impact study it was bound to "formulate and implement" its planned environmental assessment study in such a way as to promote the conservation *not only of its own wetland*, the *Refugio de Vida Silvestre Río San Juan*, but also of Costa Rica's *Humedal Caribe Noreste*.[290]

Furthermore, as an element of "collective responsibility," states are considered under a duty to take into account the impact upon listed wetland sites in the context of decisions on development assistance,[291] and to "take positive action" for the conservation of listed wetland sites.[292] The wording

284. WHC, *supra* note 197, arts. 4–6(3). The WHC thus differs from the Ramsar Convention in that the (potential) extraterritorial obligations are not limited to listed sites.

285. Ramsar Convention, *supra* note 183, art. 3(1) (emphasis added). On the potential difference between the notions of "conservation" and "wise use," see *infra* note 293.

286. BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 424–26; *see also* Bowman, *supra* note 276, at 16–18 ("collective responsibility for all designated sites").

287. Although the added value of such an obligation may be limited, as this obligation is construed in parallel to the customary duty to prevent transboundary harm, the Ramsar Convention is considered to offer, at least, an additional "forum" for deliberation of such matters. BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 424. *Cf.* Ramsar Res. VII.7, ¶ 35(c) (May 10–18, 1999).

288. Certain Activities Carried Out by Nicaragua in the Border Area & Construction of a Road in Costa Rica Along the San Juan River (Costa Rica v. Nicar. & Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, ¶ 58 (Dec. 16).

289. *Id.* ¶¶ 36–45 (separate opinion of Dugard, J. ad hoc).

290. *Id.* ¶ 42 (separate opinion of Dugard, J. ad hoc) (emphasis added).

291. BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 425 (with further references); *see also* SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 195 (1985) (already arguing in the same direction).

292. *See* BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 426, where the contours of this duty are, however, eventually left open.

of Article 3(1) might even suggest that the entire set of obligations of "conservation" (or "wise use")[293] applies with a view to sites outside a state's own territory, thus giving rise to potentially far-reaching extraterritorial obligations.[294] While this conception of extraterritorial obligations might seem quite ambitious at first glance, the finding of an expansive territorial reach of an MEA can be adequately counterbalanced by other limiting factors and a differentiation between different kinds of obligations, as argued below.[295]

The 1979 Convention on the Conservation of European Wildlife and Natural Habitats ("Bern Convention")[296] is the dedicated nature conservation instrument adopted in the context of the Council of Europe.[297] Apart from some general conservation provisions, applicable to all wildlife species,[298] the convention makes more specific stipulations for the protection of habitats, the protection of species of flora and fauna, and the protection of migratory species.[299] Unlike for the Ramsar Convention and the WHC, there are four appendices directly attached to the text of the Bern Convention, which list, for example, species enjoying "strict protection."[300] The Bern Convention is particularly noteworthy in the present context because it is one of the few MEAs for which it is documented in the *travaux préparatoires* that the negotiating states deliberately chose to omit proposed territorial limita-

293. Note the convergence of the two concepts and the primary importance of notion of "wise use" in the practice of the Ramsar CoP regarding both listed and other sites. *Cf.* Conceptual Framework for the Wise Use of Wetlands and the Maintenance of Their Ecological Character, Res. IX.1, annex A (Nov. 8–15, 2005); *see* Bowman, *supra* note 276, at 15; Bowman, Davies & Redgwell, *supra* note 8, at 414–16.

294. Contrast the more restrictive understanding by the Ramsar CoP, when it expressly limits the concept of the three-fold obligation to tackle "wetland losses" (that is, to avoid change in ecological character, mitigate loss, or compensate for it) to wetlands within states parties' territories. Ramsar Res. XI.9, ¶ 15 (July 6–13, 2012).

295. *See infra* Sections IV.F.3, IV.G.

296. Bern Convention, *supra* note 183.

297. Of the regional nature conservation treaties with a general mandate (that is, not focused on specific issues like migratory species), the Bern Convention was, until recently, the sole agreement to be in force and fully operational. The Maputo Convention, which is potentially a strong (and probably even more progressive) African counterpart, entered into force in mid-2016. *See supra* note 9 (state of ratification); *infra* Part IV.D (further discussion). By contrast, the ASEAN Agreement on the Conservation of Nature and Natural Resources, July 9, 1985, 15 Envtl. Pol'y & L. 64 (1985), has not yet entered into force. For brief commentary, see Ben Boer, *Introduction to ASEAN Regional Environmental Law, in* Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development 251, 264–65 (Werner Scholtz & Jonathan Verschuuren eds., 2015). The OAS Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, O.A.S. T.S. No. 31, is, together with the (original) African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 U.N.T.S. 3, one of the prime examples of MEAs that are still in force but have effectively become "sleeping treaties." *See* Lyster, *supra* note 291, at 124. On other (sub-)regional nature conservation instruments, *see* Kiss & Shelton, *supra* note 7, at 183–85.

298. *See* Bern Convention, *supra* note 183, art. 2 (maintenance of population levels); art. 3 (national conservation policies).

299. *See* Bern Convention, *supra* note 183, arts. 4–10.

300. Namely Appendix I (strictly protected flora species); Appendix II (strictly protected fauna species); Appendix III (protected fauna species); Appendix IV (prohibited means and methods of killing, capture, and other forms of exploitation). *See* Bern Convention, *supra* note 183, appendices I–IV.

tions.[301] This has attracted readings of the convention suggesting that its provisions entail certain extraterritorial obligations.[302] For example, Article 6(a) regarding the "deliberate capture and keeping and deliberate killing" of protected species arguably requires states parties to regulate activities of own nationals abroad (for example, the hunting of Appendix II-listed species).[303] Article 4(4), like Article 5 of the Ramsar Convention, further expressly provides for a duty of cooperation regarding sites in border areas.[304] Again, it can also be argued that the convention requires states to refrain from funding development projects abroad where this would involve the destruction or degradation of protected sites.[305] Furthermore, in the absence of any express territorial limitation, extraterritorial obligations may also flow from a number of other protective provisions of the convention.[306] As in the context of the Ramsar Convention, such an ambitious reading of extraterritorial obligations would raise the question of the limits of extraterritorial obligations, to be discussed below.

The 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS)[307] specifically focuses on the protection of "migratory species." Its protective regime builds on the listing of "endangered" migratory species in Appendix I, which are meant to enjoy special protection,[308] and the conclusion of specialized supplementary treaties for migratory species that have an "unfavourable conservation status" or other populations that "periodically cross one or more national jurisdiction boundaries."[309] The convention is of interest in the present context as it neither includes an express provision on its territorial scope, nor a specific reference to "European" migratory species or other regional remits.[310] Still, its preamble refers

301. This is not affected by the convention's title (referring to "European Wildlife"). *See Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats*, at 4 (Sept. 23, 2017), https://rm.coe.int/16800ca431. Note also that states parties to the Bern Convention not only include member states of the Council of Europe, but also some other states like Belarus, Morocco, and Tunisia. *See Chart of Signatures and Ratifications of Treaty 104*, *Convention on the Conservation of European Wildlife and Habitats* (Sept. 23, 2017), http://www.coe.int/en/web/conventions/full-list/conventions/treaty/104/signatures?p_auth=J6KfA7VM.

302. *See* BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 324–27; LYSTER, *supra* note 291, at 145–49.

303. *See* BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 326.

304. Bern Convention, *supra* note 183, art. 4(4).

305. *See* BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 326.

306. See, for example, the obligations to "maintain the population of wild flora and fauna" (Article 2), to "have regard" to the conservation of wild fauna and flora in "planning and development policies and in . . . measures against pollution" (Article 3(2)); to take measures to "ensure" the conservation of habitats (Article 4(1)); and to "give special attention" to areas important for migratory routes (Article 4(3)). *See* Bern Convention, *supra* note 183, arts. 2, 3(2), 4(1), 4(3).

307. CMS, *supra* note 5.

308. *See id.* art. III(4)–(5).

309. The supplementary instruments are called "AGREEMENTS" for migratory species with an unfavorable conservation status (included in Appendix II), and "agreements" for other populations. *See id.*, art. IV(3)–(4); *see also id.* art. V (for guidelines on the content of AGREEMENTS). Some supplementary CMS instruments are dealt with in the following, see *infra* Section IV.C.6.

310. See the Bern Convention, *supra* note 183, for a contrasting example.

to species that "live within or pass through [states'] *national jurisdictional boundaries*."[311] Its definitions of "migratory species"[312] and "range state"[313] further indicate that obligations under the convention (e.g., Article II(1), Article III(4) and (5))[314] generally focus on states having "jurisdiction" over any part of the range of species. However, provisions like Article III(4)(b)[315] are not limited to the *specific* range state in which the relevant species is currently situated, but are shared by all range states. CMS practice has further demonstrated some extensive tendencies in the understanding of the notion of "range states"[316] and the general obligations upon "parties," regarding, for example, the maintenance of flyways[317] and ecological networks,[318] climate change,[319] or the use of impact assessments.[320]

As regards the supplementary CMS instruments,[321] the 1996 Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) may serve as an example.[322] AEWA defines its "geographic scope" as "the area of the migration systems of African-Eurasian waterbirds."[323] In addition, it expressly limits its obligations by providing that states parties "shall apply *within the limits of their national jurisdiction* the measures prescribed in

311. CMS, *supra* note 5, pmbl.

312. " 'Migratory species' means the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries." *Id.* art. I(1)(a).

313. " 'Range State' in relation to a particular migratory species means any State (and where appropriate any other Party referred to under subparagraph (k) of this paragraph) that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species." *Id.* art. I(1)(h).

314. By contrast, obligations imposed upon the "parties" in general are limited, in essence, to those under Articles II(2), (3), IV(4). *See id.* arts. II(2), (3), IV(4).

315. Providing that "Parties that are Range States of a migratory species listed in Appendix I shall endeavour: . . . to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species." *Id.* art. III(4)(b).

316. This is already facilitated by the inclusion of flag states for vessels and the wide definition of "taking." *See id.*, art. I(1)(i). See also the extensive definition of range states in CMS, Res. 3.1, ¶ 3 (Sept. 9–13, 1991) ("a State should be considered a 'Range State' for a migratory species when a significant proportion of a geographically separate population of that species occasionally occurs in its territory"). This "guideline" remained unchanged in its recently revised version. *See* CMS, *Listing of Species in the Appendices of the Convention*, ¶ 3, UNEP/CMS/Resolution 3.1 (Rev. COP12) (Oct. 2017). *See generally* Bowman, Davies & Redgwell, *supra* note 8, at 542.

317. CMS, Res. 10.10, ¶¶ 3, 5–6, UNEP/CMS/Resolution 10.10 (Nov. 20–25, 2011) (referring to the "parties" in general).

318. CMS, Res. 10.3, ¶¶ 2–4, 6, UNEP/CMS/Resolution 10.3 (Nov. 20–25, 2011).

319. *See* CMS, Res. 11.26, ¶ 1, UNEP/CMS/Resolution 11.26 (Nov. 4–9, 2014) (and the "Programme of Work on Climate Change and Migratory Species" annexed thereto).

320. CMS, Res. 7.2, ¶¶ 2, 3, UNEP/CMS/Resolution 7.02 (Sep. 18–24, 2002).

321. *See supra* note 309.

322. Agreement on the Conservation of African-Eurasian Migratory Waterbirds, Aug. 15, 1996, 2365 U.N.T.S. 203 [hereinafter AEWA]. For the most recent version of the agreement's text, adopted by the AEWA Meeting of the Parties, 6th Sess. (Nov. 9–14, 2015), see http://www.unep-aewa.org/en/documents/agreement-text.

323. *Id.* art. I(1), annex 1. "Waterbirds" in this sense are defined as "those species of birds that are ecologically dependent on wetlands for at least part of their annual cycle, have a range which lies entirely or partly within the Agreement Area and are listed in Annex 2 to this Agreement." *Id.* art. I(2)(c), annex 2.

Article III, together with the specific actions determined in the Action Plan."[324] It is evident from the agreement that the jurisdictional limitations contained in Articles II to IV and the "agreement area" are distinct concepts.[325] The latter's importance lies in the definition of a specific area that is not necessarily convergent with states parties' territories or the law of the sea concept of sea zones, and which is primarily determined by reference to ecological or other scientific criteria.[326] AEWA is thus a prime example of an MEA departing from a statist conception of the territorial scope of treaty obligations and instead establishing a particular area within which the convention's protective obligations need to be implemented.[327] Keeping in mind the formulation of Article II(1), states parties thus have obligations to take measures within their "national jurisdiction" for the protection of waterbirds in the *entire* agreement area. Arguably, this entails obligations to take into account the extraterritorial impacts on waterbirds in the agreement area, for example in the context of domestic policy decisions on the deployment of renewable energy technologies[328] or the design of power lines.[329]

A rare example of an MEA specifying a particular area of agreement that is entirely composed of terrestrial areas is the 1991 Alpine Convention.[330] The convention applies to "the Alpine region" which includes, for some states parties, their entire state territory, whereas for other states parties only parts of their respective territories come within the territorial scope of the convention.[331]

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324. *Id.* art. II(1) (emphasis added). For further restrictions to measures within the state's *territory*, see *id.* art. III(2)(c); annex 3, ss. 2.1.1(a), 2.5.3, 3.1.1 and 3.2.3.

325. *Id.* art. XIII(1) (inviting range states of migratory species to become parties, even if none of the areas under their jurisdiction fall within the "agreement area" defined in annex 1).

326. This is not to say that the agreement area as defined in AEWA is solely determined by scientific criteria. Naturally, negotiators may have tried to include or to carve out certain areas due to political concerns. Still, the point that is important here is that MEAs may indeed go beyond a strictly territorial understanding of treaty obligations.

327. This ecological orientation is also visible in the definition of the "waterbirds" protected by the agreement. *See* AEWA, *supra* note 322, art. I(2)(c). In agreements like AEWA, the scope *ratione materiae* and the scope *ratione loci* are thus closely related.

328. *See* AEWA, Res. 5.16, UNEP/AEWA/MOP5/Res. 5.16 (May 14–18, 2012); AEWA, Res. 6.11, ¶ 1.1, UNEP/AEWA/MOP6/Res. 6.11 (Nov. 9–14, 2015) (urging parties to apply Strategic Environment Assessment and Environment Impact Assessment procedures "involving assessment of impacts on protected areas and other sensitive areas of importance to migratory waterbirds, as appropriate, when planning the use of renewable energy technologies").

329. *See* AEWA, Res. 5.11, ¶ 1.4, UNEP/AEWA/MOP5/Res. 5.11 (May 14–18, 2012) (calling upon states parties to "design the location, route and direction of power lines on the basis of national zoning maps and avoid, wherever possible, construction along major migration flyways and in habitats of conservation importance, where there is a likelihood of significant effects on waterbirds").

330. Convention on the Protection of the Alps, Nov. 7, 1991, 1917 U.N.T.S. 135 [hereinafter Alpine Convention]. The convention is supplemented by several protocols, reprinted in PERMANENT SECRETARIAT OF THE ALPINE CONVENTION, ALPINE CONVENTION REFERENCE GUIDE: ALPINE SIGNALS 1, 65–168 (2d ed. 2010).

331. *See* Alpine Convention, *supra* note 330, art. 1(1), annex; *see also* ALPINE SIGNALS 1, *supra* note 330, at 21–40. An exceptional role is played by the EU, which is also a party to the Alpine Convention. *Id.* at 16.

6. *Protection of the Marine Environment and Marine Species*

A number of MEAs[332] have also sought to respond to challenges affecting marine species. As in the just-mentioned example of AEWA, treaties explicitly dedicated to the conservation of marine species usually define a specific "agreement area"[333] and sometimes even seek to address impacts resulting from activities outside these specific areas of agreement.[334] The inclusion of such a specified area of agreement thus attracts, again, an extensive reading of state party obligations extending, at least in principle, to the marine species protected by the respective treaty in its entire area of agreement.[335] Notwithstanding this potentially far-reaching conception of the territorial reach of protective obligations, some MEAs explicitly reaffirm the rights and obligations of states under the law of the sea.[336] It would thus be difficult to assume that the environmental agreements could amend or even overcome the maritime jurisdiction rules provided for in the law of the sea.[337] Moreover, MEAs regularly reiterate, either explicitly[338] or implicitly,[339] the requirement that states enjoy "sovereignty" or "jurisdiction" over the relevant areas or ships for the implementation of specific obligations. The 1946 International Convention for the Regulation of Whaling ("ICRW") is noteworthy in that it does not generally employ the concept of a specific area of agreement but rather applies to all "factory ships, land stations, and whale catchers" under the jurisdiction of states parties and to "all waters in which whaling is prosecuted by such factory ships, land sta-

332. Note again that law of the sea instruments will be left aside. *See supra* note 1.

333. *See, e.g.*, Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, art. I(1)(a), Nov. 24, 1996, 2183 U.N.T.S. 303 [hereinafter ACCOBAMS] ("geographic scope" referred to as the "Agreement area"); Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas, art. 1(2)(b), Mar. 17, 1992, 1772 U.N.T.S. 217 [hereinafter ASCOBANS] ("Area of the agreement"); Agreement on the Conservation of Seals in the Wadden Sea, art. II(b), Oct. 16, 1990, 2719 U.N.T.S. 263 [hereinafter WSSA] ("Agreement area").

334. *See* WSSA, *supra* note 333, art. VII(3) (requiring states parties to also "have regard to the protection of habitats from adverse effects resulting from activities carried out outside the Agreement Area.").

335. *See, e.g.*, *id.* art. VI(1) (obligations regarding the taking of seals); *id.* art. VII(1) (duty to "pay due regard to the necessity of . . . ensuring the preservation of areas which are essential to the maintenance of the vital biological functions of seals"); *id.* art. VII(2) (duty to "preserve habitats and seals pre-sent from undue disturbances or changes resulting, directly or indirectly from human activities"); *id.* art. VII(4) (duty to explore restoration of degraded habitats).

336. *See, e.g.*, ACCOBAMS, *supra* note 333, art. I(1)(b); *cf.* ASCOBANS, *supra* note 333, art. 8(2); WSSA, *supra* note 333, art. XII.

337. *Cf.* Nele Matz-Lück & Johannes Fuchs, *The Impact of OSPAR on Protected Area Management Beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?* 49 MARINE POL'Y 155, 158 (2014).

338. *See* ACCOBAMS, *supra* note 333, arts. I(3)(g), II(3), annex 2 ¶ 1; ASCOBANS, *supra* note 333, arts. 1(2)(f), 2(2).

339. The operative part of the WSSA does not contain express jurisdictional limitations. *See, e.g.*, WSSA, *supra* note 333, art. VI (regarding taking); *id.* art. VII (regarding habitat protection); *id.* art. VIII (regarding pollution control). However, the preamble does make reference to the improvement of seals' "conservation status through concerted action on the part of the States that *exercise jurisdiction over the range of that population*" (emphasis added). *Id.* pmbl.

tions, and whale catchers."[340] Still, under Article V(1)(c), the International Whaling Commission ("IWC") may amend the Schedule attached to the ICRW[341] so as to designate "sanctuary areas."[342] It has done so twice and designated the "Indian Ocean Sanctuary" and the "Southern Ocean Sanctuary," wherein all commercial whaling is banned.[343] This resembles again the idea of specifying a particular area, detached from national territories or maritime zones, in which states parties' obligations need to be implemented. The latter sanctuary was also at issue in the *Whaling in the Antarctic* dispute before the ICJ, wherein the court had to consider whether a Japanese whaling programme ("JARPA II") fell within the permission to take whales "for purposes of scientific research" under Article VIII(1) of the ICRW.[344] While Japan had lodged an objection to the Southern Ocean Sanctuary with a view to minke whales,[345] the court found that JARPA II did not benefit from the provision of Article VIII(1) and constituted a violation of the ban on commercial whaling in the sanctuary with a view to fin whales.[346]

Generalist MEAs that are not expressly focused on the marine environment usually do not contain an express requirement for areas or ships to be subject to the "jurisdiction" of states parties. The general obligations under environmental agreements like the Bern Convention, the WHC, or the CMS, already discussed above, thus appear to be readily applicable to marine species and their habitats in maritime areas.[347] While the substantive obligations may have, again, a potentially extensive territorial reach, recent resolutions adopted by the respective treaty bodies have sometimes resorted to the "jurisdiction" concept in order to delimit state obligations in the con-

340. International Convention for the Regulation of Whaling, art. I(2), Dec. 2, 1946, 161 U.N.T.S. 72 [hereinafter ICRW]. While this wording is seemingly very far-reaching, it has been disputed whether the ICRW not only applies to high seas areas, but also to areas within maritime zones of states parties. *See* BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 155 (observing that most states parties now appear to accept that the ICRW also applies "in their respective maritime zones").

341. *See* ICRW, *supra* note 340, art. I(1). The most recent version of the schedule was amended by the IWC at its 66th Meeting (Oct. 2016). Int'l Whaling Comm'n, *International Convention for the Regulation of Whaling, 1946: Schedule* [hereinafter ICRW Schedule].

342. ICRW, *supra* note 340, art. V(1)(c).

343. ICRW Schedule, *supra* note 341, ¶ 7(a) and (b); *see also* MALGOSIA FITZMAURICE, WHALING AND INTERNATIONAL LAW 179–181 (2015); BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 170–71. Specifically on the latter sanctuary, see also Alexander Gillespie, *The Southern Ocean Sanctuary and the Evolution of International Environmental Law*, 15 INT'L J. MARINE & COASTAL L. 293 (2000).

344. Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. 226, ¶¶ 48, 120 (Mar. 31).

345. ICRW Schedule, *supra* note 341, ¶ 7(b) n.**; *see generally*, ICRW, *supra* note 340, art. V(3) (on the objections procedure).

346. Whaling in the Antarctic, *supra* note 344, ¶ 233 and *dispositif*, ¶ 5.

347. *Cf.* Arie Trouwborst & Harm M. Dotinga, *Comparing European Instruments for Marine Nature Conservation: The OSPAR Convention, the Bern Convention, the Birds and Habitats Directives, and the Added Value of the Marine Strategy Framework Directive*, 20 EUR. ENERGY & ENVT'L. L. REV. 129, 133, 135–36, 145 (2011) (noting, in the context of the Bern Convention, that while that convention does not expressly refer to marine waters, its "broad objectives and substantive provisions" and the fact that several marine species are included in its appendices indicates that its provisions can equally apply to marine species); Jeff A. Ardron et al., *The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can be Achieved Using Existing International Agreements?*, 49 MARINE POL'Y 98, 102 (2014) (with a view to the WHC).

text of marine debris,[348] climate change,[349] and underwater noise.[350] By contrast, other resolutions appear to bypass the "jurisdiction" concept and focus instead on the mere impacts that states are called upon to avoid.[351]

7. *Regulation of Trade in Endangered Species*

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")[352] seeks to comprehensively govern (international) trade in specimens covered by the three appendices to the convention.[353] More specifically, CITES subjects trade in species threatened with extinction (Appendix I) to "particularly strict regulation" and allows it only "in exceptional circumstances";[354] regulates trade in species that may become threatened with extinction unless trade in specimens is restricted (Appendix II);[355] and regulates trade in species that a state party subjects to its own regulations and for which it requires the cooperation of other states parties (Appendix III). The convention's regulatory structure apportions responsibility between the management authorities and scientific authorities of the "state of export" and the "state of import."[356] While CITES does not provide a definition of "import" and "export" that would make a territorial limitation explicit, some of its substantive provisions appear to follow the logic of duties limited to states parties' respective territories.[357]

348. For example, states parties are encouraged to "include the prevention and management of marine debris in relevant national legislation" and devise national action plans for "waters within their jurisdiction." *See* CMS, Res. 10.4, *supra* note 5, ¶¶ 5, 6; CMS, Res. 11.30, pmbl. ¶ 2, operative ¶ 18, UNEP/CMS/Resolution 11.30 (Nov. 4–9, 2014).

349. *See* CMS, Res. 10.19, ¶ 1, UNEP/CMS/Resolution 10.19 (Nov. 20–25, 2011) (on migratory species conservation in the light of climate change).

350. *See* CMS, Res. 9.19, ¶ 1, UNEP/CMS/Resolution 9.19 (Dec. 1–5, 2008) (on anthropogenic marine/ocean noise impacts on cetaceans and other biota); *see also* CBD Decision XII/23, ¶ 3, U.N. Doc. UNEP/CBD/COP/DEC/XII/23 (Oct. 17, 2014).

351. *See* CMS, Res. 10.24, ¶ 3, UNEP/CMS/Resolution 10.24 (Nov. 20–25, 2011) (in the context of anthropogenic underwater noise); ACCOBAMS Res. 4.17, ¶ 4, UNEP/ACCOBAMS/Resolution 4.17 (Nov. 9–12, 2010); ASCOBANS Res. 6.2, ¶ 3, UNEP/ASCOBANS/Resolution 6.2 (Sept. 16–18, 2009); *see also* CMS, Res. 11.20, UNEP/CMS/Resolution 11.20 (Nov. 4–9, 2014) (migratory sharks and rays); CMS, Res. 11.27, ¶ 3.3, UNEP/CMS/Resolution 11.27 (Nov. 4–9, 2014) (renewable ocean energy); CMS, Res. 10.14, ¶ 4, UNEP/CMS/Resolution 10.14 (Nov. 20–25, 2011) (risk of bycatch from gillnet fisheries); AEWA Res. 5.16, ¶ 2, UNEP/AEWA/Resolution 5.16 (May 14–18, 2012) (wind farms).

352. *Supra* note 183.

353. *See* CITES, *supra* note 183, art. II(4); *see also id.* art. I(c) (for the comprehensive definition of "trade" under the convention).

354. *Id.* arts. II(1), III.

355. *See id.* arts. II(2)(a), IV; *see also id.* art. II(2)(b) (further providing that "other species" are included in Appendix II as being "subject to regulation in order that trade in specimens of certain species referred to in [art. II(2)(a)] may be brought under effective control").

356. For definitions, see *id.* art. I(f)–(g).

357. *E.g.*, *id.* arts. III(2)(b), IV(2)(b) (on the assessment by the state of export's Management Authority as to whether the specimen was "obtained in contravention of the laws of that State"); *see also id.* art. III(3)(c), (5)(c) (on the assessment by the state of import / introduction's Management Authority that the specimen "is not to be used for primarily commercial purposes"). The territorial limitation of the latter obligation is underlined by CITES Res. Conf. 5.10 (Rev. CoP15), ¶ 4 (Mar. 13–25, 2010) (noting that the term commercial use "concern[s] the intended use of the specimen of an Appendix-I species in the country of import").

However, the fact that duties under CITES can also extend beyond the territory of states parties is already indicated by the extension of the Appendix III category to species that are subject to regulation within a state party's "jurisdiction."[358] Even more importantly, the CITES notion of "trade" also encompasses "introduction from the sea,"[359] defined as the "transportation into a State of specimens of any species which were taken in the marine environment *not under the jurisdiction of any State*."[360] While the category of "introduction from the sea" extends CITES to cases where the taken marine specimen are transported into the ports of the vessel's flag state, the provisions on "export" and "import" apply if the marine specimen taken are transported into ports other than those of the state in which the vessel is registered.[361] Consequently, CITES does not apply where marine specimen are taken in areas under national jurisdiction and transported into the ports of the vessel's flag state, as mere domestic trade is excluded from its scope. By contrast, CITES' provisions on import and export of Appendix I and II species apply to the transport of such specimen into foreign ports. Finally, another extraterritorial component is visible in the duty of scientific authorities to make a "non-detriment finding" for the species concerned.[362] This finding is not limited to the survival of the species within the state concerned, but focuses on the survival of the species "throughout its range at a level consistent with its role in the ecosystems in which it occurs."[363]

D. In Particular: MEAs Including a "Jurisdiction Clause"

Of particular interest in the present context are two MEAs that include explicit provisions on their "(jurisdictional) scope." The first example, and the forerunner in the inclusion of such a clause, is the 1992 Convention on Biological Diversity ("CBD").[364] Article 4 sets out the "jurisdictional scope" of the convention and provides that

358. CITES, *supra* note 183, art. II(3); *see also id.,* art. XVI(1).

359. *Id.* art. I(c).

360. *Id.* art. I(e) (emphasis added); *see also* CITES Res. Conf. 14.6 (Rev. CoP16), ¶ 1 (Mar. 3–14, 2013) (referring to "marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the [LOSC]"). While a number of marine species are now listed under CITES, this has met resistance by some states parties. *See* Ardron et al., *supra* note 347, at 101–02.

361. CITES Res. 14.6, *supra* note 360, ¶ 2(b).

362. See, for Appendix I species, CITES, *supra* note 183, art. III(2)(a) (state of export); *id.* art. III(3)(a) (state of import); *id.* art. III(5)(a) (state of introduction). See, for Appendix II species, *id.* art. IV(2)(a) (state of export); *id.* art. IV(6)(a) (state of introduction).

363. CITES Res. Conf. 16.7 (Rev. CoP17), ¶ 1(a)(ii), a(ix)(C) (Sept. 24–Oct. 4, 2016) (providing that "the non-detriment finding is based on resource assessment methodologies which may include, but are not limited to, consideration of: . . . population structure, status and trends (in the harvested area, nationally and internationally)"); *cf. also* CITES, *supra* note 183, art. IV(3).

364. *Supra* note 10. A similar provision in the drafts to the Cartagena Protocol on Biosafety to the CBD (Jan. 29, 2000), 2226 U.N.T.S. 208, namely draft Article 32, was finally deleted in favor of Article 4 on the (substantive) "scope" of the Protocol. *See* CBD SECRETARIAT, THE CARTAGENA PROTOCOL ON BIOSAFETY: A RECORD OF THE NEGOTIATIONS 111 (2003). On the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the

> [s]ubject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:
>
> (a) In the case of *components* of biological diversity, in *areas* within the limits of its *national jurisdiction*; and
>
> (b) In the case of *processes and activities*, regardless of where their effects occur, *carried out* under its *jurisdiction or control*, within the area of its *national jurisdiction* or *beyond the limits of national jurisdiction*.[365]

Although general literature on the CBD is now abundant, this provision has often remained somewhat neglected. If discussed, it is usually considered together with Article 5, the general provision on cooperation between parties.[366] While there is no general elaboration by the CoP upon the content and implications of Article 4, its impact is visible in some of the convention's areas of work: Problems regarding the scope of the convention have been discussed, for example, during the elaboration of the "international regime" for access and benefit sharing which eventually led to the adoption of the Nagoya Protocol.[367] The issue of the jurisdictional scope of the convention also arose in the context of protected areas and other area-based conservation measures under Article 8(a) to (c) and the so-called Aichi Biodiversity Target 11.[368] Most prominently, the delimitation of the territorial reach of the convention has become acute in the context of obligations relating to "areas beyond national jurisdiction,"[369] for example with a view to the establishment of marine protected areas ("MPAs") in such areas.[370]

CBD (Oct. 29, 2010), CBD Decision X/1, Annex I, U.N. Doc. UNEP/CBD/COP/DEC/X/1 (Oct. 29, 2010) [hereinafter Nagoya Protocol], see *infra* note 367.

365. CBD, *supra* note 10, art. 4 (emphases added).

366. *See* Birnie, Boyle & Redgwell, *supra* note 175, at 620–21; Lyle Glowka et al., A Guide to the Convention on Biological Diversity 27–28 (1994).

367. For an impression of the different options discussed at the final CoP meeting before the adoption of the Protocol, see CBD Decision IX/12, at 6–8, U.N. Doc. UNEP/CBD/COP/DEC/IX/12 (Oct. 9, 2008). The final text of the Nagoya Protocol leaves aside most of these issues and takes a quite conservative approach, limiting its scope to resources utilized within a state party's jurisdiction. *See* Nagoya Protocol, *supra* note 364, arts. 3, 15(1).

368. In that context, it was noted that "effective area-based conservation measures may also include restrictions on activities that impact on biodiversity, which would allow for the safeguarding of sites in areas beyond national jurisdiction in a manner consistent with the jurisdictional scope of the Convention as contained in Article 4." *See* CBD Executive Secretary, *Strategic Plan for Biodiversity 2011–20: Technical Rationale for the Goals and Aichi Biodiversity Targets*, at 15, U.N. Doc. UNEP/CBD/COP/10/INF/12/Rev.1 (Mar. 14, 2011). The "Aichi Biodiversity Targets" were adopted by CBD Decision X/2, U.N. Doc. UNEP/CBD/COP/DEC/X/2 (Oct. 29, 2010).

369. Often abbreviated as "ABNJ."

370. On the CBD approach to marine and coastal biodiversity in general and MPAs more specifically, see, e.g., CBD Decision II/10 (Nov. 6–17, 1995); CBD Decision IV/5 (May 4–15, 1998); CBD Decision VII/5, ¶¶ 29, 31 (Apr. 13, 2004); CBD Decision VIII/24, ¶ 4 (June 15, 2006); CBD Decision IX/20, ¶¶ 14, 16, 18 (Oct. 9, 2008); CBD Decision X/29, ¶¶ 15, 21–24, 33 (Oct. 18–29, 2010); CBD Decision XII/22 and Decision XII/23 (Oct. 6–17, 2014); CBD Decision XIII/12 (Dec. 17, 2016). The CBD CoP now appears to have generally acknowledged the "central role" of the U.N. General Assembly

While Article 4(a) clearly extends the scope of the convention to MPAs in maritime areas within national jurisdiction,[371] the issue is less clear for areas beyond national jurisdiction, e.g., on these high seas, as Article 4(b) merely refers to "processes and activities" and does not appear to encompass area-based conservation measures.[372] The issue is particularly delicate as its resolution has considerable institutional repercussions.[373] The current development appears to tend towards a further development of the legal regime governing MPAs in the framework of the Law of the Sea Convention ("LOSC").[374] In effect, the rather restrictive approach taken by Article 4(b)[375] prevents the convention from developing its full potential in this regard. The convention organs could be most useful providers of substantive guidance in a field where there is little guarantee that important biodiversity concerns will be adequately addressed through the LOSC framework.

The second example is the 2003 African Convention on the Conservation of Nature and Natural Resources (Maputo Convention), which only entered

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for issues "relating to the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction" and to limit itself to providing scientific and technical input. *Id.* pmbl. ¶ 2, operative ¶ 3. Nonetheless, the CBD CoP has continued its work on criteria for "ecologically or biologically significant (marine) areas" ("EBSA"). *See* CBD Decision XI/17 (Dec. 5, 2012); Decision XIII/12, ¶ 10 (Dec. 17, 2016). Note also that a similar issue has arisen for the use of genetic resources of the deep seabed, which will be left aside.

371. *See also* Matz-Lück & Fuchs, *supra* note 337, at 158.

372. On divergent positions amongst states parties to the CBD, and the LOSC, see Kristina M. Gjerde & Anna Rulska-Domino, *Marine Protected Areas Beyond National Jurisdiction: Some Practice Perspectives for Moving Ahead*, 27 Int'l J. Mar. & Coastal L. 351, 360–61 (2012).

373. This concerns not only the relationship between the CBD and the LOSC, but also with instruments like the Convention for the Protection of the Marine Environment of the North-East Atlantic (Sept. 22, 1992), 2354 U.N.T.S. 64. *See, e.g.*, Matz-Lück & Fuchs, *supra* note 337, at 158–62.

374. For the ongoing work in the context of the LOSC and under the auspices of the U.N. General Assembly, see G.A. Res. 69/292, ¶ 1, U.N. Doc. A/RES/69/292 (July 6, 2015) (deciding to "develop an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction") (internal references omitted), and the recent report of the Preparatory Committee established by that resolution. *See* Preparatory Committee by the Division for Ocean Affairs and the Law of the Sea, *Report of the Preparatory Committee Established by General Assembly Resolution 69/292: Development of an International Legally Binding Instrument Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* (July 21, 2017), http://www.un.org/depts/los/biodiversity/prepcom_files/Procedural_report_of_BBNJ_PrepCom.pdf.

375. *Cf. Experience of Other International Instruments and Forums as Regards Damage Suffered in Areas Beyond National Jurisdiction*, ¶ 17, U.N. Doc. UNEP/CBD/BS/WG-L&R/3/INF/3 (Feb. 6, 2007) (observing that "[b]ecause [parties] have no sovereignty or jurisdiction over the resources [in ABNJ], Parties have *no direct obligation* with regard to the conservation and sustainable use of *specific components* of biological diversity in areas beyond the limits of national jurisdiction") (emphasis added); *see also* Ardron et al., *supra* note 347, at 100, 102, 104 (CBD's competence "strictly limited" in the context of areas beyond national jurisdiction); Matz-Lück & Fuchs, *supra* note 337, at 158 (designation of MPAs in ABNJ "outside the scope of the CBD"); Sunil Kr. Agarwal, *Legal Issues in the Protection of Marine Biological Diversity Beyond National Jurisdiction*, 11 Maritime Aff. 84–85, 85 n.3 (2015); María José Ortiz, *Aichi Biodiversity Targets on Direct and Indirect Drivers of Biodiversity Loss*, 13 Envtl. L. Rev. 100, 104 (2011) (noting a "restrictive interpretation"); Lyle Glowka, *Genetic Resources, Marine Scientific Research and the International Seabed Area*, 8 Rev. Eur. Comp. & Int'l Envtl. L. 56, 60 (1999) (noting disagreement amongst the parties).

into force in mid-2016.[376] The Maputo Convention expressly sets out its "scope" in Article I, a provision that has, however, attracted only minor attention in the (rare) literature on the convention.[377] The provision reads as follows:

> This Convention shall apply
>
> 1. to all *areas* which are within the limits of *national jurisdiction* of any Party; and
>
> 2. to the *activities* carried out under the *jurisdiction or control* of any Party within the area of its *national jurisdiction* or *beyond the limits of its national jurisdiction*.[378]

Article 4 CBD and Article I Maputo Convention are broadly similar in that they each set out two clauses for different categories of situations. The first clauses relate to spatial or physical features ("area" or "biological components") that are within the "national jurisdiction" of the state party. The second clauses relate to "processes" and "activities" carried out under the "jurisdiction or control" of a state party "within the area of its national jurisdiction or beyond the limits of its national jurisdiction," regardless of where the effects occur (Article 4(b) CBD). When compared to human rights treaties, this language expressly points to the inclusion of activities that do not come within the "jurisdiction" of states in the traditional sense but are merely subject to their "control." Compared to the no-harm rule, a crucial difference lies in the omission of the necessary causation within an *area* subject to the jurisdiction or control by the state.[379] This mirrors a development already seen in the ESC rights context, namely a shift from jurisdiction over territory and individuals to jurisdiction over harmful sources/activities.[380] How this development can be used, in a more general context, will be discussed further below.[381]

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376. Maputo Convention, *supra* note 9. On the preceding 1968 Algiers Convention, see *supra* note 297. Notwithstanding the entry into force of the revised African Convention, it does not appear (as of November 2017) that the institutions now provided for in the convention text (unlike in the 1968 Algiers Convention) have already become operational. *See* Maputo Convention, *supra* note 9, art. XXVI (Conference of the Parties); *id.* art. XXVII (Secretariat).

377. *Cf.* International Union for the Conservation of Nature (IUCN), An Introduction to the African Convention on the Conservation of Nature and Natural Resources: Envtl. Pol'y & L. Paper No. 56 (2004); Bolanle T. Erinosho, *The Revised African Convention on the Conservation of Nature and Natural Resources*, 21 Afr. J. Int'l & Comp. L. 378 (2013); Hennie Strydom, *Introduction to Regional Environmental Law of the African Union, in* Regional Environmental Law, *supra* note 297, 21. *But see* Bowman, Davies & Redgwell, *supra* note 8, at 268 (briefly dealing with Article I).

378. Maputo Convention, *supra* note 9, art. I (emphases added).

379. *Cf.* the ILC's definition in the *Draft Articles on Transboundary Harm*, which appears to include such a requirement. *Draft Articles on Transboundary Harm*, *supra* note 176, art. 2(c) and cmt. 9; *see also supra* note 187.

380. *Supra* note 131 and accompanying text.

381. *See infra* Section IV.F.4.

E. (Potential) Elements of a General IEL Framework for the Extraterritorial Application of MEAs

Having outlined traces of an extraterritorial application in the practice of a number of MEAs, one can also enquire as to whether environmental agreements, just like human rights treaties,[382] exhibit certain general characteristics that might shed light on their potential for an extraterritorial application.

1. *Relationship with the Broader Normative Context of IEL*

As noted above, the customary rules on transboundary harm form one of the central elements of the existing corpus of IEL. This general recognition by states that transboundary harm is to be prevented, regulated or controlled, can provide something like a functional (positivist) foundation for an extraterritorial application of MEAs, and may also inform the interpretation of MEAs as another "relevant rule of international law applicable in the relations between the parties," within the meaning of Article 31(3)(c) VCLT.[383] In addition, there are two other normative elements of IEL that arguably support an increasing extraterritorial application of MEAs. First, the concept of "common concern" is now employed in an increasing number of MEAs dealing with global environmental concerns.[384] While its legal content is far from being fully settled, it is usually understood as indicating that a certain environmental concern tackled by a treaty transcends the mere domestic affairs of states parties and becomes a legitimate object of international scrutiny.[385] One might argue that this "concern" of all states parties also entails an element of common responsibility[386] of states for the management of resources, irrespective of where they are located.[387] Second, in close similarity to the above-mentioned examples of human trights treaties,[388] MEAs now regularly include duties to provide financial and/or technical

382. *See* the discussion *supra* Section III.B.

383. VCLT, *supra* note 21, art. 31(3)(c).

384. *See also* FCCC, *supra* note 186, pmbl. ("change in the Earth's climate and its adverse effects"); CBD, *supra* note 10, pmbl. ("conservation of biological diversity"); ACCOBAMS, *supra* note 333, pmbl. (conservation of cetaceans); *see also* AT, *supra* note 227, pmbl.; Madrid Protocol, *supra* note 230, pmbl. ("interest" of mankind).

385. *See generally* Jutta Brunnée, *Common Areas, Common Heritage and Common Concern*, *in* Oxford Handbook of International Environmental Law 550, 564–67 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007); Michael Bowman, *Environmental Protection and the Concept of Common Concern of Mankind*, *in* Research Handbook on International Environmental Law 493, 501–11 (Malgosia Fitzmaurice, David M. Ong & Panos Merkouris eds., 2010).

386. Common concern is thus also linked to the notion of "common but differentiated responsibilities." *See* Brunnée, *supra* note 385, at 566 (arguing that common concern is "the flipside" of common but differentiated responsibilities).

387. *Cf.* the above-mentioned example of the Ramsar Convention, *supra* note 291; Bowman, *supra* note 191, at 16; *see also* Sara L. Seck, *Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations*, 3 Trade, L. & Dev. 164, 180–81 (2011).

388. *Supra note* 109 and accompanying text.

assistance.[389] The proper legal conception of such stipulations has, however, remained contentious.[390] Whatever the stance taken on this issue, if included, such provisions can be considered as an additional indication of a potential extraterritorial reach of the respective agreements. In light of these related normative developments of IEL, the core idea of an extraterritorial application of MEAs might be formulated in the following terms: the environmental goods protected by an MEA (*ratione materiae*) should not be impacted upon by any act or omission of states parties, irrespective of where such environmental goods are located.[391]

2. *Object and Purpose of MEAs*

It was argued above that the assertion of a special nature (or "object and purpose") of human rights treaties was central to the emergence of the human rights approach to extraterritoriality. A major difference of MEAs lies in the fact that they do not focus on the establishment of individual rights.[392] While it would be difficult to understand human rights in any other manner than as a rights-based incursion into national sovereignty, the traditional rules of IEL arguably sought to defend this very sovereignty from transboundary harm.[393] The central aspect of human rights law, namely the establishment of rights for individuals that may be located outside the state party's territory, is thus missing in the MEA context and renders it more difficult to rely on the "object and purpose" of MEAs in order to support their extraterritorial application.

At the same time, there is much to suggest that MEAs come equally close to the idea of treaties pursuing "collective interests" and thus setting out obligations towards all other states parties (*erga omnes partes*), compliance with which lies in the interest of the entire community of states parties.[394] Similarly, in the context of standing for claims of state responsibility, it has been discussed whether violations of MEA obligations should entitle all

389. *See, e.g.*, FCCC, *supra* note 186, art. 4(7); Kyoto Protocol, *supra* note 213, art. 11; Paris Agreement, *supra* note 214, art. 9; CBD, *supra* note 10, art. 20.

390. *See* Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 510–11 (1993) (on the question whether art. 4(7) of the FCCC establishes an actual legal duty on the part of Annex I parties).

391. Sornarajah might have something similar in mind when deriving a general duty to control the activities of nationals abroad from the no-harm rule (although he does not make a connection to MEAs). SORNARAJAH, *supra* note 153, at 166–67.

392. *But see* (Aarhus) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter, June 25, 1998, 2161 U.N.T.S. 447 (establishing certain procedural rights to information (Article 4), public participation (Articles 6–8), and access to justice (Article 9), though not always drafted in express rights language).

393. *See, e.g.*, Nollkaemper, *supra* note 51, at 256–57.

394. *See* Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?* 14 EUR. J. INT'L L. 907, 909–25 (2003) (on "collective" versus "bilateral" treaty obligations in the WTO context); *Articles on Responsibility of States for Internationally Wrongful Acts*, art. 48, notably cmt. 7, (2001) 2 Y.B. Int'l L. Comm'n 26 [hereinafter ILC Articles on State Responsibility].

other states parties to invoke responsibility.[395] While these characterizations, as such, cannot answer whether individual states parties have extraterritorial obligations, MEAs further resemble human rights treaties when it comes to the creation of a specific "treaty area." Just like the "*espace juridique*" concept in the jurisprudence of the ECtHR,[396] MEAs regularly create a legal space in which the protective provisions need to be implemented. MEAs even go beyond human rights treaties in that their "legal space" is not necessarily (merely) coextensive with the states parties' respective territories, but may even extend to a specifically defined "area of agreement" that follows ecological criteria.[397] In this sense, the specific collective interest of states parties to MEAs lies in the definition of a certain "portion of the globe"[398] in which the relevant environmental concerns (scope *ratione materiae*) need to be protected, conserved, or preserved. This would appear to indicate an even more de-territorialized nature of obligations.

3. *The Presence (or Absence) of "Jurisdiction Clauses" in MEAs*

As was observed above, it is not a general requirement for a treaty to contain a jurisdiction (or similar) clause in order to define its (extra-)territorial scope of application.[399]

The discussion of ESC rights highlights that the absence of such a clause can be interpreted in three ways: as an indication that there is (i) an implicit restriction to activities/areas within the state's territory proper; (ii) an implicit restriction that follows the lines of a jurisdiction concept; or (iii) no specific territorial limitation at all.[400] While a strict reliance on the traditional notion of sovereignty may lead to solution (i), such an approach would be of little utility in the MEA context. A reasoning along the lines of solution (ii) is visible, for example, in the *Pulp Mills* case, wherein the ICJ read a "jurisdiction and control" element into the relevant provision of Article 41 of the River Uruguay Statute.[401] Most ambitiously, a recognition of the in-

395. The ILC Articles on State Responsibility, *supra* note 394, distinguish between (i) the invocation of responsibility by "injured states," which may include violations of MEAs in case "integral" or "interdependent" obligations are violated (*id.* art. 42(b)(ii) and cmt. 12: referring to pollution in the high seas in violation of LOSC art. 194 that "particularly impact[s]" upon one or several states); and (ii) the invocation of responsibility by non-injured states, which will regularly encompass violations of MEA obligations but does not allow for the full scale of responsibility claims (*id.*, art. 48(1)(a), (2) and cmt. 7). For the preceding discussion in the ILC, see, for example, *Third Report on State Responsibility* (James Crawford), ¶¶ 66–118, notably 106(b), U.N. Doc. A/CN.4/507 and Add. 1–4 (2000).

396. *Supra* note 124. Note that the *espace juridique* concept is double-edged. While it supports an extraterritorial application *within* this treaty-specific legal space, it may also be relied upon to exclude impacts *outside* this area from extraterritorial obligations. *Cf.* Bankovic, *supra* note 38, ¶ 80.

397. *E.g.*, the Antarctic treaties (*supra* Part IV.C.3), the CMS daughter agreements (*supra* notes 327, 333); *see also supra* note 326.

398. To adapt the *Island of Palmas* arbitrator's description of territorial sovereignty to the sphere of treaties. *Cf. supra* note 42.

399. *See supra* note 73 and accompanying text.

400. *See supra* Section III.C.1.

401. Pulp Mills, *supra* note 176, ¶ 197. The court understood "the obligation to 'preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures' [as]

terdependence and (non-anthropocentric) value of the environmental goods protected by an MEA (*ratione materiae*) would call for solution (iii). If it is recognized, for example, that migratory species have value, that they live in an interdependent relationship with other species, ecosystems, and habitats, and that no meaningful distinction can be made regarding the "nationality" or "territoriality" of such species, a de-territorialized understanding of the territorial reach of MEAs would indeed appear most fitting. The advantages of models (ii) and (iii) are further underlined by the above overview of developments in MEA treaty practice, which highlights that even treaties that do not contain an express jurisdiction clause are only very rarely interpreted as being strictly limited to areas and activities within states parties' territories.

F. *In What Constellations Can MEAs Apply Extraterritorially, and Which Extraterritorial Obligations Arise?*

Based on the above examples and the general elements of an IEL framework for the extraterritorial application of MEAs, a cautious attempt shall be made to put together the various elements introduced above and outline different constellations in which MEAs may apply extraterritorially, and if so, which obligations arise for states parties in the respective contexts.

1. *Areas and Activities Within the Territory or "Jurisdiction" of a State Party*

The application of MEA obligations to domestic areas and activities is rather uncontentious.[402] Most MEAs apply, in some way, to areas (such as habitats or ecosystems) or activities (such as emissions or taking of specimens) located or occurring within the territory of states parties.[403] In addition, treaty obligations may apply not only to the territory of states parties, but also to areas and activities within the (functional) jurisdiction of the state party, notably in the Exclusive Economic Zone.[404] The jurisdiction concept included into provisions like Article 4 of CBD or Article I of the Maputo Convention can thus, quite undisputedly, follow the established

an obligation to act with due diligence *in respect of all activities which take place under the jurisdiction and control* of each party." *Id.* (empahsis added).

402. This is not to suggest that it would be uncontentious for MEA obligations to be enforceable in domestic law. Whether such agreements become part of national law (and enforceable before domestic courts) may depend on some act of incorporation into national law. Rather, the point here is that the substantive obligations spelled out in most MEAs are often primarily conceived to address issues regarding the domestic environment of states parties.

403. While this is remarkable from the point of view of the historical origin of IEL (i.e. its "outward-looking" nature, focusing on transboundary harm rather than the management of domestic resources, *supra* note 50), it is of little interest in the present context.

404. See the respective first clauses of the CBD and the Maputo Convention. CBD, *supra* note 10, art. 4(a); Maputo Convention, *supra* note 9, art. I(1); *see also* BOWMAN, DAVIES & REDGWELL, *supra* note 8, at 325–26 (offering an example in the context of the Bern Convention).

conception of (maritime) jurisdiction.[405] Harmful activities in this sense may also include those of non-state actors, like industrial sources of pollution or ships navigating in areas under the state's jurisdiction. The impacts of such activities may occur in areas in foreign territories (as, for example, in *Trail Smelter*), in areas subject to foreign jurisdiction, or in areas outside any national jurisdiction.[406] This category is most closely related to the customary rules on transboundary harm.[407]

2. *Effective Control and/or Authority Exercised in Foreign Territory*

A more ambitious understanding of the notion of "jurisdiction" included in MEA treaty language might follow the human rights-specific notion of jurisdiction.[408] Transposed into the environmental context, it can be argued that environmental goods located in foreign territory are protected by MEAs if they fall within the treaty's substantive scope and are under the "effective control" or "authority" of the state. Such a reading could rely not only on the sufficiently broadly defined concept of "(national) jurisdiction," but also on the formulation of the no-harm rule, which links the notion of jurisdiction to the element of control.[409]

A specific example where states exercise such a kind of effective control and authority can be seen in the context of foreign occupation,[410] a setting that was at issue in the ICJ's advisory opinion in *Construction of a Wall*, already touched upon above.[411] While the court focused on human rights obligations, the link to environmental duties is evident from the U.N. General Assembly resolutions on the matter.[412] And although the General Assembly does not directly refer to MEA obligations, it highlights the principle of "permanent sovereignty"[413] and makes several statements that may equally apply to MEAs.[414] While an extraterritorial application of MEA

405. *See* GLOWKA ET AL., *supra* note 366, at 27–28 (noting, *inter alia*, that Article 4 CBD does not "innovate[s], but simply applies existing rules of international law to the subject matter of the Convention").

406. See the respective second clauses of the CBD and the Maputo Convention. CBD, *supra* note 10, art. 4(b); Maputo Convention, *supra* note 9, art. I(2).

407. *See supra* Section IV.A.

408. *See supra* Section III.C.2 (approach developed in the context of civil and political rights).

409. *See Draft Articles on Transboundary Harm*, *supra* note 176, art. 2(c); *see also supra* note 187.

410. *See also* Rio Declaration, *supra* note 183, princ. 23 ("The environment and natural resources of people under oppression, domination and occupation shall be protected.").

411. Construction of a Wall, *supra* note 113.

412. Most recently G.A. Res. 70/225 (Dec. 22, 2015), U.N. Doc. A/RES/70/225 (adopted 164:5:10); G.A. Res. 71/247 (Dec. 21, 2016), U.N. Doc. A/RES/71/247 (adopted 168:7:11).

413. However, see Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 244 (Dec. 19), in which the court held that the principle of "permanent sovereignty" was not applicable to "the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State."

414. *See* G.A. Res. 71/247, *supra* note 412, operative ¶ 2 ("*Demands* that Israel, the occupying Power, cease the exploitation, damage, cause of loss or depletion and endangerment of the natural resources in the Occupied Palestinian Territory . . . ."), ¶ 6 ("*Also calls upon* Israel . . . to bring a halt to all actions, including those perpetrated by Israeli settlers, harming the environment . . . ."); *see also id.* ¶¶ 7–8.

to areas under occupation raises delicate follow-up questions concerning the relationship of MEA norms with humanitarian law,[415] it appears that there is little that would generally prevent MEAs from applying in the occupation context.

Another example of states parties being subject to extraterritorial MEA obligations due to their presence in foreign territory can be derived from the 2005 award in the *Iron Rhine Railway* arbitration, which concerned the alleged right of Belgium to restore and modernize the historical train route of the "Ijzeren Rijn" railway line linking the city of Antwerp to the Rhine basin in Germany.[416] The development project was intended to be carried out on Dutch territory, in reliance on a right under the 1839 Treaty of Separation.[417] The tribunal addressed the possible environmental impact of the renovation of the railway with reference to the duty to prevent transboundary harm.[418] The tribunal observed that it was "not [concerned] with a situation of a transboundary effect of the economic activity in the territory of one state on the territory of another state,"[419] but "the effect of the exercise of a treaty-guaranteed right of one state in the territory of another state and a possible impact of such exercise on the territory of the latter state."[420] The tribunal found that, "*by analogy*, where a state exercises a right under international law within the territory of another state, considerations of environmental protection also apply."[421] Such authority of the non-territorial state within foreign territory should then also trigger the application of MEA obligations.

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415. *Cf.* Legality of the Threat or Use of Nuclear Weapons, *supra* note 176, ¶ 30; Rio Declaration, *supra* note 183, princ. 24. For further elaboration on the issue, which is outside the scope of this paper, see Phoebe Okowa, *Environmental Justice in Situations of Armed Conflict*, *in* Environmental Law and Justice in Context 231, 236–40 and 243–45, *supra* note 51 (regarding the (weak) protection provided by MEAs in times of war, and on the notion of "permanent sovereignty"). On the former element, see also Silja Vöneky, *Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War*, *in* The Environmental Consequences of War 190 (Jay E. Austin & Carl E. Bruch eds., 2000); Ulrich Beyerlin & Thilo Marauhn, International Environmental Law 417–18 (2011).

416. Iron Rhine ("Ijzeren Rijn") Railway Arbitration (Belg. v. Neth.), Decision, XXVII R.I.A.A. 35, ¶¶ 3, 16 (May 24, 2005).

417. *Id.* ¶ 17 (on Article XII of the 1839 Treaty Concerning Separation of Territories, Belg.-Neth.).

418. The Tribunal further considered the EU nature directives, but finally left these aside as it regarded them as having no impact on the outcome of the case. *See id.* ¶¶ 121–37.

419. *Id.* ¶ 223.

420. *Id.*

421. *Id.* (emphasis added). The tribunal continued: "The exercise of Belgium's right of transit, as it has formulated its request, thus may well necessitate measures by the Netherlands to protect the environment to which Belgium will have to contribute as an integral element of its request. The reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line. These measures are to be fully integrated into the project and its costs." *Id.*

3. *Areas Outside National Territory and Jurisdiction*

A peculiar feature of a number of MEAs that is not mirrored in the human rights context is the inclusion of specific "areas of agreement,"[422] which may not only comprise areas of state party territory and areas under national jurisdiction, but also areas under foreign sovereignty, areas in which sovereignty claims are unsettled, such as Antarctica, or areas beyond national jurisdiction, such as the high seas. As was observed above, the stipulation of norms for a specific agreement area leads to states having obligations, at least in principle, regarding the *entire reach* of this particular treaty area. Similar arguments can be made for transfrontier sites (e.g., protected areas, habitats, or ecosystems extending into the territory of other states parties),[423] sites of international importance (e.g., habitats contributing to international flyways or ecological networks) and shared resources (e.g., watercourses). Again, protective obligations under the respective MEAs extend, at least in principle, not only to areas within national territory and jurisdiction, but to the entire reach of such areas. However, in terms of implementation, there is an evident problem when states parties lack the jurisdictional power, for example under the law of the sea, to fully implement most ambitious MEA obligations. Apparently with this problem in mind, commentators have argued that the assumption of extraterritorial obligations under provisions like Article 2 of the Bern Convention[424] would overstretch the role of states parties "as guardians of all wildlife everywhere, regardless of any connection with Europe,"[425] thus effectively arguing for restricting its extraterritorial application and reading a certain nexus or "jurisdiction" requirement (between the species at issue and states parties) into the convention.[426]

It is submitted here that the problem can be more easily resolved by emphasizing the threefold differentiation between (i) the extraterritorial scope of application of the treaty and its provisions; (ii) the question of a state party's jurisdictional power; and (iii) the question of which obligations

422. See, for examples, the Antarctic treaties, *supra* Section IV.C.3, and the CMS daughter agreements, *supra* notes 327, 333.

423. On terminology, see *supra* note 27. See also Francois Venter, *Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty*, *in* Legal Aspects of Sustainable Development: Transboundary Governance of Biodiversity 65, 71–75 (Louis J. Kotzé & Thilo Marauhn eds., 2014), for an account of two agreements between Mozambique, South Africa and Zimbabwe (namely the 2000 Agreement on the Development of the Gaza-Kruger-Gonarezhou Transfrontier Park; the 2002 Agreement on the Establishment of the Great Limpopo Transfrontier Park). For further examples, see Maja Vasilijević et al., Transboundary Conservation: A Systematic and Integrated Approach (2015).

424. See also the above-mentioned examples in the context of the Ramsar Convention. *Supra* note 294 and accompanying text.

425. *See* Bowman, Davies & Redgwell, *supra* note 8, 325–27. The authors make a similar argument for the general listing of entire families or orders, some species of which are only remotely related (if at all) to Europe, and which thus could not give rise to specific obligations if "*none* of [those species'] members naturally occur in the parties' territories at *any* stage of their life cycle." *Id.* (emphasis in original).

426. Compare the similar stance taken by the ICJ towards the ICESCR, *supra* note 113.

are to be discharged. In this understanding, the extraterritorial scope of application of an MEA is to be determined solely through an interpretation of the relevant treaty provisions, irrespective of any jurisdictional considerations. Consequently, this approach may indeed lead to a far-reaching territorial scope of application (i). As for marine areas outside national jurisdiction, Article 4 CBD and Article I Maputo Convention are arguably narrower than other MEAs in that they do *not* include areas outside national jurisdiction, but limit their applicability to activities (or "processes") in such areas. In the present understanding, they do so unnecessarily and their restrictive construction should not inform the interpretation of other MEAs. Nevertheless, states parties may indeed lack sufficient jurisdictional power (ii) to fully implement all of their MEA obligations in certain areas (e.g., of an area of agreement).[427] Prime examples are broad obligations of states parties to conserve certain habitats or ecosystems, or to maintain certain species, in areas beyond national jurisdiction. In such a case, it is suggested that the existence of jurisdictional limitations does not, as such, make the substantive extraterritorial obligations cease to exist. Rather, it should be kept in mind that states parties usually have a variety of obligations under environmental agreements (iii). The implementation of extraterritorial obligations then arguably turns into an obligation to cooperate with other states, to coordinate common efforts,[428] and to regulate harmful activities within their territory, jurisdiction, or control that impact such areas. More ambitious concepts of extraterritorial obligations may even require states parties not to frustrate the efforts by other states to conserve such habitats or ecosystems, and to support other states (financially or technically) in their efforts to conserve the respective areas.[429] In this sense, MEAs loosely follow the distinction between different types of obligations already encountered above in the context of human rights law.[430] The advantage of the present approach arguably lies in its ability to remind states parties that areas beyond national jurisdiction are not necessarily excluded from the territorial scope of MEAs and that the respective agreements may indeed apply to such areas, even if not all MEA obligations are to be implemented in that area.[431] MEA treaty bodies

427. In this sense, it is not disputed that the LOSC, *supra* note 1, is of paramount importance as it provides the jurisdictional framework for the implementation of such measures and "set[s] the limits for effective protection measures in this context." *See* Matz-Lück & Fuchs, *supra* note 337, at 156.

428. MEAs thus regularly provide for such duties of bordering states. *See* Ramsar Convention, *supra* note 183, art. 5; CMS, *supra* note 5, art. II(1); Bern Convention, *supra* note 183, arts. 4(4), 11(1)(a); Maputo Convention, *supra* note 9, art. XXII.

429. See the above-mentioned examples of the Ramsar Convention, *supra* note 292.

430. *See supra* note 140 and the text in Section III.D.

431. This Article, as indicated above, does not address the issue of resolving conflicting treaty obligations, for instance in the relationship between MEAs and the framework of the LOSC. *Supra* note 31. However, the approach suggested here should leave states parties sufficient room to accommodate provisions like CBD Article 22(2), *supra* note 10, requiring them to "implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea." Furthermore, on the potential for a more permissive interpretation of such conflict clauses, even in light of the LOSC requirements, see Katherine Houghton, *Identifying New Pathways for Ocean Governance:*

should thus be encouraged to make use of this potentially extensive territorial reach and devise their own substantive guidance for the discharge of the respective treaty obligations in areas beyond national jurisdiction.

4. *Creation of Impacts upon Areas Under Foreign Jurisdiction Outside the Scope of the Duty to Prevent Transboundary Harm?*

While the category described in Section IV.F.1 above is closely related to the logic of the customary no-harm rule, an additional question arises as to whether extraterritorial obligations under MEAs may also follow the example of ESC rights and extend to more indirect and diffuse impacts upon the "outside" environment. Three examples are particularly noteworthy.

First, as in the human rights context, one may wonder whether states parties are required to regulate the activities of non-state actors (that have a certain nexus to a state party, e.g. nationality or incorporation) on foreign territories that impact the environment.[432] The discussion of home state obligations has often focused, notably in the case of extractive industries, on human rights issues rather than on the environmental dimension.[433] If addressed, the role of environmental law is sometimes reduced to an extraterritorial application of domestic environmental law, or the customary rules on transboundary harm.[434] The potential responses within MEAs to the issue of "intra-territorial" or "transnational" harm[435] have thus remained underexplored,[436] although some treaty bodies have already started to respond to the challenge.[437] Addressing this "governance gap"[438] through the mechanism of MEAs may further help overcome legitimacy concerns, as MEA home state obligations are based on *internationally agreed* instead of unilateral stan-

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The Role of Legal Principles in Areas Beyond National Jurisdiction, 49 MARINE POL'Y 118, 123 (2014); Alan Boyle, *Further Development of the Law of the Sea Convention: Mechanisms for Change*, 54 INT'L & COMP. L. Q. 563, 579 (2005).

432. This question is distinct from the issue of whether non-state actors may *themselves* have (direct) obligations under MEAs. As in the human rights context (*supra* note 147), these issues have attracted an increasing attention in recent years, but are still largely unsettled. *See, e.g.*, André Nollkaemper, *Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives*, *in* MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY AND THE LAW 179, 186–99 (Gerd Winter ed., 2006) (concluding that "[t]he better approach would seem to be to strengthen the responsibilities of both home states and host states . . .," at 199); Jonas Ebbesson, *Transboundary Corporate Responsibility in Environmental Matters: Fragments and Foundations for a Future Framework*, *in id.* at 200.

433. *See, e.g.*, Seck, *supra* note 387, at 166–70.

434. *Cf. id.* at 173–81.

435. Terminology follows *id.* at 173–81.

436. *See id.* at 169–70 (noting merely that the ILC in its work on transboundary harm did not address the issue of home state obligations); Simons, *supra* note 3, at 484–86.

437. *See* Ramsar Res. X.26, ¶ 17 (Oct. 28–Nov. 4, 2008) (on extractive industries) (implying that states have to take into account a complex range of possible impacts, not only in the country where private industry is active, but also including upstream or downstream impacts in river basins); *see also supra* note 303 (on the Bern Convention).

438. *See* SIMONS & MACKLIN, *supra* note 13.

dards.[439] Even so, a certain danger remains that developing countries and local communities may be underrepresented in the international deliberations leading up to treaty-based standards.[440] As regards the specific obligations of home states, it could be argued that—just like in the human rights context[441]—states are not (yet) under a general extraterritorial duty to control or regulate the activities of non-state actors.[442] However, a more progressive reading of home state obligations is arguably supported by some strands in the existing practice of MEA treaty bodies[443] and developments in the context of the Economic Partnership Agreements ("EPAs"), concluded by the EU,[444] such as Article 72(c) of the EU-CARIFORUM EPA.[445] While this provision does not provide, in itself, a clear normative standard for how to regulate the activities of investors, it presupposes that there are certain duties (as under MEAs) to make use of this regulatory power. At the same time, it should also be noted that, just like in the human rights context, any home state obligation to regulate non-state actors is likely to be limited to a duty of due diligence.[446]

A second instance of diffuse and indirect environmental impacts can be seen in the context of agricultural policies that cause or contribute to environmental degradations abroad. Examples in point are not only (subsidized) domestic production and export practices,[447] but also, as will be seen below, national or supranational import policies that directly or indirectly impact upon the environment abroad, e.g., the importation of biofuels.[448] States and supranational entities like the European Union have been active in promoting the additional production, import and use of biofuels in order to tackle,

439. On the concern that an extraterritorial application of national environmental laws may constitute a neo-colonialist practice (or, in legal terms, an encroachment upon the territorial sovereignty of the territorial state, or the permanent sovereignty over natural resources) that strips developing countries of potential economic advantages, see Seck, *supra* note 387, at 196, and the text *infra* note 468.

440. *Cf.* Seck, *supra* note 387, at 200.

441. *See supra* note 151.

442. *Cf.* Glowka et al., *supra* note 366, at 28 (in the CBD context).

443. *Supra* note 437.

444. *See, e.g.*, Interim Agreement establishing a framework for an Economic Partnership Agreement, EC–Eastern and Southern Africa States Agreement, 2012 E.U. O.J. (L 111/2); *see also* Christian Häberli & Fiona Smith, *Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid "Land Grab,"* 77 Mod. L. Rev. 189, 207 (2014).

445. Economic Partnership Agreement, EC–CARIFORUM States, art. 72(c), 2008 E.U. O.J. (L 289/I/3). The provision stipulates that the parties "shall cooperate and take, within their own respective territories, such measures as may be necessary, *inter alia*, through domestic legislation, to ensure that . . . [i]nvestors do not manage or operate their investments in a manner that circumvents international environmental . . . obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties." *Id.*

446. *Cf., e.g.*, in the water context, Pulp Mills, *supra* note 176, ¶¶ 187, 197, 223, 265 (considering the obligation to "preserve the aquatic environment" under Article 41 of the River Uruguay Statute). With a view to the deep sea-bed "area," see also Activities in the Area, *supra* note 190, ¶¶ 110–20.

447. For a human rights account of EU agricultural policies, see, for example, Vandenhole, *supra* note 110.

448. *See generally* Mairon G. Bastos Lima & Joyeeta Gupta, *The Extraterritorial Dimensions of Biofuel Policies and the Politics of Scale: Live and Let Die?* 35 Third World Q. 392 (2014).

inter alia, the climate change mitigation challenge.[449] However, an increasing scientific awareness of the environmental repercussions associated with (both "first-" and "second-generation") biofuels has made it clear that the mitigation effect of alternative fuel sources can easily be overstated and environmental impacts underestimated. Negative impacts range from direct and indirect land use change (i.e. the conversion of land for the production of biofuels and associated impacts upon soil, biodiversity etc.), effects upon the availability and quality of water, and the introduction of alien or invasive (plant) species, to—almost counterintuitively—even increases in greenhouse gas emissions.[450] While some of the domestic policies include their own sustainability criteria,[451] and states have entered into agreements with partner countries[452] or established voluntary partnerships,[453] the effectiveness and legitimacy of such approaches have been called into question.[454] Furthermore, international organizations with relevant mandates (like the Food and Agriculture Organization of the United Nations ("FAO"), UNEP, or the International Energy Agency) have not yet managed to elaborate explicit normative standards. Legal assessments have often focused upon the constraints imposed by WTO law,[455] human rights law,[456] and customary rules

449. In the European context, the relevant instrument is Directive 2009/28/EC on the Promotion of the Use of Energy from Renewable Sources, June 5, 2009, E.U. O.J. (L 140/16). Other drivers for recent increases in biofuel demand may include attempts to diversify (and secure) energy sources, and to ensure safe agricultural incomes. *Cf.* FAO, THE STATE OF FOOD AND AGRICULTURE 2008 – BIOFUELS: PROSPECTS, RISKS AND OPPORTUNITIES 26–27 (2008).

450. *See, e.g.*, Ramsar Res. X.25, ¶¶ 11, 12 (Oct. 28–Nov. 4, 2008); CBD Decision XI/27, ¶ 2, U.N. Doc. UNEP/CBD/COP/DEC/XI/27 (Dec. 5, 2012); *Biofuels and Biodiversity*, Note by the Executive Secretary, ¶¶ 39–62, U.N. Doc. UNEP/CBD/SBSTTA/16/INF/32 (Mar. 17, 2012); Joseph Fargione *et al.*, *Land Clearing and the Biofuel Carbon Debt*, 319(5867) SCIENCE 1235 (2008); IUCN, GUIDELINES ON BIOFUELS AND INVASIVE SPECIES (2009); Wybe Th. Douma, *Legal Aspects of the EU's Biofuel Policy: Protection or Protectionism?* 53 GERMAN Y.B. INT'L L. 371, 374–7 (2010).

451. An example is Article 17 of the EU Renewable Energy Directive. *Supra* note 449.

452. *See* Mairon G. Bastos Lima, *Biofuel Governance and International Legal Principles: Is it Equitable and Sustainable?* 10 MELB. J. INT'L L. 470, 480–81 (2009) (referring to several examples of cooperation between the U.S. and Brazil (e.g. their 2007 MoU to Advance Cooperation on Biofuels), and cooperation with third countries seeking to extend the biofuel market).

453. *See e.g.*, GLOBAL BIOENERGY PARTNERSHIP, http://www.globalbioenergy.org/ (last visited Nov. 21, 2017) (describing itself as a so-called "partnership for sustainable development" combining state governments, international organizations and private sector stakeholders, established in 2005/2006 following a G8+5 decision); ROUNDTABLE ON SUSTAINABLE BIOMATERIALS, http://rsb.org/about/ (last visited Nov. 21, 2017) (a largely private sector-driven association based in Geneva that develops the voluntary "RSB standard" and offers a certification procedure).

454. *See, e.g.*, Bastos Lima, *supra* note 452, at 482, 488.

455. Although there is an evident trade aspect and questions of WTO law compatibility may arise (*e.g.*, *EU and a Member State–Certain Measures Concerning the Importation of Biodiesels*, Request for consultation, WT/DS443/1 [Aug. 23, 2012]), world trade law is of limited use in the elaboration of a comprehensive framework for biofuel regulation. While it can accommodate, to some extent, environmental concerns, it does so primarily through the lens of exceptions (*e.g.*, art. XX(b), (g) of the General Agreement on Tariffs and Trade [Apr. 15, 1994], Annex 1A to the Marrakesh Agreement Establishing the WTO, 1867 U.N.T.S. 187).

456. Jean Ziegler (Special Rapporteur on the Right to Food), *Report of the Special Rapporteur on the Right to Food*, ¶¶ 19–44, U.N. Doc. A/62/289 (Aug. 22, 2007).

of IEL.[457] Again, the potential role of MEAs in narrowing down the international "governance gap" for biofuels and providing a more comprehensive legal framework has been somewhat neglected. In the context of the CBD, three CoP decisions and a number of reports have addressed the topic of "biofuels and biodiversity."[458] While the regulatory response adopted by the CBD has so far heavily relied on the development of said voluntary guidelines, it is still noteworthy that these guidelines regularly set out "legality" as one of their requirements, thus presupposing that there are (potential) substantive requirements. The practice of the Ramsar Convention has already started to cautiously define some substantive requirements.[459]

Third, the above-mentioned example of the REDD framework,[460] elaborated within the climate change regime, highlights that states may be required to take into account environmental impacts in foreign territories in their project investment decisions. While the CBD CoP has been hesitant to clearly spell out extraterritorial obligations, it emphasized, quite generally, that states should "ensure that possible actions for reducing emissions from deforestation and forest degradation do not run counter to the objectives" of the convention.[461] In light of Article 4(b) CBD, substantive guidance for such domestic decisions could arguably be provided in even stronger terms.

5. *Influence on Activities of International Institutions or Agreements*

A development that is visible in both human rights law and MEAs is the recognition that states parties cannot escape their treaty obligations by arguing that certain policies or decisions were adopted by international organizations/institutions. Instead, treaty bodies have reminded states of their continuing duties to exercise their influence or decision-making power in a manner that complies, as far as possible, with their obligations under the respective treaties.[462]

457. Bastos Lima, *supra* note 452 (seeking to apply the "Rio principles" and "good governance" principles).

458. *See* CBD Decision IX/1, U.N. Doc. UNEP/CBD/COP/DEC/IX/1 (Oct. 9, 2008) (integrating the issue into the broader topic of "agricultural biodiversity"); *see also* CBD Decision IX/2, U.N. Doc. UNEP/CBD/COP/DEC/IX/2 (Oct. 9, 2008); CBD Decision X/37, U.N. Doc. UNEP/CBD/COP/DEC/X/37 (Oct. 29, 2010); CBD Decision XI/27, U.N. Doc. UNEP/CBD/COP/DEC/XI/27 (Dec. 5, 2012). At its recent meetings, the CBD CoP apparently did not consider it necessary to address the topic again: *see* Report of the 12th Meeting, U.N. Doc. UNEP/CBD/COP/12/29, 264 (Oct. 17, 2014); Draft Report of the 13th Meeting, U.N. Doc. UNEP/CBD/COP/13/L.1 (Dec. 17, 2016).

459. *Cf.* Ramsar Res. X.25, ¶¶ 14–19 (Oct. 28–Nov. 4, 2008) (specifically on biofuels); Ramsar Res. XI.10 (July 6–13, 2012) (more generally on "wetlands and energy issues").

460. *Supra* note 223.

461. CBD Decision IX/5, ¶ 2(a), U.N. Doc. UNEP/CBD/COP/DEC/IX/5 (Oct. 9, 2008).

462. *See supra* notes 146, 162 (on human rights treaty obligations); *see also supra* notes 291, 305 (on the Ramsar and Bern Conventions).

G. (Further) Limits to the Concept of Extraterritorial Obligations?

The above sections have highlighted that, while the extraterritorial scope of application of MEAs may actually be quite far-reaching, there are a number of limitations built into the system. In some constellations, extraterritorial obligations should be construed as duties of conduct, for example as a duty to exercise due diligence in the regulation and control of corporate activities abroad. Furthermore, a lack of jurisdictional power in the implementation of extraterritorial obligations may effectively limit ambitious and burdensome obligations to supportive obligations. Still, from the perspective of national governments, the idea of extraterritorial obligations might evoke fears of an overburdening and looming financial collapse (on the "duty-bearer" side),[463] or a "neo-colonialist" subjugation to MEA regimes (on the side of countries potentially affected by the implementation of extraterritorial obligations).[464]

As regards the first issue, extraterritorial duties may be reinforced or softened by the notion of *common but differentiated responsibilities* ("CBDR"), depending on the specific characteristics of the relevant state party.[465] While the concept is not expressly integrated into all MEAs,[466] and its status as a general rule or principle of IEL still questionable,[467] it guides at least the application of those treaties that incorporate it. CBDR may thus appropriately "differentiate" the extraterritorial obligations of different states parties. As regards, second, the concern of environmental neo-colonialism or

463. For example, consider the fears expressed in Phyllis Schlafly's 1979 U.S. Senate statement that ratifying the ICESCR "would obligate [the United States] to take steps by all measures, including legislation, to distribute food all over the world and to finance a rising standard of living." *Statement of Phyllis Schlafly, Senate Hearings on International Human Rights Treaties*, S. COMM. FOR. REL., 96th Cong., 1st Sess. (1979), as quoted in Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the MDGs*, 27 HUM. RTS. Q. 755, 776 (2005).

464. *See* van Asselt, *supra* note 225, at 1242 (noting, in the climate change context, that developing states have resisted the adoption of binding "sustainable development criteria" under the "Clean Development Mechanism" which might restrict project investments in their countries). To be certain, the positions of states, be they "developed," "developing," or something in-between, are rarely static and fixed in time, but may adapt to changing circumstances. *See* Ben Saul, *China, Natural Resources, Sovereignty and International Law*, 37 ASIAN STUD. REV. 196 (2013) (with a view to the Chinese position towards IEL).

465. Underlying the notion of CBDR are at least three different ideas, namely (i) differences in historical and current contributions to the problem, (ii) differences in capabilities to tackle the problem, and (iii) differences in the needs and specific circumstances. *See, e.g.*, Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT'L & COMP. L. Q. 35, 46–59 (2000).

466. *But see* FCCC, *supra* note 186, art. 3(1), (2); Kyoto Protocol, *supra* note 213, art. 3(1) (referring to the Annex system); Paris Agreement, *supra* note 214, arts. 2(2), 4(3); Montreal Protocol to the Ozone Convention, art. 5, Sept. 16, 1987, 1522 UNTS 3.

467. *See* Bodansky, *supra* note 390, at 501–02; Thomas Deleuil, *The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties*, 21 REV. EUR. COMP. & INT'L ENVTL. L. 271, 274–76 (2012).

imperialism,[468] established through the means of extraterritorial MEA obligations, states parties might attempt to rely on the concept of *permanent sovereignty over natural resources* as a defense against any such "intrusion." However, there are a number of problems with blanket references to this concept. While permanent sovereignty could already be considered questionable from a moral point of view,[469] it has further remained contentious who should be considered the proper holder of "sovereignty" in this sense. As an attribute of state sovereignty, the "right" of the state could be exercised by the respective government; alternative interpretations have sought to ground permanent sovereignty in a right of peoples.[470] Furthermore, it would appear difficult to rely on permanent sovereignty as a defense against measures in discharge of treaty obligations (rather than unilaterally imposed standards).[471] Ideally, states parties have either participated in the development of, or subsequently agreed to, environmental treaty standards. At the least, the potential permanent sovereignty objection thus serves as a reminder that it is of crucial importance to maintain and improve the legitimacy of the MEA law-making process.[472]

V. Concluding Observations

The above discussion has sought to highlight that the notion of extraterritorial application of MEAs is only loosely governed by the framework of treaty law. Although one can draw, to some extent, on the experiences gained in the context of human rights law, there are a number of specific characteristics (e.g. the inclusion of specific "areas of agreement") that set the territorial application of MEAs apart from human rights law. The idea of extraterritorial application of MEAs overlaps, further, to some extent with the customary rules on transboundary harm, but is not identical with these. Even without including express jurisdiction clauses, a large number of MEAs either provide textual indications of a potential extraterritorial reach, or have extended their scope into the extraterritorial sphere in their practice.

468. For example, in the domestic context, see Jonas Ebbesson, *Piercing the State Veil in Pursuit of Environmental Justice*, *in* Environmental Law and Justice in Context, *supra* note 51, at 270, 277, 291.

469. *See, e.g.*, Chris Armstong, *Against "Permanent Sovereignty" over Natural Resources*, 14 Pol., Phil. & Econ. 129 (2015).

470. *See, e.g.*, Schrijver, *supra* note 48, at 369–71.

471. Ebbesson briefly considers towards the end of his text that the relevant (corporate) activities may "violate international norms, for example . . . environmental law standards. If so, values and norms, at least if part of general international law, would not really be imposed from one territory to the other." Jonas Ebbesson, *Piercing the State Veil in Pursuit of Environmental Justice*, *in* Environmental Law and Justice in Context, *supra* note 51, at 291. The present Article has sought to continue this line of reasoning.

472. The need to improve the legitimacy of the MEA law-making process is all the more important in light of the (potentially) weak position of developing countries within MEA treaty body decision-making processes. *See supra* note 440; *cf.* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 Am. J. Int'l L. 596, 605, 613 (1999).

It has been argued that there are good policy rationales and normative underpinnings that warrant an increasing focus on the extraterritorial application of environmental agreements.

Building on scattered examples of extraterritorial application from MEA treaty practice, it can be shown that MEAs may indeed apply in a number of constellations that extend beyond the territory of states parties. This is not to say, however, that the obligations in this extraterritorial sphere are necessarily the same as in the territorial context. For example, when states are required to take measures to conserve sites or species within a certain area, the implementation of such obligations will be constrained by, *inter alia*, the traditional rules on jurisdiction. At the same time, extraterritorial obligations are not necessarily limited to duties to cooperate or consult with other states. States may still be required to take measures within their own territory and jurisdiction (or even "control" in foreign territory) and provide support to other states parties. The notion of extraterritorial application in the MEA context also (partly) mirrors progressive developments in the context of ESC rights, in terms of the emergence of home state duties to regulate non-state actor activities abroad, the establishment of constraints upon import and export policies having diffuse impacts upon the environment in foreign territories, and obligations regarding participation in the decision-making processes of international organizations and treaty bodies. While the extraterritorial application of MEAs is far from settled, and further research should explore other agreements, the above discussion has sought to highlight that most existing environmental treaties have a considerable potential in this regard and states as well as treaty bodies should be encouraged to exploit this potential in a more ambitious and systematic fashion.