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Between facts and principles: jurisdiction in international human rights law

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ABSTRACT

In international human rights law 'jurisdiction' is the centre of the debate on extraterritorial obligations. The purpose of the present paper is to a) analyse how facts and principles contribute to the explanation of jurisdiction in international human rights law and b) to show how this analysis could help sharpen the debate in this area by making the grounds of disagreement between different accounts explicit. It first describes international practice regarding jurisdiction and shows that it is committed to jurisdiction being a principle that responds to facts on the ground. Second, the paper describes two academic views on jurisdiction in detail. Next, it introduces the framework on facts and principles developed by Jerry Cohen. The idea is that facts only support principles if their relevance is explained by another principle that does not depend on facts. Finally, section 4 combines the framework with our insights into jurisdiction. If jurisdiction is best understood as a principle that responds to facts, this implies that jurisdiction cannot be explained by facts alone. It must instead reflect principles that are themselves not fact-dependent. Adhering to this framework allows for better explanation of jurisdiction and a clearer understanding of the different views on jurisdiction.

KEYWORDS

Jurisdiction; human rights; extraterritoriality; Jerry Cohen; normative reasoning

Introduction

In international human rights law 'jurisdiction' and what it means is the centre of the debate on extraterritorial obligations. These are obligations stemming from international human rights law that a state owes to individuals who are not within its territory.[1] Think, for example, of a state agency storing and analysing electronic communications by people who do not reside in that state. Another example is the question of whether and to what extent an occupying power owes human rights obligations to the population of an occupied territory.[2] Most (but not all) human rights treaties contain provisions known as

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[1] I take this to be the generally accepted definition in the specialised literature. See, eg, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 7–8.

[2] For a list of examples and references to relevant case law of the European Court of Human Rights see, eg, Lea Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers' [2016] *European Human Rights Law Review* 161, 163.

jurisdiction clauses, which set out in one way or another that the obligations set forth in the treaty are owed to individuals within the 'jurisdiction' of the state parties. Article 1 of the European Convention on Human Rights (ECHR), for example, provides that state parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.' Generally, then, if a state is seen to have jurisdiction, it will also have human rights obligations imposed upon it. This raises the question of what the term means in this context.

There are a number of approaches to jurisdiction both in human rights practice and in the literature and while some views are more dominant than others, the debate cannot be seen to be a settled one. This is true both regarding case law and the literature discussing it. The most obvious differences between the available accounts of jurisdiction concern its meaning, and more precisely its scope. Some say a state only has jurisdiction when it controls territory.[3] Others hold that control over individuals without controlling the ground they stand on is sufficient.[4] Others still maintain that any impact on an individual's life will be captured by jurisdiction and entail human rights duties.[5] In terms of legal categories, jurisdiction is variously said to be a set of principles,[6] a 'question of fact',[7] or facts coupled with a normative dimension,[8] adding layers of potential disagreements onto the interpretation of the term.

Of course, disagreement of any kind is to be expected and not a problem as such. What is problematic is that *this* disagreement in *this* debate often leads to participants seemingly missing each other's points. For example, one author or body might be addressing the scope of jurisdiction while the other advances arguments as to the normative foundations of this scope and they might do so using the same language and vocabulary. This means that there is a risk of participants talking past each other. One of the consequences is that accounts of jurisdiction are difficult to evaluate because it is frequently either challenging or impossible to judge the merits of each view. Given how crucial it is which account of jurisdiction we favour in this area of law, this is, I suggest, not a satisfactory state of affairs.

To begin to make sense of and organise the disagreements authors might have, I propose to utilise a framework for relating facts and principles relying on an argument advanced by Jerry Cohen.[9] His view is that '… a [normative] principle can reflect or respond to a fact only because it is *also* a response to a principle that is not a response to a fact.'[10] If jurisdiction is a principle that responds to facts – as I hope to show below – a full explanation thereof will not only feature a formulation of the principle of jurisdiction. In addition, such an explanation will also outline the facts that support

[3]See, eg, Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857.
[4]HRC 'General Comment No 36: The Right to Life (Advance unedited version)' (30 October 2018) UN Doc CCPR/C/GC/36 para 63.
[5]Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights, Principle 9 (b).
[6]*Al-Skeini v United Kingdom* (2011) 53 EHRR 18, para 140. The Court states that the 'effective control' is a principle of jurisdiction implying that there are several such principles of jurisdiction that make up the concept.
[7]Milanovic (n 1) 53.
[8]This is how I read Besson's suggestion that jurisdiction is at once a 'practical condition' and a 'normative requirement' of human rights in Besson (n 3) 863.
[9]GA Cohen, 'Facts and Principles' (2003) 31 *Philosophy & Public Affairs* 211.
[10]ibid 214.

the proposed principle of jurisdiction, and a further, more fundamental normative principle that explains why those facts are relevant for justifying the principle of jurisdiction. Cohen conceives of his intervention as a potential refutation of constructivist justifications of normative principles because they seem to suggest that all normative principles are responsive to facts, while Cohen argues that this is not true.[11]

Cohen's argument brings with it three terminological idiosyncrasies. First, Cohen argues for an alternative to saying that all principles must be responsive to facts. The view he takes issue with has many forms but includes the central tenet that facts are part of the grounds for holding any normative principle.[12] This is what he means when he says a principle responds to or reflects facts or that it is fact-sensitive.[13] Second, he restricts his use of the term 'principle' to 'normative principle'. That is, a principle is a proposition on what ought to be done rather than a description of what is.[14] And third, he calls 'facts' everything that is not itself a normative principle – knowing that there is disagreement about what may count as a fact.[15] In all respects, I follow his terminology.

The purpose of the present paper is to (a) analyse how facts and principles contribute to the explanation of jurisdiction in international human rights law and (b) to show how this analysis could help sharpen the debate in this area by making the grounds of disagreement between different accounts explicit. I argue that the interpretation of jurisdiction, and whether or not it is a principle, plays an important role in how it is framed and debated. As such, it is an argument about the structure of normative reasoning rather than an argument in favour or against any particular account of jurisdiction. The hope is to show that reflecting upon and being transparent about the facts and normative principles we employ to explain our account of jurisdiction and extraterritorial human rights obligations generally is beneficial regardless of what they may be. The present intervention focuses on disagreement about jurisdiction in international human rights law. However, there is no reason to think the argument could not be equally relevant for other disagreements in international law and perhaps law more widely.

The paper proceeds as follows. Section 1 describes human rights practice to show that it conceives of jurisdiction being a principle (or an expression thereof) that responds in some way to facts on the ground. Section 2 introduces two academic views on jurisdiction in some detail. The purpose is to show, on the one hand, that they share the commitment of the human rights practice. On the other hand, I aim to show that they are difficult to compare and why this is problematic for the debate as such. Section 3 introduces the framework for thinking about facts and principles developed by Jerry Cohen.[16] The main idea is to say, in his words, that ' … principles that reflect facts must, in order to reflect facts,

[11]ibid 213. But see Miriam Ronzoni and Laura Valentini, 'On the meta-ethical status of constructivism: reflections on G.A. Cohen's 'Facts and Principles'' (2016) 7 *Politics, Philosophy & Economics* 403 and the objections discussed in section 3.1 below.

[12]Cohen (n 9) 213–14. Human nature would be such a fact. John Rawls' account of justice is an example of a theory that demands all fundamental principles depend on human nature – a fact. See John Rawls, *A Theory of Justice* (Harvard UP 1999) 137 and the discussion in Cohen (n 9) 239–43.

[13]Cohen (n 9) 213.

[14]ibid 211.

[15]For example, it may well be said that normative statements can be factual in the sense that they are true. But the view sketched here is neutral on this point even though it is most aptly characterised as a meta-ethical thesis. See ibid 211, 34–35.

[16]ibid.

reflect principles that don't reflect facts.'[17] Section 4 combines the framework with our insights into jurisdiction. If jurisdiction is most profitably understood as a principle that responds to facts, this implies that jurisdiction cannot be understood by reference to facts alone. It must instead reflect basic principles that are themselves not fact-dependent. This has implications for our reasoning about jurisdiction. Section 5 concludes.

1. Jurisdiction in human rights practice

I start here by indicating how international human rights practice has so far viewed jurisdiction. The point is not to evaluate the different proposals, or the explanations or justifications given for each of them, but to illustrate how facts and principles feature in different accounts and what this might tell us about the nature of jurisdiction. Further, I am not suggesting that any judgment or statement on jurisdiction necessarily needs to provide a justification for its stance.[18] What I hope to show is that the best way of understanding the different statements on jurisdiction is to say that it is a principle that responds to facts. This is important because this understanding of the practice is what makes Cohen's points about facts and principles relevant in the first place.

It is further worth noting at the outset that jurisdiction in international human rights law is as a concept distinct from other instances when the term is used.[19] It refers to the jurisdiction of a state as opposed to a court on the one hand and answers a question of duty rather than right on the other.[20] That is, it is different from both domestic law and international law concepts of the same name. The terminology is thus a little unfortunate, but it is by now entrenched enough to warrant putting up with.

Let us turn to an example. Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) states that the instrument places obligations on states parties regarding individuals that are within their territory and subject to their jurisdiction. The Human Rights Committee (HRC), the body which is tasked with interpreting the ICCPR and monitoring the performance of state parties, however, has stated that the question about extraterritorial human rights obligations, is fundamentally a question about a connection between a state and an individual as opposed to territory.[21] A plausible reading here is that jurisdiction seems to be seen as responsive to facts on the ground. In one case it is a connection with territory, while it is a connection with an individual in the other. That is, regardless of whether one thinks the HRC chose the right interpretation, jurisdiction reflects facts of some description. Turning again to the HRC's view, the fact in question is the (yet unspecified) connection between the state and the individual. To illustrate this further, it is useful to consider how the HRC justifies its stance:

> … , it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[22]

[17] ibid 214.
[18] For a treatment of the question of who needs to provide a justification and when see, eg, Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994).
[19] See for an excellent overview of the different meanings Milanovic (n 1) 19–41.
[20] Lea Raible, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship' (2018) 31 *Leiden Journal of International Law* 315–34, 320.
[21] For a clear and powerful expression of this line of argument see *Lopez Burgos v Uruguay* (HRC, 29 July 1981) UN Doc CCPR/13/D/52/1979 paras 12.2 and 12.3. See also Besson (n 3).

Recently, the Committee added more concrete content to the notion of jurisdiction as a relationship in its General Comment on the right to life where it opined that persons subject to a state's jurisdiction include 'all persons over whose enjoyment of the right to life it [said state] exercises power or effective control.'[23] In this instance, the HRC does not provide a justification as such. It only notes that the above phrase ' … includes persons whose right to life is … impacted by its military or other activities in a direct and reasonably foreseeable manner.' This latter statement could be read to indicate that foreseeability and directness of impact represent avenues for justification. Note that whenever the HRC supplies a justification it characterises jurisdiction as linked to or describing a set of facts on the ground while the justification is not responsive to facts in the same way.

The HRC's views on the interpretation of jurisdiction concern the ICCPR. But similar statements have been made regarding the International Covenant on Economic, Social and Cultural Rights (ICESCR) – another human rights instrument drafted and monitored under the auspices of the United Nations (UN). Take, for example, what the Maastricht Principles have to say about jurisdiction. The Principles do not originate from a treaty body (such as the HRC), but from a group of experts and activists who aimed to consolidate research in the area.[24] This means the Maastricht Principles are not legally binding. However, they are the first sustained effort to theorise extraterritoriality and jurisdiction regarding economic and social rights. Principle 9 on the scope of jurisdiction reads as follows:

> A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
>
> (a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
>
> (b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
>
> (c) situations 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 economic, social and cultural rights extraterritorially, in accordance with international law.

Again, a state is said to have jurisdiction when (and presumably because) a set of facts obtain. As such, jurisdiction here, too, is at least in some sense responsive to facts on the ground. Neither the Principles nor their commentary[25] provide a justification that could help us identify what the principles are that make these facts relevant. The commentary, however, refers to the case law of the European Court of Human Right (ECtHR) – the judicial body overseeing the ECHR – to which I turn now.

[22] *Lopez Burgos v Uruguay* (n 21) para 12.3.
[23] 'General Comment 36' (n 4) para 63.
[24] They are accompanied by a commentary, written by a subset of their drafters: Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084. For an illuminating discussion of the Principles' origin and the problems this might throw up see Ralph Wilde, 'Dilemmas in Promoting Global Economic Justice through Human Rights Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (OUP 2016).
[25] De Schutter and others (n 24).

The Court's leading statement on jurisdiction can be found in its judgment in *Al-Skeini v United Kingdom*.[26] The 'General principles relevant to jurisdiction under Article 1 of the Convention'[27] are mostly a summary of case law that allows the Court to list factual circumstances in which (extraterritorial) jurisdiction may be exercised by states. That is, the European practice again emphasises that jurisdiction is in some sense responsive to facts. Here is how the Court describes the function of these general principles:

> To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.[28]

The ECtHR does not explain why it considers these circumstances to be covered but not others. The only instance that resembles a justification is the following statement:

> [W]here the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of the Convention" … .[29]

The justification provided here could be generalised as the following principle: a *population ought not to be deprived of their protections under the Convention hitherto enjoyed*. This is admittedly not much. But note that this one instance of justification again takes the form of a normative principle. To reiterate the point, I am not saying here that a UN treaty body or the ECtHR necessarily need to advance a justification for their findings.[30] The argument is to point out that *if and when* an explanation or justification is put forward it takes the form of a normative principle.

To add to the above examples, consider the ECtHR's *Banković* case.[31] The Court had to decide whether a NATO bombing of the RTS building, a radio and television station in Belgrade, during the Kosovo conflict amounted to a violation of the Convention. The applicants claimed that their or their relatives' right to life according to article 2 ECHR had been violated because the airstrike killed or injured them.[32] The Court

[26](n 6) paras 130–142.
[27]ibid para 130 (heading).
[28]ibid para 132.
[29]ibid para 142.
[30]Although I have argued elsewhere there may be advantages to principled reasoning: Lea Raible, 'Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office: Victim Status, Extraterritoriality and the Search for Principled Reasoning' (2017) 80 *Modern Law Review* 510, 520–24. Note that the terminology is not identical to the one employed here. Instead, I draw on Dworkin to define principles as opposed to rules: Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 23–25.
[31]*Banković v Belgium* App no 52207/99 (ECtHR, 12 December 2001). For more on *Banković*, its impact and merits (or lack thereof) see, eg, Matthew Happold, 'Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 77; Rick Lawson, 'Life after Bancovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Bankovic"' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).
[32]*Banković v Belgium* (n 31) paras 4–11.

found that the application was inadmissible because the defendant states did not have jurisdiction according to article 1 of the ECHR. In other words, the question was whether carrying out an airstrike constituted the kind of situation that is covered by jurisdiction and would thus trigger human rights obligations. The ECtHR sets up its considerations on the matter as choosing between the following two options:

> … [The applicants] claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a "cause-and-effect" notion of jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.[33]

The Court goes on to supply explanations as to why it sides with the respondent governments.[34] Taken together, the points advanced by the ECtHR suggest the following: the wording of the Convention or the *travaux préparatoires* do not support the applicants' argument. What the ECtHR does not supply is a justification for why the wording of the Convention, as opposed to, say, its object and purpose or another value, should be decisive in adopting its narrow view.

Taken together, practice seems to emphasise jurisdiction as either describing or closely linked to certain factual situations: who exercises control, whether an airstrike counts as control, if impact of an action is sufficient, and so on. This is true regardless of the scope of jurisdiction identified by each body. This is important because the consensus on the nature of jurisdiction in this sense informs the academic debate we now turn to.

2. Accounts of and disagreement on jurisdiction

Following on from the insights regarding human rights practice, this section surveys two academic accounts of jurisdiction defended by Marko Milanovic and Samantha Besson respectively. These are not the only views available,[35] and a comprehensive survey is not the aim of this paper. Readers might ask at this point why I do not rely on my own account of jurisdiction to make my points. The reason is that when defending my view in my earlier work,[36] I have attempted to do justice to the concerns raised in this paper. This makes my account less useful as an illustration. The two approaches surveyed here, on the other hand, *are* illustrative. This is not least because Milanovic's insists on jurisdiction as a (mostly) factual affair, while Besson's explicitly builds on normative principles. The aim of this section is again not to evaluate the merit of either of the two accounts.[37] What I want to show instead is that, first, even Milanovic's factual account relies on normative principles and, second, that Besson's incorporation of

[33]ibid para 75.
[34]ibid paras 75–82.
[35]Other accounts include, eg, Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2012); Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 *Law & Ethics of Human Rights* 47; Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020).
[36]See specifically Raible, *Human Rights Unbound* (n 35) ch 4–5.
[37]I have done so elsewhere. For my argument on their respective merits see Raible, *Human Rights Unbound* (n 35) ch 3.

normative principles allows her to identify much more precisely where her disagreement with Milanovic lies than vice versa. In turn, this means that more awareness about the structure of beliefs in this area could sharpen the academic debate and perhaps, eventually, also the case law.

Marko Milanovic characterises jurisdiction as the exercise of power by another name.[38] This approach takes a stance on the question human rights bodies care about, specifying that jurisdiction denotes power exercised over territory rather than individuals. That is, exercising control over an individual is not sufficient to trigger human rights obligations on the part of the state doing the controlling.[39] This approach may seem restrictive, but it is rooted in an important qualification: the distinction between negative and positive obligations. Negative obligations require states to refrain from certain actions. For example, when applied to the right to life the relevant negative obligation is not to unjustifiably take lives. Positive obligations to protect, ensure, secure, or fulfil human rights,[40] on the other hand, require states and their agents to take specific actions and in some instances to protect individuals from harm. Milanovic's account does not require jurisdiction for negative obligations to respect human rights to obtain.[41] Negative obligations to respect human rights are, in other words, always owed whenever a state acts and regardless of its connection or lack thereof with an individual. The overarching idea is that extraterritoriality of human rights obligations should be meaningful – that is, make a difference to potentially impacted individuals – while not being too burdensome.[42]

As for the meaning of jurisdiction in this context Milanovic specifies that:

> … 'jurisdiction' in various human rights treaties refers to a power that a state exercises over a territory, and perhaps also over individuals. When the state obtains this power it must, with due diligence, fulfil its obligation to secure or ensure the human rights of all persons within its jurisdiction. This power is a question of fact, of actual authority and control.[43]

What matters here for our purposes is that the interpretation of jurisdiction this account arrives at is supposed to be a fact. In other words, Milanovic does not seem to conceptualise jurisdiction as a principle. However, this stops short of a full explanation of what is at stake. Instead, the argument as a whole – building on values of universality and effectiveness[44] – as well as the definition as such – depends on more than facts. Take the quote above. Its second sentence can be read as a fact-sensitive principle: When a state obtains power, it should meet its human rights obligations. The quote does not supply explicit support for the principle. That is, all the quote says is that Milanovic affirms the above principle. But we can say even without reading any further that one way to support the principle is to say that a state needs to be *in a position to guarantee human rights*

[38]Milanovic (n 1) ch 2. His overall theory is more complex than this assertion. As the aim is to illustrate a method of reasoning rather than to assess his account on its merits, simplicity trumps completeness here.
[39]Milanovic develops his approach to jurisdiction in part as a reaction against what he calls 'the personal model of jurisdiction' – a view that holds such control should be sufficient: Milanovic (n 1) 173–209, where he casts doubt on this model as playing the kind of limiting role a jurisdictional threshold ought to play.
[40]The terminology in human rights practice and literature varies. Verbs used to describe positive human rights obligations include protect, fulfil, ensure, and secure human rights. But the slight differences these express are not crucial for our purposes.
[41]Milanovic (n 1) 209, 19.
[42]ibid 219–20.
[43]ibid 53.
[44]ibid 219.

and that is why factual power is required. The proposition in italics is a fact in support of the principle Milanovic affirms and he puts it forward himself at a later stage in the argument.[45]

In the same place, Milanovic suggests normative principles that support *when states obtain power they should fulfil their human rights obligations* based on the universality of human rights.[46] However, these normative principles (implicit for the most part) are not the only ones the account relies on. The other, and equally important, idea is that the capacity to influence certain situations or outcomes for individuals is at the heart of bearing human rights duties.[47] In fact, the point of his model of jurisdiction is to 'reconcile universality and effectiveness'.[48]

A plausible way of explaining the role of effectiveness as a value is a view of human rights that describes them as identifying aims to be achieved because said outcomes are in themselves valuable to individuals.[49] The distinction between negative and positive obligations further suggests that this view allocates human rights obligations according to what has been called the capacity plus least-cost principle.[50] That is, this view of jurisdiction treats a favourable outcome as the point of human rights. It then identifies agents that have the necessary capacity to bring about that outcome and further specifies the duty bearer by working out who can do so at the least cost.[51] What shapes this account of jurisdiction, in other words, is a view of the function of human rights and the obligations they impose. Whether this view is plausible is beside the point. What matters instead, is that jurisdiction while described as factual power is justified by reference to other facts, the relevance of which is explained relying on normative principles. In particular, jurisdiction is linked to the nature of human rights and the principles it suggests on the view of the nature of human rights employed.

Contrast the above view of jurisdiction with the one defended by Samantha Besson. Her account aims to make explicit and redress what she sees as flaws in factual views of jurisdiction.[52] Jurisdiction here is defined as a threshold criterion for the recognition of human rights and the corresponding obligations and further described jurisdiction as a 'normative relationship between subjects and authorities'.[53] The view applies to all types of human rights obligations of states, that is, it does not distinguish between negative and positive ones. The key feature of this account of jurisdiction is that it is

[45]ibid 106–07.
[46]ibid ch 3.
[47]Milanovic explicitly endorses this view, although only in passing and not in the chapter that is dedicated to the interpretation of jurisdiction as a term. See ibid 107, 09. Interestingly, his view has also been criticised as arbitrary precisely because he does not follow through on this capacity approach, but again without explicit acknowledgement as to how this relates to the view of human rights employed, see Shany (n 35) 61–64.
[48]Milanovic (n 1) 219.
[49]Outcome oriented views of human rights are usually interest-based accounts. See, eg, Alan Gewirth, 'Duties to Fulfill the Human Rights of the Poor' in Thomas Pogge (ed), *Freedom From Poverty as a Human Right – Who Owes What to the Very Poor?* (OUP 2007); Charles R. Beitz, *The Idea of Human Rights* (OUP 2009); Elizabeth Ashford, 'The Nature of Violations of the Human Right to Subsistence' in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018). For a critique of these views see Saladin Meckled-Garcia, 'Do Transnational Economic Effects Violate Human Rights?' (2009) 2 *Ethics & Global Politics* 259. I argue elsewhere that they have significant limitations when it comes to extraterritoriality see Raible, *Human Rights Unbound* (n 35) 50–55.
[50]On this principle and how it supplements notions of capacity see Leif Wenar, 'Responsibility and Severe Poverty' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007).
[51]Raible, *Human Rights Unbound* (n 35) 87.
[52]Besson (n 3) 858–59.
[53]ibid 860.

understood as ' … *de facto* political and legal authority; that is to say, the practical political and legal authority that is not yet legitimate or justified, but claims to be or, at least, is held to be legitimate by its subjects.'[54] This feature is further specified as follows:

> Qua de facto authority, jurisdiction consists in effective, overall and normative power or control (whether it is prescriptive, executive, or adjudicative). It amounts to more than the mere exercise of coercion or power as a result: it also includes a normative dimension by reference to the imposition of reasons for action on its subjects and the corresponding appeal for compliance (e.g., through giving instructions).[55]

The quote mentions a normative dimension, but for our purposes (and as we will see in more detail in section 3 below) imposing reasons as a descriptor of a situation is still a fact. It specifies the kind of power and the circumstances required to trigger human rights obligations. Nevertheless, the generalised principle justifying the scope of jurisdiction could (again) be that *once a state obtains the de facto authority (as opposed to power) it ought to fulfil its human rights obligations*.

Besson supplies arguments for the choice of de facto authority as the relevant concept to add to power as such. In particular, she explains her specification of jurisdiction by reference to the nature of human rights. In contrast to what I argued above is implied by Milanovic's account, the focus on authority suggests that human rights are not conceptualised mainly in terms of their beneficial outcomes for individuals. This account does not rely on universality or capacity, either. Instead, human rights are conceptualised as

> … normative relationships between a right-holder and a duty-bearer. But unlike other moral rights, they are systematic rights of all against all, and egalitarian ones at that, to the extent that all human rights subjects have the same rights against all and those rights are constitutive of equal moral status.[56]

Human rights, then, are political because their universal trait is to protect access to political membership, and institutional, because only institutions can afford said membership to individuals in the first place.[57] Besson's view explicitly links these features of human rights to the meaning of jurisdiction. The institutional and political character of human rights on her view is what makes authority in addition to power or control a necessary feature of jurisdiction because it is authority that gives meaning to membership in a political community.[58] As above, this suggests that the view on what human rights are forms part of the justification and explanation of jurisdiction.

Besson's view is different from Milanovic's but we can only understand the differences once we consider the respective justifications – be they implicit or explicit. As a consequence of their different starting points, Besson and Milanovic have different views about the meaning of jurisdiction. Their disagreement is not superficial. On the contrary, it goes to the heart of the account of human rights that is endorsed implicitly or explicitly as

[54]ibid 864–65, citing Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995) 215.
[55]ibid 865, citing Raz (n 54) 212.
[56]Besson (n 3) 866.
[57]Besson (n 3) 866, citing Samantha Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (2011) 4 *Ethics & Global Politics* 19. The view relies on the notion of a right to have rights advanced by Hannah Arendt, *The Origins of Totalitarianism* (Penguin 2017) 250–54.
[58]Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 3) 863–65.

well as to the principles informing it. Milanovic hints at the connection of extraterritoriality and the normative foundation of choice when he identifies the latter in international human rights law as the ideal of universality.[59] But it is telling that it is Besson – whose account builds more explicitly on normative foundations – who is better equipped to address the deep disagreement between the two accounts.[60] That is, the author who builds explicitly on principles and engages with their justification is also the author who is able to specify her disagreement with others. It strikes me that this is not a coincidence. The problem is that the influence of these underlying principles is not always acknowledged. This means that the actual differences between the views are not clear. This is what I mean when I say that commentators seem to be talking past each other.

Linking the justification of jurisdiction to an account of human rights in international law strikes me as plausible – but do not make too much of it. I have not defended this proposition, nor have I tried to sketch a particular account of international human rights law. While I happen to believe an account of jurisdiction needs to be tied to a successful justification of human rights obligations,[61] this is not the argument I am making here. All I am defending in this paper is that applying the distinctions Cohen draws in order to structure our justifications and explanations – whatever form they take – is useful because it sharpens our accounts and prevents miscommunication.

Building on this insight, I next introduce Jerry Cohen's argument that there is a necessary connection between principles that respond to facts and principles that do not. If I am right about this structure of reasoning about jurisdiction, his account will yield pointers as to what is missing when we only outline facts or when we neglect the structure of normative reasoning more generally. In what follows I sketch Cohen's view of this connection before turning to applying it to the problem at hand.

3. Cohen on facts and principles

3.1. Contribution to explaining extraterritoriality

Cohen's view is that '… a [normative] principle can reflect or respond to a fact only because it is *also* a response to a principle that is not a response to a fact.'[62] His thesis proposes a structure for thinking about normative reasoning that I argue is useful in making disagreements about jurisdiction in international human rights law more explicit and clear. My reasons are as follows.

As seen above, most bodies and authors (including myself) suggest that jurisdiction is meant to respond to facts. In other words, it seems reasonable to say that there is somewhat implicit agreement about jurisdiction in the following sense: jurisdiction is seen as the expression of a principle – whatever the principle may be – of which facts on the ground form an important part of the reason for affirming it.[63] There is disagreement

[59]Milanovic (n 1) 106.

[60]Samantha Besson, 'LJIL Symposium: A Response by Samantha Besson' (*Opinio Juris*, 21 December 2012) <http://opiniojuris.org/2012/12/21/ljil-symposium-a-response-by-samantha-besson/> accessed 21 July 2021. It is interesting to compare Milanovic's take in the same symposium: Marko Milanovic, 'LJIL Symposium: A Comment on Samantha Besson's Article on the Extraterritorial Application of the ECHR' (*Opinio Juris*, 21 December 2012) <http://opiniojuris.org/2012/12/21/ljil-symposium-a-comment-on-samantha-bessons-article-on-the-extraterritorial-application-of-the-echr/> accessed 21 July 2021.

[61]Raible, *Human Rights Unbound* (n 35) ch 2–3.

[62]Cohen (n 9) 214.

about jurisdiction in the sense that different bodies and authors defend different interpretations. That is, there is disagreement about what the principle underlying jurisdiction should be and what facts specifically it is supposed to respond to.

Where the debate seems to be less clear is whenever we seek a *reason*, that is, at least an explanation why a broader or narrower scope of jurisdiction is argued for as preferable. Sometimes the reasons are supplied, but not usually in a comparable manner. This is troublesome because it means we cannot engage with the disagreement other than perhaps by appeal to authority and find ourselves at an impasse. This impasse is where I contend Cohen's thesis is helpful. If I – along with many others – am right that jurisdiction is a(n expression of a) principle that responds to facts, then it must be true that it also reflects principles that do not respond to facts. This matters because it offers a very basic yardstick for what anyone who wishes to defend a particular interpretation of jurisdiction ought to supply in order to succeed.

Before I set out Cohen's argument, I want to take up two potential objections because they clarify what is important about his argument for our purposes and suggest slight amendments to his position that are useful for the present intervention. First, there is the possibility that Cohen is wrong about the structure of normative arguments. Second, whether or not Cohen is right could be immaterial because the structure of normative arguments is not what is relevant to the interpretation of jurisdiction (or, for that matter, other concepts in international law). That is, a general account on normative arguments is not the right choice for this paper on my part because how facts and value relate in law is more aptly addressed by accounts dealing specifically with that question. I will take these doubts in turn.

There are two kinds of objections relating to whether Cohen's argument is correct that are worth considering. The first – and for our purposes the more salient one – comes in two versions. Robert Jubb is concerned that Cohen's argument equivocates between epistemic and logical grounding.[64] A similar concern is raised by Ronzoni and Valentini when they argue that Cohen confuses the structure of normative principles with their justification.[65] This objection takes seriously Cohen's description of his own view as a logical one:[66] '[t]he priority of fact-insensitive principles is a matter of what utterances of principle commit one to, not of how one comes to believe or know what one says in uttering them.'[67] However, so the objection goes, Cohen himself does not stick to the logical character of his argument. This is said to be so either because he describes it in terms of beliefs and their structure[68] or because he wants to use it to refute constructivism of, for example, the Rawlsian variant.[69] The first is a mistake because what one believes or not is an epistemic question, not a logical one.[70] The second one confuses the search for substantive principles (Cohen's concern) with the one for methodological ones (constructivists' concern).[71] In

[63]Sections 1 and 2 above.
[64]Robert Jubb, 'Logical and Epistemic Foundationalism About Grounding: The Triviality of Facts and Principles' (2009) 15 *Res Publica* 337.
[65]Ronzoni and Valentini (n 11).
[66]Jubb 3 (n 64) 44.
[67]Cohen (n 9) 227.
[68]Jubb (n 64) 344–45.
[69]Cohen (n 9) 213.
[70]Jubb (n 64) 345.

turn, these mistakes lead Cohen to think that his thesis covers the process of justification as well as their plausibility. But this is not the case because justifications, let alone plausible ones, are more sophisticated and complex than valid syllogisms on the one hand,[72] and because his thesis may not apply to the generating of methodological principles for justification at all.[73] The objection then holds that Cohen's account may be true, but probably only trivially so.[74]

These are salient and persuasive objections to Cohen's argument – particularly so when we conceptualise his account of normative reasoning primarily as an attempt to refute constructivism. However, this is not the most relevant aspect for our purposes. Instead, the present paper is interested precisely in the logical structure of normative reasoning. That is, the objection of equivocation does not undermine Cohen's thesis for the purposes of this paper, but it does suggest that insisting on the logical character of the view is crucial. For this reason, it will be necessary to amend Cohen's phrasing and emphasis at times. I shall point out whenever I make such an amendment.

Insisting on the logical character of Cohen's view brings me to the second objection, namely that this kind of theory is not the right one to make sense of legal reasoning or interpretation. Here, the charge would be that legal reasoning and legal justification are not only or even primarily logical, and are (as above) more sophisticated than valid syllogisms. Alternatives that might be suggested to analyse reasoning or justification related to jurisdiction in international human rights law could, say, be found in the works of Dworkin[75] or MacCormick.[76]

It is obviously true that legal reasoning is not just logical, and it is also true that a valid syllogism does not suffice to supply a full justification for any position, principle, or interpretation of a legal concept, and I am not proposing to take issue with this. However, the modesty of Cohen's argument – especially once it is seen as logical in character – is an advantage for our purposes. First, it can accommodate a wide range of views on the nature of legal reasoning, law's authority and validity precisely because it is concerned with the logical structure of normative arguments more widely. And second, its modesty also means that differing views on concepts such as law's authority and validity do not undermine the analysis of disagreements as I am proposing to do here. That is, Cohen's view is useful for present purposes *because* it is not a legal one, not despite of it. With these caveats and clarifications in mind we now turn to the details of Cohen's argument.

3.2. Premises and argument

Cohen's argument has three premises. First, 'whenever a fact *F* confers support on a principle *P*, there is an explanation why *F* supports *P*. That is, there needs to be an explanation of how *F* represents a reason to endorse *P*.'[77] This premise does not stipulate that any principle – let alone every principle – is in need of a justification. Cohen clarifies:

[71]Ronzoni and Valentini (n 11) 414–15, 18–19.
[72]Jubb (n 64) 349.
[73]Ronzoni and Valentini (n 11) 418–19.
[74]Jubb (n 64) 352. More generous, but sceptical about the scope of Cohen's view as well: Ronzoni and Valentini (n 11) 419.
[75]Ronald Dworkin, *Law's Empire* (Hart 1986).
[76]MacCormick (n 18).
[77]Cohen (n 9) 217.

> The premise rather insists that there is always an explanation why a ground grounds what it grounds. What initiates the sequence of principles is not a need for justification – that, we may suppose, has already been fulfilled, by the cited fact – but a need for explanation (of why a stated justification justifies).[78]

The above statement is followed by a footnote, part of which is worth reproducing here. It reads:

> Let me clarify the structure of this sequence, which is neither one of explanations nor one of justifications but one which alternates those illocutions: that makes my argument more complex than it might at first appear to be. We begin with "*F* justifies *P*." We then ask "Why does *F* justify *P*?" and the answer takes the form: "Because P_1 makes F a justification for *P*." We then ask "But what justifies P_1?" And the answer will be: "Fact F_1"or "No facts, but. … "[79]

The upshot is that the framework Cohen suggests alternates between demands for justification and demands for explanation. The last statement in the footnote is intended to leave room for a number of possibilities, including that ultimate principles may be self-evident or that they may need grounds but lack them. The only restriction on the justification of ultimate principles is that they cannot be justified by facts.[80] The overall argument is further conditional: Cohen does not defend *that* there are fact-sensitive principles, only that ' … *if* any facts support any principles, then there are fact-insensitive principles that account for that relationship of support … .'[81] Keeping in mind what we said above, it is important to emphasise that this structure is not sufficient to supply a justification, and certainly does not say anything about whether any argument that follows it is plausible. But it sets out the logical steps necessary to relate facts and principles.[82]

Second, any such fact-based explanation invokes – even if only implicitly – an ultimate commitment that would survive if *F* were either denied or not true.[83] In other words, any such ultimate principle – in order to be this ultimate principle – would still hold true even if fact *F* did not, could not, or never did obtain. This more fundamental principle P_1, however, would not only survive if *F* did not hold but it also explains *why F* supports *P*.[84] These fundamental principles are what Cohen calls fact-insensitive.

Third, Cohen denies that such an enquiry into why any fact *F* supports any principle *P* will proceed indefinitely.[85] He argues: '[i]t follows from these premises that every fact-sensitive principle reflects a fact-insensitive principle.'[86] Regardless of whether there is objective truth about principles this conclusion is true for the ' … principled beliefs of a given person, as long as she is clear about what she believes and why she believes it.'[87]

[78]ibid 219.
[79]ibid.
[80]ibid.
[81]ibid 227–28.
[82]See on this point and in response to Jubb's (n 64) objection surveyed above: Kyle Johannsen, 'Explanation and Jusitfication: Understanding the Functions of Fact-Insensitive Principles' (2016) 11 *Socialist Studies* 174.
[83]ibid 217–18.
[84]ibid 218.
[85]But see the charge of infinite regress in Lea Ypi, 'Facts, Principles and The Third Man' (2012) 8 *Socialist Studies* 196. These concerns are well taken, but an enquiry into whether they undermine Cohen's argument is orthogonal to my purposes.
[86]Cohen (n 9) 218.
[87]ibid.

For our purposes, the first two premises are more important than the third one. In unpacking the argument further, I shall thus focus on them. In general, I do not aim to do justice to Cohen's entire argument and the objections he is countering. Rather, I am focusing on those aspects that I believe will help us structure the debate about jurisdiction more fruitfully.

How do the first aspects of Cohen's argument achieve this? The first premise focuses on the fact that whenever there is a fact *F* that supports or justifies a principle *P* there is an *explanation why* a fact *F* supports or justifies principle *P*. In particular, this premise supplies a way of differentiating justifications and explanations and also gives some indication of how they relate. The second premise, in turn, says something about what *explanations* (as opposed to justifications) need to look like. The argument suggests that there may well be more than one step involved in explaining why a fact supports a principle. This sequence of steps, however, will end with a principle that holds whether particular facts obtain or not. Let me give a couple of examples.

3.3. Examples from international law

Say there is a fact-sensitive principle *P*: *A state that exercises control over a territory ought to fulfil human rights duties towards individuals present in that territory*[88] because *a state is only able to guarantee human rights when it controls territory*. The latter is fact *F* which this principle is sensitive to: the link between territorial control and the capacity to protect human rights. The idea is that controlling territory is a good proxy for this capacity. Cohen insists there must be an *explanation* why this fact (as opposed to another fact or no fact at all) supports this principle. That explanation could be, for example, another principle P_1: *states need to be able to fulfil human rights obligations before we can impose such obligations*. Another, more general form of this principle is known as *ought implies can*.[89] The difference between *P* and P_1 is that *P* is fact-sensitive while P_1 is not. *P* is true when it does indeed follow that territorial control equates with an ability to guarantee human rights. P_1, on the other hand, survives even if that is not the case.

It is helpful to add another illustration of how this argument on the logical structure of normative reasoning could bear on debates in international law: the interpretation of treaties. How to interpret international treaties in general – including, but not limited to, human rights treaties and quite apart from their scope of application – is an area notoriously caught between facts and principles.[90]

Take the common assertion of intentionalism, that is, the idea that international treaties need to be interpreted according to what the contracting states intended and intend it to mean.[91] Accordingly, an intentionalist would place considerable weight on the

[88]This is too vague to function as an account of jurisdiction, of course, and I am not arguing that anyone is defending the claim that jurisdiction is fully represented by this principle. But for the moment my purpose is illustration only, which means that this will have to do.

[89]Cohen addresses "ought implies can" and explains that it is best understood as a fact-insensitive normative principle, but that discovering this may require some counterfactual thinking: Cohen (n 9) 230–31.

[90]I am drawing here on George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509, 534–35 and on Lea Raible, *Human Rights Unbound* (n 35) ch 1.

[91]For a recent version of intentionalism in international human rights law see generally (and despite the title) Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014); see also the critique in Marko Milanovic, 'Running in Circles: A Note on Bjorge's Evolutionary Interpretation of Treaties' EJIL: Talk! 18 December 2014 <https://www.ejiltalk.org/

drafting history and the *travaux préparatoires* as supplementary means of interpretation according to article 32 of the Vienna Convention on the Law of Treaties.[92] She would say that to interpret any treaty we ought to take into account its wording because it expresses the intention of states. These are her fact-sensitive principle *P* and her fact *F*. The formalisation follows the same pattern as above: 'We ought to take into account a treaty's wording' is *P*, while 'the wording of treaties expresses the intention of states' is *F*.

To be sure, *F* supports *P* and may on some accounts even satisfy the criteria for a justification. But it raises the further question why we should care about the intention of states. Saying that we should care about states' intentions because their intentions are important is not enough: it leads to an infinite regress.[93] In order to avoid this fate, we would need to say, for example, that we ought to respect and further states' projects that they pursue through treaty making.[94] This is not a statement of fact but a normative proposition: it states a duty. As such, this statement of duty above is our principle P_1: it makes principle *P* reflect fact *F*. It is a principle that is insensitive to facts in the sense here required.[95] That is, its truth does not depend on any fact obtaining. States may pursue projects, or not, and the proposition that there is a duty to respect such projects, should states decide to pursue them, would still hold true. What changes when states are indeed pursuing projects through international treaties is that the normative proposition, the principle it embodies, is now applicable.[96] And when it is applicable it can serve to explain the relevance of facts such as state's intentions for the interpretation of a treaty. In other words: P_1 tells us why fact *F* supports or justifies principle *P*.

3.4. Relevance and truth of facts

One important aspect that we are now better able to identify is that there are two dimensions to facts that matter for how they relate to principles: their relevance and their truth. Facts may support or even justify fact-sensitive principles. But neither the facts nor the fact-sensitive principles explain why it is fact *F* rather than fact F_1 that supports the principle. In other words, facts do not make themselves relevant.[97] What is more, fact-sensitive principles – being dependent on facts for support by definition – cannot supply an explanation of relevance either. This is where normative principles that are not sensitive to facts make an appearance.

Take one of the principles *P* mentioned above: *A state that exercises control over a territory ought to fulfil human rights duties towards individuals present in that territory* (because *a state is able to guarantee human rights when it controls territory*). To know

running-in-circles-a-comment-on-bjorges-evolutionary-interpretation-of-treaties/> accessed 21 July 2021. Potential problems with this account include that it does not in itself offer an answer to the question of whose intention would count as the state's, or indeed why the intention of the drafter is more important than, say, what the subjects of a treaty provision understand it to mean.

[92] Article 32 reads: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

[93] Letsas (n 90) 534.

[94] ibid 535.

[95] See generally Cohen (n 9). This is in line with Dworkin's definition of a principle as a standard required by some dimension of morality: Dworkin, *Taking Rights Seriously* (n 30) 22.

[96] Cohen (n 9) 215–16; Letsas (n 90) 534–35.

[97] Letsas (n 90) 535.

why it is control over territory rather than, say, control over another resource or an individual that supports the principle we will need at least (something like) principle P_1, which says: *States need to be able to fulfil human rights obligations before we can impose them*. We may then say that we think control over territory is a good proxy for practical capacity. But it does not end there. While control may well be a good proxy for capacity, this connection does not say why capacity would be a relevant consideration in the first place. That is a different question. It could be relevant because, say, we think practical capacity is valuable in constraining duties – that agents ought not to be expected to do what they cannot. It is this latter, fact-insensitive principle that explains why control over territory – the fact supporting principle P – is the relevant fact.

In turn, this way of arguing only indicates when a fact is relevant, not when it is true. We assume that it is true and then go on to explain why this fact, rather than another one is relevant. Our reasoning follows the same structure regardless of whether F is true. If it is not, we may need to adjust our view of extraterritoriality or whatever else we are trying to explain, taking into account facts that are. But this goes to the truth of the facts, not their relevance.

It follows that we need to distinguish between at least two questions when we account for the extraterritorial application of human rights through the meaning of jurisdiction. The first question is – at least in some sense – an empirical one. If we stick to the example we worked with in this section, the empirical question might be something like this: Is it true in a meaningful sense that control over territory is a good proxy for the kind of capacity we have in mind? If it is not a good proxy, we should be prepared to give up the fact of control over territory and search for a fact that is more accurately linked to the capacity. Of course, we first need to know about what kind of capacity we are aiming for.

This brings me to the second question, which is a normative one. To say something about the nature of the capacity that states need to possess to discharge human rights obligations, we need to know why we should care about capacity at all. Emphasising the existence and importance of the second question in addition to the first question is what we have to gain when we apply Cohen's argument to the debate on jurisdiction. The next section explains how I think this awareness could be translated.

4. Jurisdiction and implications for the structure of justification

Cohen's argument is one about the logical structure of normative reasoning. As such, he does not prescribe any particular form of justification – not in general, and certainly not on jurisdiction in international human rights law. In fact, neither of the two premises discussed above say anything about how principles are justified or indeed whether they need to be justified at all.[98] My claim so far has not been that Cohen's argument places a demand for justification on anyone who introduces or works with an account of jurisdiction. Instead, I have been arguing that Cohen's thesis will help us frame our alternating explanations and justifications more fruitfully because it sheds light on the structure of normative reasoning. This is where I want to take his argument further.

Specifically, I want to argue two points. First, I show that major disagreements on jurisdiction are to be found not only regarding the facts that its principles are sensitive to,

[98]Cohen (n 9) 219.

but also in the principles invoked to explain the relevance of those facts. That is, disagreements pertain to *P*, *F*, and P_1 alike. Second, I will insist that any justification put forward for jurisdiction as (a set of) fact-sensitive principle(s) *P* should at the very least distinguish between empirical questions (regarding *F* and its truth) and normative questions (regarding P_1 and *F*'s relevance rather than its truth) so as to make treating our disagreements more effective and transparent. Even if this is not adhered to, Cohen's structure should be helpful to rationally reconstruct arguments to make them comparable. Its logical character means that it can accommodate a wide range of views and possibilities while insisting on a common structure.

Following from what I said above, this section illustrates how the distinctions Cohen draws can be helpful to read and develop accounts of jurisdiction. Of course, the idea is not necessarily that either Cohen's or my terminology be followed. But I will insist that distinguishing what is said about jurisdiction along the lines of fact-sensitive principles, the facts that support those principles and the fact-insensitive principles that make those facts relevant is beneficial. How could this be done?

Consider the examples referred to above. We were able to draw some comparisons between Milanovic's and Besson's views. For example, we were able to identify that their disagreement pertains to more than jurisdiction. To fully compare the accounts, however, was not possible. I aim to show here that reconstructing their respective accounts to distinguish whether any given point is addressing *P*, *F*, or P_1 would be helpful in this respect. In turn, this also puts participants in the debate in a better position to judge the merits of each view.

Milanovic's account of jurisdiction consists of multiple propositions that could be qualified as a fact-sensitive principle *P*. The one that's considered above reads: *when states obtain power they also obtain human rights obligations they ought to fulfil*.[99] The meaning of power is not specified other than a reference to its factual nature. Besson's main principle of jurisdiction is also a version of *when states obtain power they also obtain human rights obligation they ought to fulfil*. She goes on to specify that power on her account must have a normative dimension as well as a factual one. Nevertheless, there is little that differentiates these views at this stage even though the authors concerned insist that their disagreement is significant.[100] Just by looking at the operational fact-sensitive principle *P*, this does not become obvious, however. Perhaps fact *F* will help.

We encounter a complication here. Neither Besson, nor Milanovic specify fact *F*, which they take to support a justification of their principle *P*. A plausible reading

[99]For the purposes of his account of extraterritoriality Milanovic distinguishes between negative and positive human rights obligations. Negative duties are conceptualised as obligations not to do something, whereas positive duties are a requirement to some sort of positive action. The bar of jurisdiction – on Milanovic's account only applies to positive obligations, but not to negative ones: see generally, Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 1) ch 4. This, one might say, is sufficient to distinguish his account from others (including Besson's). Note, however, that the principle as stated still applies to both kinds of obligations: it is *F* (the kind of power or control and what it is a proxy for) that changes, not *P*. While this might mean we would have to repeat the exercise in this section a couple of times for each aspect of his account, it does not undermine the present argument in general.

[100]For more on how each author perceives their disagreement see Marko Milanovic, 'LJIL Symposium: A Comment on Samantha Besson's Article on the Extraterritorial Application of the ECHR' (*Opinio Juris*, 21 December 2012) <http://opiniojuris.org/2012/12/21/ljil-symposium-a-comment-on-samantha-bessons-article-on-the-extraterritorial-application-of-the-echr/> accessed 21 July 2021 and Samantha Besson, 'LJIL Symposium: A Response by Samantha Besson' (*Opinio Juris*, 21 December 2012) <http://opiniojuris.org/2012/12/21/ljil-symposium-a-response-by-samantha-besson> accessed 21 July 2021, as well as the discussion in section 2 above.

would be to say that it is again the fact that *power (of whatever specification) is a good proxy for capacity*. This is our fact *F*. Following Cohen's steps this far enables us to see the beginning of a meaningful differentiation: the *kind* of power Besson and Milanovic have in mind seems to be different. This is reflected in *P* but more obviously in *F*, where a specification would be more pressing.

Exploring fact-insensitive principle P_1 for both takes yields an even clearer picture. A plausible reading of Milanovic's account – and here I rely on rational reconstruction – suggests that the normative, fact-insensitive principle P_1 at play is a version of the capacity plus least-cost principle.[101] *Any obligation should be discharged by the agent which incurs the least cost in doing so.* To illustrate the gist of this principle, consider a shooter who injures someone who stands next to you. Even though you did not injure this person, you still have an obligation to help in the first instance. The least-cost principle (as a P_1) explains why the fact that you are close, while the shooter is far away is relevant in allocating responsibility in the first instance.[102] For Milanovic, then, power over territory does not only equate with capacity, but the latter also indicates that a state faces lower costs (presumably both monetary and otherwise) than other agents to discharge human rights obligations. Note that the capacity plus least-cost principle supplies the explanation we are looking for. It tells us why the factual connection between territorial control and capacity supports principle *P*.

Besson's account is not amenable to the same explanation. This is easier to ascertain because she supplies much of the explanation I suggest we should be looking for herself. However, the way her view introduces normative reasoning as part and parcel of jurisdiction may muddy the waters a little. Recall that Besson describes jurisdiction as a normative rather than a factual concept, defined as

> … '*de facto* political and legal authority'; that is to say, the practical political and legal authority that is not yet legitimate or justified, but claims to be or, at least, is held to be legitimate by its subjects.[103]

It is more than mere power or coercion as it is only present in the case of effective overall control in conjunction with a normative dimension. The latter consists – as authority – in giving reasons for compliance and thus replacing the original reasons for action.[104]

If we follow Cohen's classification, the description of jurisdiction Besson supplies is not normative at all. Instead, the quote above is still part of a fact-sensitive principle *P*: it specifies the kind of situation Besson has in mind as capturing jurisdiction. That is, the relevant version of *P* reads: *When a state obtains de facto political and legal authority it also obtains human rights obligations it ought to fulfil.* On this version of *P*, the relevant fact *F* which supports it becomes *de facto political and legal authority captures the context human rights specify for their application.* This change of formulation reflects the fact that this view is not concerned with capacity. Instead, as I read it, the

[101] On how the least-cost principle allocates responsibility see generally Leif Wenar, 'Responsibility and severe poverty' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Wwes What to the Very Poor?* (OUP 2007).

[102] ibid 264. Note that this does not say anything about other obligations – including those to face consequences – the shooter might incur.

[103] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 3) 864–65 citing Raz (n 53) 215.

[104] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 3) 865, again citing Raz (n 54) 212–13. This is how I understand Raz's account of practical authority. The reasons given by a practical authority do not only guide the action of its subjects but replace all other reasons for action with the pronouncements of the authority.

concern is to define what context is necessary for human rights to apply. On Besson's view, that context is a political community of equals, which enables public institutions to specify and allocate human rights obligations.[105] P_1 which explains the relevance of authority could thus be: *Human rights ought to be applied only when the community of application is able to specify their content through institutions*.

The comparison between these two views on jurisdiction started out with P, which looked very similar. Only teasing out how each account moves from *P* to *F* through P_1 which explains *F*'s relevance made it possible to reconstruct what both Milanovic and Besson acknowledge: their disagreement.

None of this means that accounts of jurisdiction should follow Cohen's terminology to the letter. I do not think a successful explanation of jurisdiction (or any other legal principle or doctrine) requires a particular vocabulary. But the present argument has substantive implications. It suggests that it is misleading to say that jurisdiction is only a question of fact.[106] The better view is to understand it as a principle that reflects facts because it is sensitive to them. This is what I aimed to show in section 2 above. The upshot of viewing jurisdiction as such a principle is to say that it will be dependent on normative principles that tell us which facts are relevant to and support it. Describing jurisdiction as a matter of fact is thus at the very least incomplete.

The present argument further suggests that it may be equally unhelpful to speak of jurisdiction's 'normative dimension'[107] without elaborating where this normative dimension sits in relation to facts on the ground. It is more profitable to be clear what each principle – fact-sensitive or not – and each fact is doing in order to support an explanation and, ultimately, a justification of an account of jurisdiction. What talk of a normative dimension does get right is the following: a full explanation of jurisdiction as a fact-sensitive principle will involve facts as well as normative propositions that explain what facts are relevant. Whether the normative proposition in question holds up to scrutiny is a different matter. Making all aspects explicit, however, means such scrutiny can be applied without participants in the debate – whether scholarly or institutional – talking past each other.

5. Conclusion

We have seen that many views of jurisdiction share a commitment to jurisdiction being a principle (or an expression thereof) that responds in some way to facts on the ground. Applying Cohen's framework to this insight means that jurisdiction – even if it is meant to pick out a set of facts on the ground – cannot be explained or justified by reference to facts alone. The examples discussed in the introduction further suggest that a list of facts is insufficient even in practice where we might not want to argue that a particular way of reasoning be imposed.

Nevertheless, an explicit explanation of both the facts and their relevance is needed. This will take the form of normative principles that are not themselves dependent on

[105]See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 3) 866. More generally, see, Samantha Besson, 'The Egalitarian Dimension of Human Rights' (2013) 136 *Beiheft, Archiv für Rechts- und Sozialphilosophie* 19; Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244, 248–57.

[106]See, eg, Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 57.

[107]Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 3) 865.

facts. The suggestion has not been to require a particular form or terminology for an account of jurisdiction to be successful. Instead, I hope the argument will be read as an encouragement to reflect on the structure of normative arguments about jurisdiction and perhaps also as a tool to reconstruct and compare existing accounts. Making explicit which facts and principles are relied on to justify the scope and nature of jurisdiction is, I suggest, a modest ask with significant advantages for academic debate as well as practice.

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