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John Quigley

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TERRITORIAL APPLICABILITY OF THE CONVENTION: ARTICLE 2

*John Quigley**

Article 2 of the Draft United Nations Convention on the Rights of the Child requires States Parties to ensure rights guaranteed by the Convention "to each child within their jurisdiction."¹ This phrase defines the territorial applicability of the Convention. Territorial scope is a critical element in any human rights treaty. If human rights treaties are to serve their purpose, they should not be limited in their application only to territory over which a state party exercises sovereignty. Human rights treaties typically apply beyond such territory. In light of the principles developed in other human rights treaties, this article examines the territorial applicability of the Draft United Nations Convention on the Rights of the Child.

* Professor of law, The Ohio State University College of Law; Adjunct Professor, The Ohio State University Department of Political Science. A.B., 1962, Harvard College; M.A., 1966, Harvard University; LL.B., 1966, Harvard Law School; Exchange Research Fellow, 1966-67, Moscow State University.

1. *Question of A Convention on the Rights of the Child: Report of the Working Group on the Rights of the Child*, 45 U.N. ESCOR (Agenda Item 13), U.N. Doc. E/CN.4/1989/48 (1988) [hereinafter *Report of The Working Group*]. This language was adopted by the United Nations Commission on Human Rights, the Economic and Social Council, and remained unchanged in the text as submitted to the United Nations General Assembly in October 1989. See *Adoption of A Convention on the Rights of the Child*, G.A. Res. --, U.N. GAOR Supp. (No. --), U.N. Doc. A/44/616 (1989) [hereinafter *Adoption of A Convention*]. Article 2 provides:

1. The States Parties to the present Convention shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Id. art. 2.

I. TERRITORIALITY AND HUMAN RIGHTS LAW

Human rights law developed predominantly on the premise of obliging a State to take or abstain from certain acts in its own territory. Prior to development of human rights law, States had obligations only for acts committed against nationals of other States. Those obligations fell under the general law of State responsibility as obligations to the State of the foreign national. It was not an obligation directly to the foreign national.

Human rights law developed with the predominant aim of extending a State's obligation from foreign nationals to its own nationals. The most controversial aspect of this extension of liability was the imposition on states of an obligation to observe the rights of its own nationals within its own territory. This is where territorial sovereignty had traditionally been a bar to international liability.

Human rights law did not, however, limit its applicability to a State's territory. The focus of human rights law is the protection of individuals from actions of States. With respect to certain human rights obligations, it is inherent in the obligation itself that it applies only to territory over which the State has control. A State may ensure employment opportunities, medical care, or freedom of expression only where it controls territory. But obligations to refrain from acts harmful to a person are not limited. The Genocide Convention, for example, prohibits genocide.² The Convention is silent as to territorial applicability.³ The manifest intent is that a State is prohibited from committing genocide anywhere, such as, within its own borders, in international territory, inside another State, or even in outer space. A State is also prohibited from forcibly abducting persons for purposes of

2. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

3. *Id.* at 280.

prosecution, regardless of the place of abduction.⁴

II. TERRITORIALITY AS REFLECTED IN HUMAN RIGHTS INSTRUMENTS

Like the Genocide Convention, the Universal Declaration of Human Rights is silent as to territoriality.⁵ The Declaration's preamble refers to the "universal and effective recognition" of human rights and in defining rights, the Declaration focuses on the individual, not on the territory.⁶ It states: "[a]ll human beings are born free and equal in dignity and rights."⁷ The Declaration defines rights by the formulation that "everyone is entitled to all the rights and freedoms set forth."⁸ The implication is that the individual is entitled to these rights wherever that individual is located.

Similarly, the African Charter on Human and Peoples' Rights is silent.⁹ It imposes on States Parties the obligations of the Charter without territorial limitation: "[t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."¹⁰ Like the Declaration, it phrases rights in a universal fashion. In defining the right to life and physical integrity, it states: "[e]very human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."¹¹

4. Quigley, *Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists*, 10 HUM. RTS. Q. 193 (1988).

5. Article 2 of the Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. Doc. A/810 at 71 (1948).

6. *Id.* at 71.

7. *Id.* at 72, art 1.

8. *Id.* at 72, art 2.

9. See African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 I.L.M. 58 (1982).

10. *Id.* at 60.

11. *Id.*

The American Convention on Human Rights requires States Parties

[t]o respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.¹²

Thus, the obligation to respect rights is not limited territorially. The only territorial limitation is with respect to ensuring that rights are made available to all without discrimination.

The Convention for the Protection of Human Rights and Fundamental Freedoms contains a territorial formulation that limits a State's obligations.¹³ It states: "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."¹⁴ The phrase "within their jurisdiction" is not defined in the Convention. This phrase could be read to include only the territory of a State Party. However, it has not been construed in this fashion. The European Commission of Human Rights, an implementing body under the Convention, has been asked to apply the Convention to territory held by a State in belligerent occupation. The Commission has decided that the Convention applies to such territory.

In *Cyprus v. Turkey*,¹⁵ filed after Turkey occupied a portion of Cyprus in 1974, Cyprus alleged a variety of human

12. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 at 18-45, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. 21 rev. (1970).

13. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

14. *Id.* at 224.

15. *Cyprus v. Turkey*, 62 I.L.R. 4 (Eur. Comm'n H.R. 1978).

rights violations committed by Turkey in that territory.¹⁶ Cyprus cited several Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms that it claimed Turkey violated.¹⁷ Turkey denied that it was in military occupation, on the ground that a new government had been established in the portion of Cyprus in question, and that Turkey did not exercise control there.¹⁸ The Commission decided that Turkey did exercise control as a belligerent occupant.¹⁹ Turkish forces, it said, had "[e]ntered the island of Cyprus, operating solely under the direction of the Turkish Government and under established rules governing the structure and command of these armed forces including the establishment of military courts."²⁰ The Commission cited the "within their jurisdiction" language of Article 1 of the European Convention.²¹ It stated that this language means "[t]hat the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad."²²

Cyprus v. Turkey has been characterized as "[a] significant recognition in principle of the applicability of international human rights law to occupied territories."²³ The Commission's rationale extends to a situation in which a state has military control but has not established a military

16. *Id.*

17. *Id.* at 5.

18. *Id.* at 64.

19. *Id.* at 75.

20. *Id.*

21. *Id.* at 74.

22. *Id.*

23. Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 287 (1985). For agreement with the analysis in the text that the Commission ruled that the Convention was applicable to a State Party exercising belligerent occupation, see T. Buergenthal, TO RESPECT AND TO ENSURE: STATE OBLIGATIONS AND PERMISSIBLE DEROGATIONS, in THE INTERNATIONAL BILL OF RIGHTS 72, 76-77 (L. Henkin ed. 1981) [hereinafter BILL OF RIGHTS].

government.²⁴

The Commission had reached the same conclusion in a previous case.²⁵ The wife of Rudolf Hess, incarcerated in Spandau Prison, Berlin, for World War II crimes against peace, petitioned for his release. The United Kingdom was one of four states in joint military occupation of Berlin. The Commission decided that the United Kingdom was not responsible for Hess' incarceration under Article 1 of the European Convention, but only because of the quadripartite character of the occupation:

The Commission is of the opinion that the joint authority cannot be divided into four separate jurisdictions and that therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter "within the jurisdiction" of the United Kingdom, within the meaning of Art. 1 of the Convention.²⁶

The Commission said "[t]hat there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention."²⁷ Although the Commission found that the quadripartite character of the occupation relieved the United Kingdom of responsibility, the Commission considered the European Convention to cover its actions while in military occupation of foreign territory.

The Convention Against Torture, like the European Convention, applies within a state's jurisdiction. It states:

24. BILL OF RIGHTS, *supra* note 22, at 76-77.

25. *Ilse Hess v. United Kingdom*, Decision on Admissibility, May 28, 1975, 2 Eur. Comm'n H.R. 72 (1975).

26. *Id.*

27. *Id.* at 72-73. See generally I. HENDRY & M. WOOD, *THE LEGAL STATUS OF BERLIN* 212-13 (1987).

"[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."²⁸

The anti-discrimination Conventions are typically silent as to territoriality. In the Convention on Discrimination Against Women, States Parties "agree to pursue . . . a policy of eliminating discrimination against women."²⁹ In the Racial Discrimination Convention, States Parties "undertake to pursue . . . a policy of eliminating racial discrimination" and "to engage in no act or practice of racial discrimination."³⁰ The Declaration Against Religious Discrimination states: "[n]o one shall be subject to discrimination by any State . . . on grounds of religion or other beliefs."³¹ For embassies abroad, States are presumably obliged to refrain from discriminating on the basis of gender, race, or religion in hiring local employees.

The Apartheid Convention is silent as to territoriality,³² although the logic of the Convention is such that it would not be possible to maintain apartheid other than in a territory over which a state exercises control. But there is no reason that the apartheid convention need be restricted only to territory over which a state holds sovereignty. Indeed the International Court of Justice has condemned South Africa for instituting apartheid in Namibia, which South Africa held

28. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, 39 U.N. GOAR Supp. (No. 3) at 197, U.N. Doc. A/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified*, 24 I.L.M. 535 (1985).

29. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979), *reprinted in* 19 I.L.M. 33 (1980).

30. Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966).

31. Article 2(1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GOAR Supp. (No. 51) at 171, U.N. Doc. A/36/51 (1981), *reprinted in* 21 I.L.M. 205 (1982).

32. International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), U.N. GOAR Supp. (No. 30) at 75, 28, U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50 (1974).

illegally.³³

In a report on human rights in armed conflict, the Secretary-General of the United Nations construed the United Nations Charter's human rights provisions as applying in belligerent occupation. He said that the

human rights provisions of the United Nations Charter make no distinction in regard to their application as between times of peace on the one hand and times of war on the other These texts seem to cover all persons living in countries which are at peace as well as inhabitants of countries engaging in, or affected by, armed conflicts. The phraseology of the Charter would . . . encompass persons living under the jurisdiction of their own national authorities and persons living in territories under belligerent occupation.³⁴

The Secretary-General construed the Universal Declaration of Human Rights as well to apply in wartime:

The Universal Declaration of Human Rights does not refer in any of its provisions to a specific distinction between times of peace and times of armed conflict. It sets forth the rights and freedoms which it proclaims as belonging to "everyone," to "all," and formulates prohibitions by the phrase that "no one" shall be subjected to acts of which the Declaration disapproves. The Declaration proclaims that the "universal and effective recognition and observance" of the

33. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16.

34. *Respect for Human Rights in Armed Conflict: Report of the Secretary-General*, G.A. Res. 2444 (XXIII), 24 U.N. GAOR C.3 (Agenda Item 61) at 488, U.N. Doc A/7720 (1969).

rights and freedoms shall be secured.³⁵

III. TERRITORIALITY AND THE RIGHTS OF CHILDREN

Most frequently, the Convention on the Rights of the Child will be invoked regarding acts by a State within its own territory. However, many acts affecting children cross national borders. Following the Vietnam War, a "babylift" to the United States was organized for children left homeless by the war. The draft Convention addresses the situation of refugee children in Article 22.³⁶ In such situations, issues of the respect for a child's cultural background, a topic covered by Article 20, may arise.³⁷ Child custody cases often involve cross-border transfers of a child, a matter addressed in Article

35. *Id.* at 12, para. 24.

36. Article 22 of the Draft Convention on the Rights of the Child, as submitted to the United Nations General Assembly, provides:

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in this Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Adoption of A Convention, supra note 1, art. 22.

37. Article 20(3) of the Draft Convention provides:

3. Such care could include, *inter alia*, foster placement, Kafala of Islamic Law, adoption, or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural, and linguistic background.

Id. art. 20(3) (emphasis in original text).

10(2).³⁸ The drafters thus contemplate that the Convention will apply in situations in which a State's activity reaches outside its own territory.

The rights of children need to be protected most during times of war. Nazi Germany deported children from occupied territory to Germany.³⁹ The experience of World War II led to the incorporation into the Geneva Civilians Convention of a number of protections applicable specifically to children,⁴⁰ although children fall under protections applicable to persons generally. A State in control of foreign territory should be obliged to protect the rights of children.

While the humanitarian law as reflected in the Geneva Civilians Convention provides considerable protection to the rights of children under belligerent occupation, the Convention on the Rights of the Child provides many additional forms of protection. This typifies the fact that human rights law is broader than humanitarian law. Humanitarian law ensures only certain basic rights of a population under belligerent occupation; human rights law protects many more rights.⁴¹

38. Article 10(2) of the draft Convention, as submitted to the United Nations General Assembly, provides:

2. A child whose parents reside in different States shall have the right to maintain on a regular basis save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under Article 9, paragraph 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Id. art. 10(b).

39. M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 200 (1959).

40. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 U.N.T.S. 287, art. 89 (food rations for children under 15 years).

41. Quigley, *The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population Have a Right to Freedom of Assembly and Expression?* 12 B.C. INT'L & COMP. L. REV. 23-27 (1989).

IV. FORMULATION OF TERRITORIALITY IN THE DRAFT CONVENTION

Article 2 of the Draft Convention on the Rights of the Child, in providing its basic obligation, says:

States Parties shall respect and ensure the rights set forth in this Convention to each child in their jurisdiction without distinction of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.⁴²

Although states are obliged to provide primary education⁴³ only in territory they control, States should be obligated not to violate the privacy of a child⁴⁴ regardless of the location of the violation. A State's obligation to protect the right of a child to life⁴⁵ should universally apply. If a State should take reprisal on a political opponent by murdering that opponent's child on the high seas, the Convention would seem to apply.

The term "within their jurisdiction" in Article 2 reads broadly.⁴⁶ It makes the Convention apply to any situation in which a State violates the rights of a child, regardless of

42. See *Report of The Working Group, supra* note 1, art. 2. The draft Convention submitted in October 1989 to the United Nations General Assembly states:

1. The States Parties to the present Convention shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Adoption of A Convention, supra note 1, art. 2(1).

43. *Id.* art. 28 (right to education).

44. *Id.* art. 16 (right to privacy).

45. *Id.* art. 6 ("every child has the inherent right to life.").

46. See *supra* note 1.

location. The fact that various provisions of the Convention apply extraterritorially indicates that the drafters contemplated that in some instances a State is obliged to abide by the Convention in actions that extend beyond its borders.

A State is obliged to abide by the Convention in territory over which it has sovereignty, or any territory that it holds in fact. The Convention also applies where a State's army is on foreign territory, even if it has not been established as a belligerent occupant. Additionally, the Convention applies to territory that a State holds under belligerent occupation. As stated above, the phrase "within their jurisdiction" has been construed under the European Human Rights Treaty to apply to belligerent occupation. In using that phrase, the drafters of Article 2 evidently intended to incorporate that meaning.

From the human rights treaties analyzed above a body of law emerges with respect to territorial application. The formulation "within their jurisdiction" in Article 2 the United Nations Draft Convention on the Rights of the Child⁴⁷ is consistent with customary and conventional human rights law regarding the extent of rights guarantees. This formulation requires a State Party to abide by the Convention wherever its activity may reach.

47. *Id.*