With (State) Power Comes (State) Responsibility: Plugging the Accountability Gap Through a Reappraisal of Jurisdiction in International Human Rights Law

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Abstract—This article argues that states can be held legally accountable for inter-state arms trading. This is especially important in light of the conflict in Israel and Palestine, which has seen numerous human rights violations facilitated by arms trading. Currently, the accountability regime is inadequate. Many states have not ratified the Arms Trade Treaty 2014, and Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts provides no individual forum for complaint. Instead, we must look to international human rights law. This article advances a new definition of jurisdiction under

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Article 1 of the European Convention on Human Rights and Article 2(1) of the International Covenant on Civil and Political Rights. Jurisdiction should mean an exercise of state power backed by a normative relationship between the state and the individual. This normative relationship is triggered by (1) the reasonably foreseeable causal relationship between the state and the individual and (2) the existence of parallel international law obligations. When selling arms, states may exercise jurisdiction and violate the right to life by exposing individuals to the 'substantial and foreseeable' risks associated with the use of arms by the receiving state.

Introduction

Arms trading is aptly described by a UN Special Rapporteur on human rights as the 'Billion Dollar Death Trade.'[1] For proof of this, look no further than the conflict in Israel and Palestine. The death toll in Gaza has surpassed 25,000 since the Hamas attack on October 7th, yet the United States has just announced the sale of another 14,000 rounds of tank ammunition to Israel, costing $106 million.[2] The sums involved are astronomical. The consequences for individuals are indescribable. Despite this, there is an accountability gap. The Arms Trade Treaty 2013 has failed to prevent states from facilitating human rights violations, given that many major players, including the United States, are not

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[1] UN Special Rapporteur on the situation of human rights in Myanmar, *The Billion Dollar Death Trade: The International Arms Networks That Enable Human Rights Violations in Myanmar*. <https://www.ohchr.org/sites/default/files/documents/countries/myanmar/crp-sr-myanmar-2023-05-17.pdf> accessed 8 May 2024.

[2] See, for example: BBC News, 'US Arms Exports to the Middle East 2019-23 (14 March 2024) <www.bbc.co.uk/news/world-middle east68737412#:~:text=The%20US%20is%20by%20far,arms%20between%202019%20and%202023> accessed 19 April 2024. For updates, see Forum on the Arms Trade, 'Biden and Arms Sales to Israel'; David Gritten, 'Gaza war: Where does Israel get its weapons?' (*BBC News,* 15 April 2024) <https://www.bbc.co.uk/news/world-middle-east-68737412#:~:text=The%20US%20is%20by%20far,arms%20between%202019%20and%202023> accessed 8 May 2024. For updates, see <https://www.forumarmstrade.org/bidenarmsisrael.html>. Note also the recent decision of the International Court of Justice ordering Israel to take provisional measures to prevent the Commission of genocide in Gaza (without prejudice to the question of whether Israel is committing genocide): *Application of the Convention on the Prevention and Punishment of Genocide in the Gaza Strip (South Africa v Israel)* [2024] ICJ General List No 192.

parties to the Treaty, while states parties continue to trade with impunity.[3] Further, Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts,[4] which provides that states may be held responsible for assisting other states in breaching their obligations, provides no individual forum for complaints.[5]

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[3] The United States is not a party to the ATT, and many states parties have failed to comply with its obligations. For example, the United Kingdom on 7 July 2020 decided to resume granting export licenses to Saudi Arabia, employing a 'revised methodology' and determining that 'Saudi Arabia has a genuine intent and capacity to comply with IHL.' (Hansard, HC Deb 07 July 2020, col 32WS) <https://hansard.parliament.uk/commons/2020-07-07/debates/20070747000017/ExportLicencesSaudiArabia> accessed 8 May 2024. On 7 June 2023, the Divisional Court in *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2023] EWHC 1343 (Admin) dismissed a legal challenge against the Secretary of State for his decision to re-issue export licenses in 2020. This decision followed submissions from the Yemeni Human Rights Organisation, Mwatana for Human Rights. They detailed 149 airstrikes carried out by the Saudi-led Coalition which allegedly caused harm to civilians in Yemen, with 32 incidents *prima facie* breaching IHL [91]. That said, the ATT is of course a positive step in regulating inter-state arms transfers. It is notable that the ATT now has 114 state parties, including the United Kingdom, China, Germany and France.

[4] I refer to them as 'articles,' rather than 'draft articles' because of their subsequent treatment by the General Assembly. In para 3 of GA res 56/83 (12 December 2001), the GA 'took note' of the 'articles on the responsibility of states for internationally wrongful acts.' This is also how the ILC Secretariat refers to them. Hereinafter referred to as ARSIWA.

[5] cf the European Convention on Human Rights, where any 'victim' of human rights violation can bring a case before the court (Article 34). For authors to bring claims under the ICCPR, the respondent state must have ratified the second Optional Protocol.

To hold states accountable for inter-state arms trading, we must rely on international human rights law. This article advances a new definition of jurisdiction which applies to the European Convention of Human Rights[6] and the International Covenant on Civil and Political Rights.[7] Specifically, jurisdiction should mean an exercise of state power, backed by a normative relationship between the state and the individual.[8] This normative relationship is triggered by (1) the reasonably foreseeable causal relationship between the state and the individual and (2) the existence of parallel international law obligations. Additionally, there should be an expansive understanding of the right to life. These arguments apply to both treaties under the principle of systemic integration in Article 31(3)(c) of the Vienna Convention of the Law of Treaties 1969.[9]

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[6] Hereinafter referred to as the 'ECHR'.

[7] Hereinafter referred to as the 'ICCPR'.

[8] cf *Banković v Belgium* [2001] ECtHR App no. 52207/99 [75]; UN Human Rights Committee, *General Comment No 36: Article 6 (Right to Life)* UN Doc CCPR/C/GC/36 (2019) [63].

[9] *Vienna Convention on the Law of Treaties* [1969] 1155 UNTS 331 Art 31(3)(c). Hereinafter referred to as the VCLT.
The article provides that interpretation must take account of 'any relevant rules of international law applicable in the relations between the parties.' The provision was not clearly explained by the International Law Commission in the drafting process, due to concerns about the difficulty in clarifying the relationship between treaty and custom. However, McLachlan explains that the provision essentially reflects the desire for 'systemic integration.' This involves harmonising different rules of international law, often stemming from different sources. Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International & Comparative Law Quarterly 280; *Yearbook of the International Law Commission*, vol 2 (1964) [74].

Aside from making two positive arguments, this article responds to Ludvig Öhrling's thesis, entitled 'Arms Trade, Human Rights and the Jurisdictional Threshold.'[10] Öhrling and I reach the same conclusion that states should be held accountable for inter-state arms trading, but there are differences in (1) our methodologies and (2) the content of our jurisdictional models.

In terms of methodology, Öhrling focuses narrowly on the meaning of 'jurisdiction' in Article 1 ECHR. This is regrettable. The ECHR only has 46 state parties, while the ICCPR has 174, including the United States and Russia.[11] To truly address the problem of inter-state arms trading, we need a new meaning of jurisdiction, applicable to both to the ECHR and the ICCPR. It is hoped that this will provide a springboard for wider jurisdictional models under Article 1 of the American Convention of Human Rights and African Charter on Human and Peoples' Rights.[12]

The biggest difference lies in the respective contents of our notions of jurisdiction. Öhrling endorses Ben-Naftali and Shany's model of jurisdiction based on direct, significant, and

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[10] Ludvig Öhrling, 'Arms Trade, Human Rights and the Jurisdictional Threshold: On the Responsibility of Arms Transferring States Under the European Convention on Human Rights' (Lund University 2021).
[11] ECHR: <www.coe.int/en/web/cpt/states>; (accessed 08/05/24); ICCPR: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en > (accessed 8 May 2024).
[12] *African Charter on Human and Peoples' Rights* (Adopted 27 June 1981, Entered into Force 21 October 1986) 1520 UNTS 217. The Charter has no specific jurisdictional clause ; *American Convention on Human Rights* (Adopted 22 November 1969) 1144 UNTS 123 Art 1.

foreseeable extraterritorial consequences.[13] This is problematic, as Öhrling's descriptive argument, which relies solely on ECtHR case law, cannot support this model. By contrast, my model receives support from the (1) ECtHR, (2) Human Rights Committee, (3) Inter-American Court of Human Rights, (4) African Commission on Human and Peoples' Rights, and (5) it is derived from an application of the customary principles of interpretation in the VCLT.[14]

This article will first examine the current extraterritorial models of jurisdiction and their inapplicability to inter-state arms transfers. Second, it will defend a new meaning of jurisdiction. Third, it will outline the expansive reading of the right to life required in addition to this model of jurisdiction. Finally, the model of jurisdiction will be tested against the rules of interpretation under the VCLT,[15] concluding that the model is descriptively possible.

The Current Models of Jurisdiction

Before arguing for a new definition of jurisdiction, it is instructive to set out the current position. Jurisdiction has several meanings

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[13] Öhrling (n 10) 64; Ben-Naftali and Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 Israel Law Review 64.

[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 [160]; *Golder v UK* [1975] ECtHR App no 4451/70 [29].

[15] *VCLT* Arts 31 and 32.

in international law.[16] In international human rights law, jurisdiction refers to the trigger for the imposition of human rights treaty obligations.[17] This is supported by the text of Article 1 ECHR, which provides that states owe obligations to those 'within their jurisdiction.'[18] Although Article 2(1) ICCPR provides that states owe obligations to those within their territory <u>and</u> subject to their jurisdiction, this clause is widely recognised as operating disjunctively, and thus jurisdiction is sufficient to engage human rights obligations.[19] International courts and bodies have recognised that jurisdiction is 'primarily territorial'[20], meaning states most commonly owe human rights obligations

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[16] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 434. Jurisdiction can refer to (1) the competence of a court (domestic or international) to hear a dispute, (2) the authority of a state to prescribe, enforce or adjudicate upon legal rules, (3) factual power exercised by a state which triggers human rights obligations, or (4) the domainé reserve, or the domain in which states are entitled to be free from outside interference (particularly in the context of the principle of non-intervention).
[17] ibid 416.
[18] *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 Art 1.
[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [109]; UN Human Rights Committee, General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant [2004] UN Doc CCPR/C/21/Rev.1/Add.13, para 10; cf the US position: Matthew Waxman, 'Opening Statement by Matthew Waxman on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR)' (US Department of State, 2007) <https://2001-2009.state.gov/g/drl/rls/70392.htm>.
[20] *Banković v Belgium* (n 8) [61], [67]; *Al-Skeini and Others v UK* [2011] ECtHR App no 55721/07 [131]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (n 21) [109].

within their own borders. However, there are two well-recognised exceptions. First, states owe obligations when they exercise effective overall control over territory abroad (the spatial model),[21] and second, when agents of the forum state exercise authority over persons (the personal model).[22] These exceptions do not cover inter-state arms trading.

The Spatial Model – Effective Control over Territory

Under this model, applied by both the Human Rights Committee and the European Court of Human Rights, states exercise jurisdiction where they have effective control over territory outside the forum state.[23] Effective control is a question of fact.[24] Relevant factors include the 'strength of the state's military presence in the area' and 'the extent to which its military, economic and political support for the local subordinate

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[21] *Loizidou v Turkey (merits)* [1996] ECtHR App no 15318/89 [56]. *Al-Skeini and Others v UK* [2011] ECtHR App no 55721/07 [138]. UN Human Rights Committee (n 8) [10].

[22] *Al-Skeini and Others v UK* (n 21) [133]-[137]. *Delia Saldias de Lopez v Uruguay* [1981] HRC CCPR/C/13/D/52/1979 [12.1]-[12.3].

[23] UN Human Rights Committee, *General Comment No 36: Article 6 (Right to Life)* UN Doc CCPR/C/GC/36 (2019) [63]; *Loizidou v. Turkey (merits)* (n 21) [53].

[24] *Al-Skeini and Others v UK* (n 20) [139]. It is very important to distinguish effective control for the purposes of IHRL obligations and effective control as a test for attribution under article 8 of the Articles on the Responsibility of States for Internationally Wrongful Acts, since both may be relevant in the same context. *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/83 (2001) ('*ARSIWA*') Art 8; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14 [115].

administration provides it with influence and control over the region.'[25] Effective control does not, however, extend to inter-state arms trading, or even direct bombing campaigns. In *Banković,* the ECtHR held that NATO's bombing of Belgrade was not an exercise of jurisdiction, specifically rejecting the application of the effective control state in this context.[26] *A fortiori*, arms sales will not be sufficient to ground jurisdiction.

The Personal Model – Authority over Persons

The ECtHR and HRC have recognised extraterritorial jurisdiction based on an exercise of power by agents of the state over people in another state.[27] According to the ECtHR, human rights obligations can be 'divided and tailored' under this model of jurisdiction.[28]

The ECtHR in *Al-Skeini v UK* recognised three categories of personal jurisdiction, which map onto those recognised by the HRC. These are: (1) acts of diplomatic or consular agents who exert authority and control over others[29], (2) states exercising public powers on another state's territory which

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[25] *Al-Skeini and Others v UK* (n 20) [139]. This suggests that military presence is not always required, which perhaps explains the ECtHR's intermittent references to 'effective overall control'.
[26] *Banković v Belgium* (n 8) [75].
[27] *Delia Saldias de Lopez v Uruguay* (n 22) [12.1]-[12.3].
[28] *Al-Skeini and Others v UK* (n 2120) [137]; This decision overruled Banković on the point and has now been explicitly confirmed by the ECtHR in *Ukraine and The Netherlands v Russia* [2022] ECtHR App no 8019/16, 43800/14 and 28525/30 [571].
[29] *Banković v. Belgium* (n 8) [73].

would normally be exercised by that state's government, either through consent, invitation, or acquiescence by that government,[30] or (3) use of force by state agents operating outside their territory over persons.[31]

Öhrling explains that since the *Banković* decision, the ECtHR has recognised an increasingly liberal personal model of jurisdiction.[32] In *Ukraine and the Netherlands v Russia,* the Court explained that 'Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state which it could not perpetrate on its own territory.'[33] This echoes the HRC's position in *Lopez Burgos v Uruguay*.[34]

These statements are inaccurate. In *Soering v United Kingdom,* which concerned state extradition, the ECtHR held that a state can breach Article 3 of the ECHR by exposing an individual to the 'foreseeable consequences of extradition', namely torture, inhuman and degrading treatment.[35] Applying the liberal approach above, the reasoning in *Soering* should apply absent a jurisdictional link. However, in *MN v Belgium*, which concerned Syrian nationals applying for visas to enter Belgium,

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[30] ibid [71]; *Delia Saldias de Lopez v. Uruguay* (n 22) [12.3]: the HRC refers to agents committing human rights violations regardless of the 'acquiescence of the Government of that State,' so the language is slightly different.
[31] *Issa and Others v Turkey* [2004] ECtHR App no 31821/96 [71]; *Delia Saldias de Lopez v Uruguay* (n 22) [12.1]-[12.3].
[32] Öhrling (n 10) 51–52.
[33] *Ukraine and The Netherlands v. Russia* (n 28) [570].
[34] *Delia Saldias de Lopez v. Uruguay* (n 22) [12.3].
[35] *Soering v UK* [1989] ECtHR App no 14038/88 [86].

the Court rejected this argument, specifically relying on the absence of the territorial connection.[36] This inconsistency means that cases of facilitation, such as inter-state arms trading, do not constitute an exercise of jurisdiction under the personal model.

A Reappraisal of Jurisdiction

Öhrling argues in favour of a 'functional' model of jurisdiction. He explains that 'functional' is 'in essence a claim for universalism,'[37] with states owing human rights obligations to individuals who they 'have a functional capacity to protect.' [38] This is a good starting point, but the obvious problem is its breadth. In a globalised world, many states, particularly those with power and wealth, have some capacity to help any individual. To adopt a notion of jurisdiction based on universalism essentially renders it otiose.

Instead, there should be a new definition of jurisdiction which is broader than the territorial and personal models, but narrower than the universal functional model. States should owe human rights obligations when they exercise state power and have a normative relationship with individuals affected by that power.[39]

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[36] *MN and Others v Belgium* [2020] ECtHR App no 3599/18 [120].
[37] Öhrling (n 10) 57.
[38] ibid 1.
[39] This definition is inspired by the following articles: Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) Human Rights Law Review 8; Samantha Besson, 'The Extraterritoriality of the European

The ECtHR's and HRC's Position

The ECtHR has repeatedly held that the ordinary meaning of jurisdiction in Article 1 of the ECHR reflects the term's meaning in public international law.[40] Jurisdiction in PIL is 'the authority of the state, based in and limited by international law, to regulate the conduct of persons, both natural and legal, by means of its own domestic law.'[41] This authority consists of jurisdiction to: (1) prescribe – the authority to make legal rules, (2) enforce – the authority to enforce those rules, and (3) adjudicate – the authority of states' domestic courts to settle legal disputes.[42] The law of jurisdiction exists to ensure that states exercise their competences within the limits set by other states. Jurisdiction is thus 'primarily territorial.'[43] The ECtHR states that this understanding must apply with equal force to jurisdiction in IHRL. This should be rejected.[44] Jurisdiction in IHRL does not refer to a state's competence to make, enforce, or adjudicate upon legal rules. This is obvious from the first instance of extraterritorial jurisdiction recognised by the ECtHR itself. In *Loizidou v Turkey*, the Court

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Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' 25 Leiden Journal of International Law 857. I have sought to combine these originally competing and mutually exclusive models.

[40] *Banković v Belgium* (n 8) [59]; *HF and Others v France* [2022] ECtHR App nos 24384/19, 44234/20 [184]. 'Public international law' hereinafter referred to as 'PIL'.

[41] Milanovic (n 39) 420.

[42] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 440.

[43] *Banković v Belgium* (n 8) [75].

[44] Milanovic (n 39) 419.

held that Turkey exercised jurisdiction in Cyprus on the basis of its 'military action.'[45] Critically, Turkey's invasion was not internationally recognised as falling within its competence to enforce domestic law. Jurisdiction in the sense of PIL competence must be distinguished from jurisdiction in the sense of factual power.[46]

Having established that the jurisdictional analysis in *Loizidou* was essentially factual, it is vital to examine the specific descriptive aspect of the jurisdictional test. It is suggested that 'state power' should fulfil this descriptive limb. State power should be defined as any power which is attributable to the state under ARSIWA.[47]

The argument that 'state power' constitutes jurisdiction was first advanced by Professor Milanovic.[48] The HRC referred to 'state power' as an aspect of jurisdiction in General Comment No 36 on the right to life.[49] By contrast, The ECtHR continues to refer to 'public power,' which is endorsed by Öhrling.[50] This confusing terminology calls for clarification.

The reference to 'public power' should be rejected in favour of 'state power.' The use of the phrase 'public power' is dangerous because it appears to distinguish the public-facing acts

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[45] *Loizidou v Turkey (merits)* (n 21) [52].
[46] Milanovic (n 39) 423–424.
[47] *ARSIWA* (n 24) CH.II.
[48] Milanovic (n 39) 417.
[49] UN Human Rights Committee (n 8) 36 [63].
[50] Öhrling (n 10) 57; *Banković v Belgium* (n 8) [71]; *Al-Skeini and Others v UK* (n 20) [149].

of the state from the private-facing acts. To hold that only public-facing acts can constitute an exercise of jurisdiction would provide a loophole for states to avoid accountability.

Imagine State A exercises 'effective control' (for the purposes of attribution, rather than IHRL jurisdiction)[51] over an arms company operating in that state. Under the test set out by the International Court of Justice in *Nicaragua v United States*,[52] this satisfies the test for attribution under Article 8 of ARSIWA.[53] However, this is essentially a private-facing act, in that the state-backed private company is delivering arms pursuant to a commercial agreement with the receiving state. We can say (1) that the arms company is a state organ, but (2) the state is exercising its private-power, which means it would not satisfy the jurisdictional test of 'public power' in IHRL. This test would thus allow states to evade liability by acting through arms companies, rather than selling arms themselves.

The test of state power should mean any power which is attributable to the state under ARSIWA.[54] While the public and private law distinction may be relevant in terms of domestic

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[51] These two tests of 'effective control' are distinct and operate in different areas of international law. The test set out in *Nicaragua* determines whether conduct is *attributable* to the state (under the secondary rules of international law contained in ARSIWA). The test of 'effective control' in IHRL determines whether the state has exercised jurisdiction in the territory of another state. The latter test necessarily assumes that the relevant conduct is attributable to the state.

[52] *Nicaragua* (n 24) [115].

[53] *ARSIWA* (n 24) Art 8.

[54] ibid CH II.

administrative law,[55] ultimately, in PIL, all state organs, engaging in *any* capacity, are required to comply with international law. Adopting a 'public power' test would unduly narrow the circumstances in which a state exercises jurisdiction. This is because the impact of the state's conduct will not necessarily vary according to whether that conduct is public or private.

Besson's Position – The Need for a Normative Relationship

Besson agrees with Milanovic that jurisdiction in IHRL is different to that in PIL. However, she differs in arguing that an additional normative relationship is required between the state and the individual to trigger jurisdiction. Besson defines jurisdiction as '*de facto* political and legal authority… [that] claims to be, or at least is held to be legitimate by its subjects.'[56] For Besson, this normative claim is a 'corresponding appeal for compliance' by the state, or a 'claim to legitimacy, even if that claim ends up not being justified.'[57]

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[55] The UK House of Lords and Supreme Court have frequently struggled to draw the line between public and private entities, most recently in the context of s6 of the Human Rights Act 1998, which provides that public authorities act unlawfully when they violate Convention rights. See, for example *YL v Birmingham City Council* [2007] UKHL 27, which was immediately reversed by s145 of the Health and Social Care Act 2008.

[56] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' 25 Leiden Journal of International Law 857, 865.

[57] ibid.

Besson's model is attractive. Firstly, if the imposition of human rights obligations is a normative consequence of an exercise of 'jurisdiction,' then a normative reason should justify that consequence. Second, the normative element avoids circular reasoning by not assuming the existence of human rights prior to determining whether there is an exercise of jurisdiction.

However, Besson's requirement of normativity should not be restricted to a claim by the state to exercise authority. The restriction is undermined by the case law of the ECtHR and is not justifiable.[58]

In *Carter v Russia*, the ECtHR held that Russia had exercised jurisdiction over Alexander Litvinenko by poisoning him in London.[59] Russia did not claim to exercise legitimate authority over Mr Litvinenko; it simply exercised power. While Russia may privately believe it had a right to poison Mr Litvinenko, Russia did not make a public claim to have legitimate authority. Indeed, such a claim would lead to international condemnation. Nevertheless, the ECtHR rightly recognised an exercise of jurisdiction, which suggests Besson's model is too narrow. There is no reason to confine Besson's requirement of a normative relationship to this claim to authority. Rather, the focus should be on any feature which generates a normative relationship.

[58] Though her article was written before these cases.
[59] *Carter v Russia* [2021] ECtHR App no 20914/07 [170].

The Normative Features of Inter-state Arms Trading

Having established that the ordinary meaning of jurisdiction requires (1) state power and (2) a normative relationship, it is instructive to examine the properties of proposed models of jurisdiction to see if they meet these criteria and can provide guidance on relevant normative features.

Reasonable Foreseeability

Öhrling relies on Ben-Naftali and Shany's intensity of power relations model,[60] which entails that states exercise jurisdiction where their actions have 'direct, significant and foreseeable' consequences in foreign territory.[61] Shany distinguishes this from the special legal relations model, or 'relations of power that put the state in a unique legal position to afford IHRL protection.'[62] Shany puts 'foreseeability' in the power category, but this is too narrow. Rather, foreseeability of extraterritorial harm is a normative feature which can justify the imposition of human rights obligations. Öhrling seems to implicitly recognise this, as he refers to the need for a 'concrete and precise' normative relationship, before paradoxically arguing in favour of Shany's power relations model.[63]

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[60] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 Law and Ethics of Human Rights 47, 69.
[61] Ben-Naftali and Shany (n 13) 64.
[62] Shany (n 60) 71.
[63] Öhrling (n 10) 64.

To resolve this analytical confusion, it is necessary to separate the descriptive aspect of jurisdiction (the exercise of state power), from the normative aspects. As established, one such normative aspect is the notion of 'foreseeability.'

Immediately, we must replace 'foreseeability' with 'reasonable foreseeability.' The former term was rejected by states in the HRC's Draft General Comment No 36 and is not supported by international practice.[64]

The importance of reasonable foreseeability has been emphasised by the African Commission on Human and Peoples' Rights,[65] the Committee on Economic Social and Cultural Rights,[66] and the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and

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[64] State responses to draft GC 36 [2017]: The United States of America [13], France [37], Russia [6]. See also Australia [3], Austria (p2), Canada [7], Germany [21], Norway (pp4-5), and The Netherlands [29]. Available at Office of the High Commissioner for Human Rights, 'General Comment No 36: Article 6 (Right to Life) <www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life> accessed 8 May 2024.

[65] African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (2015) [14]. Available at <https://achpr.au.int/en/node/851#:~:text=cannot%20be%20implemented.-,General%20Comment%20No.,to%20present%20General%20Comment%20No> accessed 8 May 2024.

[66] Committee on Economic, Social and Cultural Rights, *General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (2017) [27].

Cultural Rights.[67] More widely, the Inter-American Court of Human Rights has stated that a mere causal link is enough for jurisdiction in the context of transboundary harm,[68] which runs contrary to *Banković*.[69] These statements of international courts and expert treaty bodies constitute subsidiary means of determining law under Article 38(1)(d) ICJ Statute, and should inform the interpretation of the ICCPR and ECHR, given the principle of systemic integration in Article 31(3)(c) VCLT.[70] The notion of reasonable foreseeability should thus constitute one normative feature.

Parallel International Law Obligations

So far, we have established the feature of reasonable foreseeability. The second normative feature is the existence of parallel international law obligations, particularly those generated by the ATT. The ECtHR and HRC have recognised that parallel international law obligations can generate IHRL obligations in the absence of a territorial basis of jurisdiction.[71] In *Hanan v Germany*

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[67] ETO Consortium, *Maastricht Principles on Extraterritorial Obligations on States in the Area of Economic, Social and Cultural Rights* (2011) Principle 9(b). Note, the principles are 'soft law,' but do purport to codify current international law rules on extraterritorial obligations. .

[68] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity: interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention of Human Rights* [2017] IACtHR Advisory Opinion OC-23/17 [102].

[69] *Banković v Belgium* (n 8) [75].

[70] *VCLT* (n 9) Art 31(3)(c).

[71] *Hanan v Germany* [2021] ECtHR App no 44871/16 [135-136]; *AS and others v Malta* [2021] HRC CCPR/C/128/D/3042/2017 [6.7].

the ECtHR found that Germany's obligation to investigate extra-territorial violations of the right to life was triggered because of, *inter alia,* parallel customary humanitarian law, namely the obligation to investigate potential war crimes.[72] This parallel obligation constitutes one 'special feature' which broadens the notion of jurisdiction. While *Hanan* appears confined to the procedural aspect of Article 2 ECHR, the same cannot be said for *AS v Malta*, where the HRC relied on three international treaties to show that Malta owed positive, substantive obligations outside its territory (namely to rescue asylum seekers at sea).[73]

This argument is not without controversy. In *Hanan*, the dissenting Judges Grozev, Ranzoni, and Eicke described the approach as creating 'a chilling effect' by 'unnecessarily duplicating obligations' and broadening the scope of the Convention.[74] In response, the majority in *Hanan* emphasised that 'the gravity of the alleged offence' justified an expansive approach to jurisdiction. A similar argument could be made about inter-state arms trading, especially when considering the pending

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[72] *Hanan v Germany* (n 71) [137]-[142]. The other 'special features' were the inability of Afghanistan to conduct its own investigation and the domestic law obligation on Germany to investigate. Neither of these are relevant here.
[73] *AS and others v Malta* (n 71) [6.6]-[6.7]. The treaties are: (1) United Nations Convention on the Law of the Sea 1982, (2) International Convention on Maritime Search and Rescue 1979, and (3) International Convention for the Safety of Life at Sea 1974.
[74] *Hanan v Germany* (n 72) Joint partly dissenting opinion of Judges Grozev, Ranzoni and Eicke [7]; Andreas Zimmermann (dissenting) similarly rejected relying on parallel international law obligations to expand jurisdiction in *AS and others v Malta* (n 73).

case of genocide against Israel before the ICJ (facilitated by such arms trading).

There are two further arguments to support reliance on parallel international law obligations to generate a normative jurisdictional link. First, Öhrling argues that that the ATT generates 'legitimate expectations' of IHRL compliance.[75] Second, states impliedly consent to broader IHRL obligations given their acceptance of comparable obligations without a jurisdictional bar.

Öhrling's argument currently lacks a basis in IHRL, with legitimate expectations confined to the doctrine of estoppel.[76] However, considering the desire for systemic integration in international law, now may be an appropriate time to apply the principle of estoppel - a general principle of international law - to the IHRL context. Essentially, estoppel would operate to prevent the state from denying its IHRL obligation when it has already consented to a similar international law obligation. This would provide a doctrinal peg on which Öhrling's legitimate expectations argument could be hung.

Implied consent may provide an additional normative link. The ECtHR could adopt a rebuttable presumption that where a state consents to an obligation in international law, it also consents to a comparable IHRL obligation. For example, article 7(1)(b)(ii) ATT imposes due diligence obligations on states to regulate the transfer of arms where such transfers would be used

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[75] Öhrling (n 10) 65.

[76] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merits)*, Dissenting Opinion of Sir Percy Spender [1962] ICJ Rep 6 143–144.

to 'commit or facilitate' a 'serious violation of international human rights law.'[77] The ECtHR and HRC could adopt a presumption that the state accepts this obligation in the IHRL context, at least as regards 'serious' violations, which includes the right to life.[78] To rebut the presumption, the state could be required to act as a 'persistent objector' to reject the obligation.[79] This could be effective given the political pressure on states to respect human rights, especially in the context of the Israeli-Palestinian conflict.

Applying These Features

To summarise, we have three features which constitute an exercise of jurisdiction in IHRL: (1) the descriptive feature of state power, (2) the normative feature of reasonable foreseeability, and (3) the normative feature of parallel international law obligations. Admittedly, there lies a difficult question as to whether these features are cumulative. Clearly, some form of state power is necessary. As for the normative features, whether they are independently sufficient will be a question of state practice. Gradually, state practice is beginning to coalesce around the notion of reasonable foreseeability, but it is too early to conclude that this is independently sufficient to create

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[77] *Arms Trade Treaty* [2013] 3013 UNTS 269 Art 7(1)(b)(ii).
[78] *Coronel v Colombia* [2002] UN Doc CCPR/C/76/D/778/1997 [5.2]; *Velikova v Bulgaria* [2000] ECtHR App no 41488/98 [82]; *Concluding Observations on Togo's Report,* UN Doc CCPR/C/TGO/CO/4 [2001] [9].
[79] Crawford (n 42) 26; *Fisheries (UK v Norway) (Judgment)* [1951] ICJ Rep 116 131.

a normative link. Therefore, these features are currently sufficient only if taken together.[80]

Inter-state arms trading *triggers* these features. First, it involves an exercise of state power, namely a decision to grant export licenses to foreign states.[81] Second, there will often be a reasonably foreseeable connection between the sending state and the individual affected by the receiving's state's use of arms. Third, inter-state arms trading is already governed by the ATT, which imposes parallel obligations, such as that contained in Article 7(1)(b)(ii).[82]

To see how inter-state arms trading may constitute an exercise of jurisdiction, imagine the following two scenarios. First, State A sells arms to State B, who is currently in an armed conflict and has reportedly engaged in human rights violations. Second, State X sells arms to State Y, who uses and stores the arms for domestic training purposes. Both State A and State X have exercised state power in granting an export license to the foreign state. However, only State A has the requisite normative feature of reasonable foreseeability: it is reasonably foreseeable that State B will use arms to commit further violations as it is in an armed conflict and has reportedly engaged in human rights violations. Therefore, only State A has exercised jurisdiction. This example demonstrates that the model of jurisdiction is not overly expansive, which is vital to ensure state support.

[80] See the section on state practice for more detail.
[81] Öhrling (n 10) 64.
[82] *ATT* (n 77) Art 7(1)(b)(ii).

Expanding the Content of the Right to Life

Now that it has been established that states can exercise jurisdiction through inter-state arms trading, it must be shown that states can *violate* their obligations under the right to life. Öhrling effectively assumes this. He relies on *Albekov and Others v Russia*,[83] in which Russia breached Article 2 by its 'failure to confine a mined area and properly notify the residents.'[84] However, this is distinguishable from inter-state arms trading, in which states are *facilitating* violations of the right to life.[85] *Albekov,* by contrast, concerned Russia's *direct* breach of a positive obligation.

To expand the right to life, we must have recourse to the ECHR and ICCPR's extradition line of case law. In *Soering*, the UK breached Article 3 ECHR for exposing Soering to the 'foreseeable consequences of extradition' suffered outside UK jurisdiction, namely torture.[86] The ECtHR justified this obligation on the basis of the importance of Article 3 as a non-derogable right which must be protected in accordance with the 'spirit' of the Convention.[87] This positive obligation was also

[83] *Albekov and Others v Russia* [2008] ECtHR App no 68216/01.
[84] Öhrling (n 10) 39.
[85] Here, by 'right to life,' I mean the obligation under Article 6 ICCPR, as in most cases, the state *using* the arms will not be a party to the ECHR. That said, even if the state is not party to any international human rights treaties, this should not prevent the sending state from breaching its obligation.
[86] *Soering v UK* (n 35) [86].
[87] ibid [88].

applied in the context of the right to life in *Al Nashiri*, which established that states are under obligations not to extradite the victim where there is a 'substantial and foreseeable risk' that they could be subjected to the death penalty.[88] Similarly, in *Munaf v Romania,* the HRC held that 'a state party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction.'[89] Applying this to the inter-state arms trading context, states could be held accountable when transferring arms which pose a 'substantial and foreseeable' risk of violating the right to life.[90]

The key weakness of this argument is that these cases have a purely territorial basis of jurisdiction (the rights-holder was present in the forum state before extradition). In contrast, in inter-state arms trading cases, the rights-holders are in foreign territory.

Öhrling argues that *Soering* can be applied without such a territorial link. He relies on Jackson's argument that the true *ratio* of *Soering* is preventing states from exposing individuals to the 'foreseeable consequences of extradition',[91] relegating the jurisdictional issue to the background. Jackson's argument

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[88] *Al Nashiri v Romania* [2018] ECtHR App no 33234/12 [728].
[89] *Munaf v Romania* [2009] HRC CCPR/C/96/D/1539/2006 [14.2].
[90] *Al Nashiri v Romania* (n 88) [728]. The same reasoning would apply to the right to be free from torture, inhuman or degrading treatment, but this article focuses on the right to life.
[91] *Soering v UK* (n 35) [86]; Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture, and Jurisdiction' (2016) 27 European Journal of International Law 824; Öhrling (n 10) 66.

accords with: (1) the living instrument doctrine, (2) the importance the ECHR places on the seriousness of the right, and (3) the existence of a parallel international law obligation (Convention Against Torture).[92]

Generally, Jackson's argument appears to have been rejected by the ECtHR in *MN v Belgium*. There the Court criticised any reliance on *Soering,* given the lack of a territorial basis of jurisdiction.[93] In the arms-trading context, Öhrling argues that *Soering* has been rejected extraterritorially by the ECtHR in *Tugar v Italy*. Therefore, it follows *ex hypothesi* that the case should be overruled. This analysis is incorrect. *Tugar,* in fact, can be read consistently with Jackson's argument.

In *Tugar v Italy*, the applicants attempted to use *Soering* to show that Italy violated Article 2 ECHR through failing to establish regulations monitoring and controlling the sale of arms to third states by private companies. These arms were sold by a company within Italy's jurisdiction to the Iraqi government, where the arms were later used to severely injure the applicant.[94] The Commission distinguished *Soering* on the basis that the transfer of arms was 'too remote' from the applicant's injury, and therefore Italy had not breached its positive obligation under Article 2.[95] While this appears problematic, the case is distinguishable because it did not concern direct inter-state arms transfers, but instead conduct by a third party. Naturally then, the

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[92] Jackson (n 91) 825–827.
[93] *MN and Others v Belgium* (n 36) [120].
[94] *Tugar v Italy (Admissibility)* [1995] ECHR (First Chamber) App no 22869/93, Ser 83-A 26.
[95] ibid.

connection between the state's conduct (its lack of due diligence) and the eventual impact on the applicant is weaker.

Further, the Court in *Tugar* could have simply distinguished *Soering* because of the jurisdictional differences in the two cases. In Italy, the victim was not present in the territory at the time of the arms transfer and thus there was no territorial jurisdiction (in contrast to *Soering*). Despite this, the Court engaged with the remoteness test posited in *Soering*.[96] Placing the emphasis on this test, rather than distinguishing the case based on jurisdictional differences, opens the door to Jackson's argument on 'freeing Soering'. Read in this way, the positive obligations that arise based on a 'substantial and foreseeable risk' can apply in the absence of a territorial basis of jurisdiction.

Testing the Model

The new definition of jurisdiction has significant normative attraction: it ensures accountability for conduct which facilitates numerous human rights violations. That said, the descriptive question of whether the model is permissible when applying the rules of interpretation in PIL is more complex.

The rules of treaty interpretation in PIL are contained in Articles 31 and 32 of the VCLT, which reflect customary international law.[97] The International Law Commission, who

[96] ibid.

[97] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 14) [160]; *Golder v. UK* (n 14) [29].

drafted the articles, has made clear that the rules of interpretation form a 'crucible,' with no hierarchy.[98]

To interpret the meaning of 'jurisdiction' in Article 1 ECHR and Article 2(1) ICCPR, the following rules are relevant: (1) the ordinary meaning of the term, (2) the context of the treaties, (3) the object and purpose of the treaties, and (4) state practice.[99] The pronouncements of UN treaty bodies such as the HRC should be ascribed 'great weight.'[100] Decisions of the ECtHR are binding on the respondent state, per articles 32 and 46(1) ECHR. This of course only applies in respect of the Convention.

The Ordinary Meaning of Jurisdiction

It has been argued that the ordinary meaning of jurisdiction under the ECHR and ICCPR should be an exercise of state power backed by a normative relationship. This definition is coherent because it explains why states owe human rights obligations under the various ECHR models.

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[98] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries* (1966) 219–220. In human rights treaties, the object and purpose of the treaty may be especially helpful due to the frequency of vague and obscure language.
[99] *VCLT* (n 9). State practice in the application of the treaty must be considered under article 31 VCLT, while state practice which do not reach that threshold may be considered as a supplementary means of interpretation under article 32 VCLT.
[100] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* International Court of Justice [2010] ICJ Rep 639 [66].

The Context

This article has advanced a new definition of jurisdiction in the context of the right to life, but in principle, the model should extend to all rights. The context of the treaty supports this interpretation.[101] The meaning of 'context' is carefully circumscribed by the VCLT. Article 31(2) states that 'context' includes the 'text' of the treaties, including its 'preamble and annexes.[102]

The text of the ECHR and ICCPR includes both the jurisdictional clauses (Article 1 ECHR and Article 2(1) ICCPR) and the human rights obligations. These are kept structurally separate, suggesting that the jurisdictional threshold applies in respect of all obligations. This may be contrasted to the International Covenant on Economic, Social and Cultural Rights,

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[101] The notion of jurisdiction relied on has also been applied outside the context of the right to life: Committee on Economic, Social and Cultural Rights (n 66); *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity: interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention of Human Rights* (n 68). The latter does not adopt the same model, but does emphasises causation as the determining factor, suggesting a functional model in the context of transboundary harm.

[102] *VCLT* (n 9) Art 31(2). This articles also defines context as including 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' (31(2)(a)) and 'any instrument which was made by one or more parties in connection with the conclusions of the treaty and accepted by the other parties as an instrument related to the treaty' (31(2)(b)). These are irrelevant for this enquiry.

which has no general jurisdictional clause and instead a specific rights-based jurisdictional clause in Article 14.[103]

The Object and Purpose of the ECHR and ICCPR

The object and purpose of the ECHR and ICCPR may be derived from the preamble of both treaties, which also fall under the 'context' in Article 31(2) VCLT.[104] Both treaties aim to 'promote universal respect for, and observance of, human rights and freedoms.'[105] Judge Bonello interprets the preamble of the ECHR in his concurring opinion in *Al-Skeini v UK* as justifying a broader model of jurisdiction. Specifically, he states, 'universal hardly suggests an observance parcelled off by territory or on the checkboard of geography.'[106] This suggests a model of jurisdiction untethered by territorial considerations. The model advanced here likewise relegates the importance of territory, and positively emphasises the role of state power and normativity.

Letsas argues that the meta-intention of the drafters of the ECHR is the abstract protection of rights, rather than concrete protection (i.e. protecting rights in a specific range of circumstances).[107] This means that the drafters intended to

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[103] *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') [1966] 993 UNTS 3, Art 14.
[104] *VCLT* (n 9) Art 31(2); *Golder v. UK* (n 14) [34].
[105] *International Covenant of Civil and Political Rights* [1966] 999 UNTS 171, preamble; *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5, preamble.
[106] *Al-Skeini and Others v UK* (n 20) concurring opinion of Judge Bonello [9]. Öhrling (n 10) 56–57.
[107] George Letsas, 'Intentionalism and the Interpretation of the ECHR', Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris,

protect rights in a range of situations, which, critically, could be *expanded* in future. This intention is supported by the vague nature of the treaty text. For example, Article 3 ECHR states that 'no one shall be subjected to torture or to inhuman or degrading treatment.'[108] This language has evolved, such that making an individual homeless can now constitute degrading treatment, violating Article 3. Similarly, the focus on 'abstract intention' of rights protection should allow for a broader notion of jurisdiction. Indeed, the ECtHR has already taken steps forward, for example by recognising the exceptions of effective control and personal jurisdiction.

An evolutive approach requires examining modern practices. Traditionally, state practice was considered most relevant, as states decide whether to undertake international obligations. However, Higgins argues that international law contains several *participants*, including states, international organisations, and individuals.[109] For Higgins, individuals have rights owed to them under international law. The ECHR is one example, given that individuals can directly enforce their claims at international level.[110] However, it is still states who owe the obligation, and state consent is required in order for the state to

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Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 years on, vol 1 (Martinus Nijhoff Publishers 2010) 268.

[108] *ECHR* Art 3.

[109] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Repr, Clarendon Press 2010) ch 3.

[110] The ICCPR provides for direct individual complaints, but the respondent state must have signed and ratified the First Optional Protocol of the Covenant.

be bound.[111] Therefore, while international courts may be able to interpret obligations, and international organisations and individuals may comment on desirable changes to obligations, states have ultimate control. This creates problems for the reappraisal of jurisdiction.

Subsequent State Practice

Subsequent state practice is relevant both legally and politically. Legally, subsequent state practice may be relevant (1) as a mandatory rule of interpretation (where there is a consensus) or (2) as a supplementary, residual rule.[112] The weight of subsequent practice depends on 'its clarity and specificity' and 'whether and how it is repeated.'[113] The state practice in respect of a broader jurisdictional model falls into the second category, but this does

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[111] One exception is given by Higgins (n 109), namely that individuals and states can agree to submit their dispute to a specific arbitral body (as seen with investor-state arbitration).

[112] Compare Article 31(3)(b) with Article 31(2) *VCLT* (n 9). It will be assumed that subsequent practice includes the recent practice of states up until the present day. This was the view taken by the majority in respect of the 1890 Anglo-German Treaty in the *Case concerning Kasikii/Sedudu Island (Botswana v Namibia)* [1999] International Court of Justice ICJ Rep 1045. However, four dissenting judges: Weeramantry, Para-Rangurem, Fleischauer, and Rezek, were of the view that subsequent practice as to the interpretation the treaty should be confined to the immediate decades after its conclusion Hazel Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case', *Treaty Interpretation and the Vienna Convention on the law of Treaties: 30 Years On* (Martinus Nijhoff Publishers 2010) 69.

[113] *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties,* UN Doc A/73/10 (n 82) draft conclusion 9.

not undermine its *political* importance. State practice in respect of a broader model of jurisdiction provides important evidence as to what states are willing to accept. The evidence shows that states are generally reluctant to accept a broader model of jurisdiction, but that attitudes have begun to shift (a) in respect of the notion of reasonable foreseeability and (b) specifically in the arms-trading context.

In 2017, states were invited by the HRC to submit comments on its draft General Comment No 36 on the right to life. Paragraph [66] of the draft stated that jurisdiction extends over persons who are 'impacted by its [the state's] military or other activities in a [direct], significant and foreseeable manner.'[114] The top three arms exporters, the United States, France, and Russia, all explicitly rejected the model.[115] This is unsurprising. For example, the US does not even acknowledge the disjunctive nature of the ICCPR, making it unlikely to accept a broader jurisdictional model.[116] The state practice is undeniably weighty, given its clarity and specificity.

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114 UN HRC, *General Comment No. 36: Article 6 (Right to Life)* UN Doc CCPR/C/GC/36 (Advance Unedited Version) <www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> [66] accessed 8 May 2024. This reflects Shany and Ben-Naftali's model of jurisdiction.
115 State responses to draft GC 36 [2017]: The United States of America, [13], France [37], Russia [6]. See also Australia [3], Austria (p.2), Canada [7], Germany [21], Norway (p.4-5), and The Netherlands [29]. Available at <www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life>. (Accessed 22 May 2024)
116 Waxman (n 19).

However, there is hope. While Finland and Malta endorsed the comment in its entirety,[117] the United Kingdom and Australia proposed a number of amendments which emphasised support for the notion of reasonable foreseeability. For example, the UK proposed that the obligation to respect and ensure the right to life 'extends to reasonably foreseeable threats.'[118] Australia stated that the reference to 'foreseeable threats', and not 'reasonably foreseeable threats,' does not 'reflect the current state of international law.' This suggests that the notion of 'reasonable foreseeability' will be received better than pure foreseeability. This would explain why the HRC's final version added in this element of reasonableness.[119]

Additionally, in the arms trading context, states have been increasingly receptive to a broader model of jurisdiction.[120] In 2021, the Human Rights Council, consisting of 47 states, along with Albania, Chile, Costa Rica, Ecuador, Greece, Mexico, Paraguay, Peru, Switzerland, and Uruguay, passed Resolution

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[117] Finland and Malta's response to draft GC 36. Available at <www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life> accessed 14 May 2024.

[118] UK Response to draft GC 36 [7]. Available at <www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/UnitedKingdom.pdf> accessed 8 May 2024.

[119] UN Human Rights Committee (n 8) [63].

[120] Human Rights Council, *Impact of Arms Transfers on the Enjoyment of Human Rights* (2017) UN Doc A/HRC/35/8; Human Rights Council, 'Impact of Arms Transfers on Human Rights' (2021) UN Doc A/HRC/47/L.27; Human Rights Council, 'Report of the Working Group on the Universal Periodic Review, United Kingdom' (2017) A/HRC/36/9; Human Rights Council, 'Report of the Working Group on the Universal Periodic Review, France', (2018) A/HRC/38/4.

47/L.27. [121] Paragraph [3] 'urges states to refrain from transferring arms when they assess… that there is a clear risk that such arms might be used to commit or facilitate serious violations or abuses of international human rights law or serious violations of international humanitarian law.'[122] The Resolution's emphasis on refraining from arms trading when there is a 'real risk' echoes the *Soering/Al-Nashiri* understanding of extraterritorial obligation, where states are under duties even though they are acting purely territorially because of the extraterritorial consequences of state action. The language is similar to that in the ATT. Article 7(1)(i) and (ii) require states to consider, in their export assessments, the risk of serious violations of IHL or IHRL facilitated by arms exports. 'Serious violations' would certainly include the right to life.[123] This suggests that, *in principle*, states are willing to modify their inter-state arms trading practices.

Here, it is useful to disaggregate the types of state practice. While states may *say* they are in favour of broader jurisdictional models, their arms-trading *practice* suggests otherwise. This may have been what prompted Josep Borrell, the EU High Representative for Foreign Affairs and Security Policy, to encourage states to 'provide less arms, in order to prevent so many people being killed.'[124] Undeniably, the politics are infused

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[121] Human Rights Council, 'Impact of Arms Transfers on Human Rights' (2021) UN Doc A/HRC/47/L.27.

[122] *Human Rights Council Resolution 47/17, 'Impact of Arms Transfers on Human Rights'* (2021) [3].

[123] *Coronel v. Colombia* (n 78) [5.2]; *Velikova v. Bulgaria* (n 78) [82]; *Concluding Observations on Togo's Report* (n 78) [9].

[124] Interview with Josep Borrell, 'Informal Foreign Affairs Council' (12 February 2024). Quoted from AFP and Toi Staff, 'EU's top diplomat to Israel's allies: Send less arms if you think too many Gazans dying'

with the law, and the politics may be changing. On 25th March 2024, the United Nations Security Council passed a resolution calling for a ceasefire in Gaza, with the US notably abstaining.[125] Whether this will lead to a shift in arms policy remains to be seen, but it emphasises the ever-changing nature of the issue, and the fact that *previous* state rejection of a broader jurisdictional model is not dispositive of state attitudes *now*.

Conclusion

This article has argued for a reappraisal of the ordinary meaning of jurisdiction and an expansive understanding of the right to life, both in the ECHR and the ICCPR. The new meaning of jurisdiction, based on state power and normativity, provides an explanation for the current models of jurisdiction and demonstrates how states can be held accountable for inter-state arms trading. Specifically, states have jurisdiction where they: (1) exercise state power when granting an export license to a foreign state, (2) have a reasonably foreseeable causal relationship with individuals in that foreign state, and (3) are parties to parallel obligations in international law, such as the ATT.

It is an open question whether the normative features are cumulative. I suggested above that the current international

(*The Times of Israel*, 12th February 2024) <https://www.timesofisrael.com/eus-top-diplomat-urges-israels-allies-to-limit-arms-exports-over-gaza-deaths/> (accessed 08/05/24).

[125] See: 'Israel-Raffi Berg, 'UN Security Council passes resolution calling for Gaza ceasefire' *BBC News* (25 March 2024) <www.bbc.co.uk/news/world-middle-east-68658415> accessed 8 May 2024.

practice has not yet coalesced around the notion of reasonable foreseeability such that it can constitute an independent and sufficient criterion for a normative link, though the practice seems to be heading that way. Ultimately, state practice will decide what happens, though I would not be surprised if judicial creativity had a role to play.

In making these arguments, I have sought to criticise and develop Öhrling's thesis, which similarly argues in favour of state accountability in IHRL. I have attempted to provide a general definition of jurisdiction, rather than a specific model (e.g. a 'functional' model) which is doctrinally coherent and explains the current models already in existence. I have tried to ground specific features of my model in the practice of international bodies and states, relying on the *lex lata* where possible. That said, it is undeniable that this model of jurisdiction requires international participants to adjust their thinking.

In the current political climate, considering the humanitarian crisis in Gaza, it is especially important to confront states with radical interpretations of international law. Indeed, the nature of the solution is often proportionate to the gravity of the problem. While the argument may appear radical, it is proportionate and largely grounded in current practice. In this sense, I hope that this article not only shows what the law *should be*, but rather what the law *can be*.