

The ‘capacity-impact’ model of jurisdiction and its implications for States’ positive human rights obligations

Alice Ollino*

1. Introduction

One of the questions posed by this Zoom-in is whether novel accounts of extraterritorial jurisdiction are gathering momentum in international human rights law and how the European Court of Human Rights (ECtHR) is coping with pushes – whether from applicants, *amici curiae* or other international human rights bodies – for broader jurisdictional understandings. In their respective contributions, Lea Raible and Mariagiulia Giuffré discuss the potential for broader jurisdictional interpretations that move away from more established doctrines of ‘effective overall control over a territorial area’ or ‘physical control over the individual’.¹ Both Raible and Giuffré engage with a notion of jurisdiction that has recently gained popularity in international human rights fora and builds essentially on the *capacity* of respondents States to fulfil human rights and the *impact* of their activities on individuals abroad.² To my understanding, the authors have different takes on the significance of this model. Raible is more sceptical about its conceptual soundness and warns us against turning State’s capacity to influence individuals’ human rights into a sufficient condition for triggering jurisdiction.³ Instead, Giuffré, who reads capacity as the expression of the State’s exercise of public powers, argues that grounding jurisdiction on this exercise and its impact

* Post-doctoral fellow, School of Law, University of Milano-Bicocca.

¹ See *Al-Skeini v UK* App no 55721/07 (ECtHR, 7 July 2011) para 130–142.

² L Raible, ‘Extraterritoriality between a Rock and a Hard Place’ (2021) 82 QIL-Questions of Intl L 7; M Giuffré, ‘A Functional-impact Model of Jurisdiction: Extraterritoriality before the European Court of Human Rights’ (2021) 82 QIL-Questions of Intl L 53.

³ Raible (n 2) 17-20.



on individuals' human rights would allow the Court to embrace a more principled approach to jurisdiction.⁴

In this contribution, I wish to expand on Raible's criticism toward jurisdiction grounded on State's 'capacity to influence' (whether factual or derived from public powers) and impact. Raible – whose criticism draws primarily on legal reasoning – asserts that concepts of capacity and impact force us to base jurisdiction on consequentialist arguments by which duties are owed because of the negative repercussions that their absence would engender. According to the author, this line of thinking 'puts the cart before the horse'⁵ and distorts the principle 'ought implies can' into 'can implies ought'.⁶

Through a more practical approach, I further argue that the capacity-impact model so far developed by certain UN bodies makes the concept of jurisdiction fundamentally meaningless. I will show that the model is especially problematic in relation to States' positive human rights obligations, as it conflates the crucial question of their *content* with the (separate) issue of their *applicability* in a given context. More specifically, the capacity-impact model is premised upon relevant facts – 'power over' or 'capacity to influence' certain situations, knowledge of specific human rights risks, proximity, foreseeability and reasonableness – which are normally used to harness the substance of States' due diligence obligations, including human rights ones. Owing to their flexible and open-ended nature, the precise content of these obligations always requires assessment against the circumstances of each case and certain factual conditions. The capacity-impact model adopts the same relevant conditions but applies them to test whether States hold (positive) human rights obligations in the first place. In the end, the operation establishing jurisdiction – the assessment on whether the individual right and the correlative State obligation exists in a certain case – is substituted and preceded by the operation that marks the boundaries of a State's duty to act in a particular situation.

⁴ Giuffré (n 2) 68-77.

⁵ Raible (n 2) 20 and, more generally, Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020) 94-100.

⁶ Raible (n 2) 18.



The choice of limiting the analysis of the capacity-impact model only to positive human rights obligations is driven by the following consideration. From the standpoint of practice, UN bodies have so far applied jurisdictional arguments based on capacity only with States' alleged positive obligations to protect.⁷ Arguably, this is because the potential of the capacity-impact model is that of enlarging the scope of States' extraterritorial human rights positive obligations far beyond the reach of currently predominant jurisdictional understandings. Furthermore, in the context of negative obligations to respect human rights, the concepts of capacity and impact are more readily established since what is at stake in situations possibly attesting to their violation is State's *commissive* conduct vis-à-vis the individual. Instead, with positive obligations to protect and prevent, defining capacity and impact requires a more articulated analysis. Hence, although I do not intend to take a position on the academic debate on whether it is ultimately appropriate distinguishing between negative and positive human rights obligations,⁸ I will rely on this conceptual separation for the purpose of the analysis.⁹

In the following sections, I will first provide a brief description of the capacity-impact model developed by UN human rights treaty bodies. While some contributors to this Zoom-in have already discussed some aspects of this jurisdictional model, this reappraisal is necessary as it will identify the relevant factual conditions that, under the capacity-impact model, trigger jurisdiction between the State and the individual. I will then move to examine how these factual conditions are normally used to assess the substance of due diligence obligations and whether a State has failed to discharge its duty in a particular situation. My argument is that a sound conceptual understanding of the nature and scope of operations

⁷ See the next Section.

⁸ This debate started with M Milanovic, *The Extraterritorial Application of Human Rights Treaties* (OUP 2011) 210–215, arguing for conceptualizing jurisdiction differently depending on the negative or positive nature of the obligation in question; contrarily S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden J Intl L* 857, 879; Y Shany, 'The Extraterritorial Application of International Human Rights Law' (2020) 409 *Recueil des Cours de l'Académie de Droit International* 89–80.

⁹ On the importance of conceptualizing separating between negative and positive obligations, R Pisillo-Mazzeschi, *International Human Rights Law: Theory and Practice* (Springer 2021) 135–155.



of due diligence obligations, including human rights ones, is crucial for grasping the shortcomings of the capacity-impact model. Section 4 will then illustrate the consequences that flow from applying the capacity-impact notion of jurisdiction to human rights positive obligations, after which I will provide a short conclusion.

2. *The foundational elements of the capacity-impact model of jurisdiction*

While the recognition by human rights courts of a concept of jurisdiction based on capacity and impact is still limited,¹⁰ the model has been applied by UN bodies. In particular, the Human Rights Committee (HRC) and the Committee of the Right of the Child (CRC) have already relied upon this jurisdictional approach to sort out cases involving the protection of the right to life. What makes these cases interesting is that their factual situations and background are very different to one another and that their uniqueness is often invoked by the competent UN body to justify recourse to a broader notion of jurisdiction.¹¹ However, at closer scrutiny, all these cases adopt as normative conditions necessary for meeting jurisdiction similar or identical factual considerations.

Starting with the CRC, this body has recently relied on the concept of the State's capacity to establish France's jurisdiction toward French foreign fighters' children detained in camps in northern Syria. The applicants complained that the decision of France to abstain from taking measures necessary to repatriate these children amounted to a violation of several rights, including the right to life, the right to receive protection and assistance if deprived of a family environment, the right to health and the right not to be subject to torture, inhuman or degrading treatment. Thus, at the core of the submission was France's omission and failure to discharge its positive obligations deriving from the Convention on the Right of the Child.

¹⁰ See Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17 (15 November 2017).

¹¹ Committee on the Rights of the Child, 'Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No 104/2019' UN Doc CRC/C/88/D/104/2019 (8 October 2021) (cited as 'CRC, Decision of October 2021') para 10.4.



Addressing the question of jurisdiction, the Committee based its argument on the capacity of France to affect the fate of the children detained and ensure their rights. Specifically, it noted that '*as the State of the children's nationality, [France] has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses*'.¹² This statement deserves scrutiny. The Committee clearly departed from more established understandings of extraterritorial jurisdiction, which grounds obligations on the effective control that States exercise over individuals or territory, noting that France had no control of the camps in north-eastern Syria. Instead, the CRC relied on the concepts of France's power and capacity over children, which were inferred first and foremost from the institutional power that a State holds vis-à-vis its nationals. The underlying argument is that a State with prescriptive jurisdiction over its nationals bears the power to affect the exercise of their rights.¹³

However, nationality alone cannot justify the creation of human rights obligations toward individuals. First, one could argue that if nationality was indeed the normative condition for jurisdiction, this may unduly burden States in their extraterritorial obligations or, contrarily, foster unnecessary discriminations in certain situations.¹⁴ Second, just because a State has power *in abstracto* to influence the rights of its nationals, this does not mean that the State bears this power *effectively* in the circumstances of the case.

This is why the CRC did not limit itself to invoking nationality as the source of France's capacity to intervene, but it contextualised this capacity against the situation in question. In particular, it observed that:

'It is uncontested that the State party *was informed* by the authors of the situation of extreme vulnerability of the children, who were detained in

¹² CRC, 'Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications No 79/2019 and No 109/2019' UN Doc CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019 (2 November 2020) (cited as 'CRC, Decision of November 2020') para 9.7 (emphasis added).

¹³ *ibid.*

¹⁴ Raible, 'Extraterritoriality' (n 2) 13-15; Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights' EJIL:Talk! (10 November 2020) <www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/>.



refugee camps in a conflict zone. Detention conditions have been internationally reported as deplorable and *have been brought to the attention of the State party's authorities* through the various complaints filed by the authors at the national level. The detention condition pose an *imminent risk of irreparable harm*.¹⁵

Thus, France's positive duty to repatriate children ensued from a combination of power *in abstracto* (ie nationality) *and* relevant facts pointing to the *effective* capacity of the State to act upon the situations of detained children. The Committee identified such relevant facts in *knowledge* of the State of the situation of vulnerability, and the *proximity* of the violation of children's rights.

The Human Rights Committee made analogous considerations in the recent *A.S. and others v Italy* and *A.S. and others v Malta* cases. Like in the CRC's decision, these two submissions also concerned the right to life, albeit their factual circumstances differed substantially from the decision above. In these two cases, the complaints involved Malta and Italy's failure to promptly intervene to rescue the lives of more than 400 persons in distress on the board of a vessel in the Mediterranean Sea. As stressed by Giuffr  in her contribution, this was a situation of 'contactless control' since, during the time the alleged wrongful conducts unfolded, the applicants were located in the high seas and were not under the physical control of Maltese and Italian authorities.¹⁶

To establish jurisdiction, the HRC resorted to the concept of capacity. As for Malta, it first observed that the vessel in distress was located in the Malta's search and rescue area, for which Maltese authorities bear responsibility for coordinating the search and rescue operation under the 1979 International Convention on Maritime Search and Rescue (SAR).¹⁷ The HRC then argued that by formally *accepting* to assume coordination of the rescue efforts, Malta had *effective control over the rescue operation*

¹⁵ CRC, 'Decision of November 2020' (n 12) para 9.7 (emphasis added).

¹⁶ Human Rights Committee, 'Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 3042/2017' UN Doc CCPR/C/130/D/3042/2017 (27 January 2021) (cited as '*A.S. and others v Italy*') and 'Decision adopted by the Committee under the Optional Protocol, concerning communication No 3043/2017' UN Doc CCPR/C/128/D/3043/2017 (13 March 2020) (cited as '*A.S. and others v Malta*').

¹⁷ *A.S. and others v Malta* (n 16) para 6.7.



and, therefore, capacity to intervene against a loss of lives which was *direct* and *reasonably foreseeable*.¹⁸ As for Italy, the Committee noted that although this State was not under the duty to coordinate the search and rescue operation like Malta, 'a special relationship of dependency had been established between the individuals on the vessels in distress and Italy'.¹⁹ Specifically, the *initial contact* made by the vessel in distress with the Italian coastguard and the *proximity* of Italian authorities to the place of the event gave Italy the power and capacity to promptly intervene.²⁰ Drawing on these considerations, the HRC concluded that Italy had jurisdiction over the persons on the vessel because these individuals 'were directly affected by the decision taken by the Italian authorities in a manner that was reasonably foreseeable'.²¹

Note that the Committee referred to the same or very similar parameters to the ones used by the CRC. It invoked some *de jure* elements present in the case (Malta's responsibility under the SAR Convention; Italy's duties to rescue under the law of the sea) and established States' factual capacity based on knowledge of the events, the proximity of the violations and a relationship of causality between States' inactions and the events.

While these were the first two cases in which the HRC found jurisdiction based on the State's capacity to affect the exercise of individuals' rights, it was not the first time that the Committee resorted to this concept. In *A.S. and others v Italy and Malta* the HRC recalled General Comment 36 on the right to life, in which it affirmed that a State's jurisdiction toward individuals in relation to the right to life includes 'persons located outside any territory effectively controlled by the State, whose right to life is nonetheless *impacted* by its military or other activities in a *direct* and *reasonably foreseeable* manner'.²²

Finally, the concepts of State's power over a situation at risk of human rights violations, knowledge and foreseeability were recently used again by the CRC in an admissibility decision concerning the negative

¹⁸ *ibid.*

¹⁹ *A.S. and others v Italy* (n 16) para 7.8.

²⁰ *ibid* para 7.5.

²¹ *ibid* para 7.8.

²² HRC, 'General Comment no 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC para 7 (emphasis added).

impact of climate change on children's rights. Again, there is no parallel with the precedents so far analysed in terms of factual background of this case and international obligations under scrutiny. The case originated indeed from a submission made by applicants of various nationalities against five States (Argentina, Brazil, France, Turkey and Germany), alleging failure to prevent and mitigate the consequences of climate change and, as a result, the violation of their right to life, health and culture. The peculiarity is that State responsibility was invoked regardless any link of nationality or physical presence in the territory of one of these States. The applicant indeed argued that States bear jurisdiction toward all children negatively impacted by the foreseeable consequences of their failure to prevent and mitigate climate change.

Although the CRC eventually declared the communication inadmissible,²³ it did accept the interpretation of jurisdiction furnished by the applicants. First, the Committee took note of the advisory opinion issued in 2017 by the Inter-American Court of Human Rights (IACtHR) on the Environment and Human Rights, which pioneered the idea of jurisdiction based on capacity and causality. In that context, the IACtHR had indeed be called to assess whether individuals outside a State's territory who are nonetheless negatively affected by State's failure to prevent transboundary environmental harm come under its jurisdiction as per Article 1 of the American Convention. The Court answered affirmatively. It argued that jurisdiction arises when the territorial State exercises *effective control over the activities* that cause transboundary environmental harm, and there is a causal link between the act or omission that originated in the State's territory and the violation of human rights of individuals located abroad.²⁴

Building on the same reasoning, the CRC observed in *Sacchi*:

'when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated (...) if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory.'²⁵

²³ CRC, 'Decision of October 2021' (n 11) para 10.21.

²⁴ See IACtHR, *The Environment and Human Rights* (n 10) para 104.

²⁵ CRC, 'Decision of October 2021' (n 11) para 10.7.



Drawing again on the same factual elements as above, the Committee argued that jurisdiction existed since the alleged harm suffered by the victims was 'reasonably foreseeable' to States parties, and States had effective control over the activities causing transboundary environmental effects.²⁶

3. *The factual conditions that mark the substance of human rights due diligence obligations*

In this section, I will show how the relevant facts invoked by UN bodies to establish jurisdiction are typically used in international human rights practice – and more generally, in practice across international law – as conditions that shape the *content* of due diligence obligations.

To do so, we first need to take a step back to briefly reappraise the nature of due diligence obligations and their modality of operation in international (human rights) law.

3.1. *The nature and operation of due diligence obligations in international law*

On a general level, the term due diligence is normally evoked to point to an international standard of conduct that informs the interpretation of a vast array of international obligations.²⁷ When a primary rule qualifies as a 'due diligence obligation', this usually means that this obligation imposes on States a specific course of conduct and the fulfilment of a standard of care defined by international law.

Due diligence obligations span across international law, and therefore their content and scope of application vary significantly depending on the legal regime they belong.²⁸ However, from a dogmatic perspective,

²⁶ *ibid.*

²⁷ Generally on the application of the due diligence standard across international law H Krieger, A Peters, L Kreuzer (eds) *Due Diligence in the International Legal Order* (OUP 2020) and S Cassella (ed) *Le standard de due diligence et la responsabilité internationale* (Pedone 2018).

²⁸ ILA Study Group on Due Diligence in International Law, 'Due Diligence in International Law – Second Report' (Johannesburg, 2016) 2–3 and Krieger, Peters,

some common characteristics help define the contours of these obligations. First, due diligence obligations are obligations of conduct, ie obligations that require a party to display best-effort toward achieving a given result without guaranteeing success.²⁹ These obligations are typically opposed to obligations of result, requiring a party to attain the result set by the obligation. Hence, in cases of obligations of result, failure to achieve the goal set by the primary rule suffices for establishing State responsibility unless such failure was due to a situation of *force majeure*. On the contrary, failure to achieve the goal set by an obligation of conduct does not automatically imply responsibility since it is necessary to prove that such failure stems from a lack of effort toward achieving said goal.

Second, due to their nature as obligations of conduct, due diligence obligations are generally associated with the concept of risk.³⁰ Certain primary rules only impose duties of best-effort nature because they indeed presuppose that the State may not always be in the position to attain the goal set by the rule. For example, regarding diplomatic protection, a State is required to abstain from entering the premises of a diplomatic mission but not to protect the premises of the mission in an absolute manner.³¹ Intrusions may still occur, and the State need not provide an absolute guarantee from any disturbance of the peace of the mission. Similarly, a wide range of international obligations to prevent,³² obligations

Kreuzer, 'Due Diligence and Structural Change in the International Legal Order' in Krieger, Peters, Kreuzer (n 27) 351.

²⁹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 para 430; *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for an Advisory Opinion submitted to the Seabed Dispute Chamber)* [2011] ITLOS Rep 2011 para 110, 117.

³⁰ On the link between due diligence obligations and risk see R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German YB Intl L* 9, 41-50.

³¹ *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* (Merits) [1980] ICJ Rep 3, 33.

³² *Genocide case* (n 29) para 430; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep para 101.



to protect given interests,³³ or obligations to ensure given goals³⁴ are typically construed as duties of due diligence since they premise upon the idea that the result set by the rule (ie prevention, protection or attainment of the goal) depends on conditions outside the State's strict control.³⁵

Third, due diligence obligations are flexible in content. In the words of the International Tribunals for the Law of the Sea, the content of due diligence obligations 'may change over time as measures considered sufficiently diligent at a certain moment in time may become not diligent enough in light, for instance, of new scientific or technological knowledge'.³⁶ Such flexibility reflects in the way obligations of due diligence are often worded in treaties. In some cases, what is required of a State is to adopt 'all appropriate measures' to pursue a given goal or adopt measures deemed 'necessary', 'effective', or 'reasonable' according to the circumstances of the case. In other cases, flexibility emerges when States need to fulfil their duties 'according to their capabilities', 'in so far as possible', or according to the best practical means at their disposal.³⁷

The flexible and open-ended substance of due diligence obligations makes it difficult to pin down a priori and in the abstract what precisely is expected of a State bound by one of these rules. The content of due diligence obligations always depends on each case's factual circumstances and, as such, 'calls for an assessment *in concreto*'.³⁸ Sometimes, the primary rule will indicate with more precision the measures required by due diligence; therefore, the discretionary power left to the interpreter to assess if the State acted reasonably in a given case will be narrower in scope. In other circumstances, the content of the primary rule is so vague that

³³ See for instance Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293 art 2(1); Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 art 22; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 art 192.

³⁴ *Responsibility and Obligations of States* (n 29) paras 110-112; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 arts 4(1), 6, 7.

³⁵ On why these obligations classify as due diligence obligations A Ollino, *Due Diligence Obligations in International Law* (CUP 2022) 111-129.

³⁶ *Responsibility and Obligations of States* (n 29) para 117.

³⁷ On the various formula adopted in treaties to point to due diligence obligations and on their significance Ollino (n 35) 108-111; 168-175.

³⁸ *Genocide case* (n 29) para 430.



the interpreter bears the burden of identifying the measures expected to comply with due diligence and explain why they are *reasonable* in a particular instance.³⁹

In any event, regardless of the more or less explicit content of the primary rule, certain factual conditions will generally determine whether the State has duly discharged its obligation to act with due diligence in a particular case. The first of such conditions is knowledge of the risk associated with the due diligence rule. States are indeed expected to act with due diligence so long as they know – or should have known under normal circumstances – of risks that the rule is supposed to address. For example, a State is under the duty to act to prevent genocide the moment the State learns of, or should have learned of, the existence of a serious risk that genocide will occur.⁴⁰ Similarly, a State duty to act to prevent transboundary environmental harm arises when the State knows that there is a serious risk that transboundary damage will occur.⁴¹

Knowledge is crucial for assessing the scope of a State's duty to act in a particular circumstance because it links to the concept of possibility to act, which underpins the rationale of due diligence obligations.⁴² Due diligence means requiring the State to display best-effort toward a particular result, not to attain a result outside the State's possibility to guarantee. Clearly, a State has possibility to act vis-à-vis the risks addressed by a primary rule of due diligence as long as the State *knows*, or *should have known* under normal circumstances, of them.

The second condition informing the extent of a State's duty to act with due diligence is power over the source of risk.⁴³ When a State must protect the premises of a diplomatic mission from intruders, its duty to act is grounded on the presumption that the State holds power over the

³⁹ On reasonableness as the golden parameter for interpreting due diligence ILC Study Group on Due Diligence in International Law (n 28) 7-10.

⁴⁰ *Genocide case* (n 29) para 431.

⁴¹ ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries (2001) ILC YB II/2, 153-154; see also *Corfu Channel Case (UK v Albania) (Merits)* [1949] ICJ Rep 244 16-17, 22.

⁴² For a conceptual understanding on due diligence obligations and how they relate to possibility to act Ollino (n 35) 132-137.

⁴³ Some authors do not speak of power over the source of risk but rather of 'control', for instance Besson, *La "Due Diligence" en Droit International* (2020) 409 *Recueil des Cours de l'Académie de Droit International* 153; on why the concept of power is, in my opinion, more appropriate Ollino (n 35) 132-133.



intruders. In the case of the duty to prevent transboundary environmental damage, a State is under a duty to act since the State has power over the activities from which transboundary damage may occur. Again, this has to do with possibility. If the State has no power over the source of the risk associated with the primary rule of due diligence, the State cannot affect the situation that the rule intends to change or manage. Hence, power over the source of risk informs the State's capacity to affect a particular outcome. Capacity to affect influences the possibility for a State to act.

In light of the foregoing, there are two fundamental aspects of power over the source of risk that require attention. The first is that power over the source of risk is a dispositional concept and not necessarily the manifestation of a particular State's action. A State can hold power over the source of risk and have the capacity to affect it even if such capacity is not actually exercised in a given case and remains a potential. For example, to establish that a State had a duty to act with due diligence to prevent intruders from entering the premises of a diplomatic mission in a given case, it is unnecessary to verify whether actions were taken by the State vis-à-vis the intruders. For a duty to act to arise, it is sufficient to show that at the time of the harmful events, the State had the capacity to act upon the intruders and a potential to stop their actions.

The other element to consider is that, depending on the primary rule of due diligence, power over the source of risk is usually inferred by territorial control or a State's jurisdictional competence over sources of risks or activities linked to these sources. For example, it is presumed that a State has capacity to act upon intruders and halt disruption into a foreign diplomatic mission because the State has control over its territory. Similarly, possibility for the coastal State to act and ensure that marine living resources in the Exclusive Economic Zone (EEZ) are conserved and managed in a way that does not subject them to overexploitation is inferred by the jurisdictional functions granted by UNCLOS to the coastal state in its (EEZ).⁴⁴

The fact that a State is presumed to have power over sources of risk under its territorial control or jurisdictional competence does not obviously mean that the State will be able to act upon all these sources at any

⁴⁴ See *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Case No 21) [2015] ITLOS Rep para 123-132, 210.



time and place. How far this power *effectively* exists depends on the circumstances in which the State finds itself. If a State proves that it lacked the capacity to act upon certain risks in a specific case and that this lack of capacity did not ensue from its wrongful conduct, there will be no responsibility for failure to act.⁴⁵ Hence, the State's effective power over the source of risk and the relative capability to act require assessment in each case. The following sub-section clarifies this aspect further by focusing on the international human rights context

3.2. *Knowledge, capacity and power over the source of risks in international human rights practice*

The general observations above also apply to a State's human rights due diligence obligations. For reasons of opportunity and space, I will limit the analysis to the practice of the ECtHR, but the same considerations apply in the practice of other regional human rights courts and UN treaty bodies.⁴⁶

The ECtHR usually identifies due diligence in a State's positive obligations to protect human rights.⁴⁷ These are indeed obligations that require States to exercise best-effort toward preventing violations and ensure protection of human rights without requiring the State to guarantee that every possible infringement will be averted.⁴⁸ Positive obligations to protect are generally construed to prevent violations by non-state actors, but this may not necessarily be always the case.⁴⁹

The practice of the ECtHR usually assesses the content and scope of a State's positive obligation to protect human rights along two lines. On

⁴⁵ See for instance *Buckingham case* in G Hackworth, *Digest of International Law* vol 5 (Washington: US Government Printing, 1943) 480; see also *Boyd (USA v United Mexican States)* (1928) 4 RIAA 380; *F.M. Smith (USA v United Mexican States)* (1928) 4 RIAA 469. For a review of practice in this area R Pisillo-Mazzeschi, *Due diligence e responsabilità internazionale degli stati* (Giuffrè 1989) 254–288 and more generally, Ollino (n 35) 139-142.

⁴⁶ See, for a general review, B Baade, 'Due Diligence and the Duty to Protect Human Rights' in Krieger, Peters, Kreuzer (n 27) 92.

⁴⁷ On the due diligence nature of this obligations see, among others, L Lavrysen, *Human Rights in a Positive State* (Intersentia 2016) 155; Baade (n 46) 92.

⁴⁸ *Mastromatteo v Italy* App no 37703/97 (ECtHR, 24 October 2012) para 68; See, generally, also Lavrysen (n 47) 155-158.

⁴⁹ See for instance *Budayeva and others v Russia* App no 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 (ECtHR, 20 March 2008) para 147-160.



the one hand, due diligence requires the State to put in place an adequate institutional and operational framework to prevent and remedy human rights violations and afford general protection to society at large.⁵⁰ This may require the adoption of laws, regulations, administrative and other measures that will ensure an adequate legal and institutional apparatus capable of preventing potential violations. On the other hand, acting with due diligence to fulfil protection will also mean that the State is expected to act upon specific risks of violations when the latter arise and the human rights of targeted individuals are at stake.⁵¹

In this regard, understanding how far a State is under a duty to act vis-à-vis risks of human rights violations in a given case depends on knowledge and power over the source of risk. This is well illustrated in a passage of a Court's decisions concerning the scope of a duty to protect life:

'not every claimed risk to life can entail from the authorities a Convention requirement to take operational measures to prevent that risk from materialising. A positive obligation will arise (...) where it has been established that the authorities *knew or ought to have known* at the time of the existence of a *real and immediate risk* to the life of an identified individual or individuals from the criminal act of a third party and *they failed to take measures within their scope of power*, which judge reasonably, might have expected to avoid that risk'.⁵²

Accordingly, a State will be under the duty to act to prevent *individualised* risks of human rights violations only if State authorities knew, or should have known under normal circumstances, about the risks of such violations. The requirement of knowledge as a condition for triggering a duty to act in a situation at risk of human rights violations is covered by extensive practice of the Court and, therefore, does not need further exploration.⁵³ Suffice here to say that knowledge or constructive knowledge

⁵⁰ *Lopes de Sousa Fernandes v Portugal* App no 56080/13 (ECtHR, 19 December 2017) para 164-167.

⁵¹ See, generally, Baade (n 47) 97-103.

⁵² *Mastromatteo v Italy* (n 48) para 68.

⁵³ *Osman v United Kingdom* App no 87/1997/871/1083 (ECtHR, 28 October 1998) para 115; see generally V Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' (2020) *Leiden J Intl L* 601.

is required not only for a State to be able to act to ensure the right to life, but also in relation to a plethora of positive obligations under the Convention.⁵⁴

In addition, a State will be expected to act and ensure protection so long as it has the power and capacity to act toward individualised risks of human rights violations. If a State has no capacity to affect the situation at risk of violations by acting upon the sources of this risk – ie third private parties or activities that may carry a degree of risks of violations – there will be no failure to fulfil positive obligations. For example, if State authorities know that a targeted individual's life is in danger because of the threats from private parties, they have to act to prevent harm when their action would be neither impossible nor disproportionately burdensome. Thus, if the individual loses his life but it is proved that the state could not prevent this loss because it had no capacity to affect the situation in question, responsibility is excluded.

To assess if a State had effective capacity to address risks of violations in a given case, the ECtHR is usually referring to the concepts of 'foreseeability', 'reasonable capacity to intervene', 'proximity' and, to a certain extent, causality. For example, in a case involving the death of a woman committing suicide in fear of being evicted from her house, the Court argued that 'self-immolation as a protest tactic cannot be *reasonably considered predictable* in the context of eviction from an illegally occupied dwelling'⁵⁵ and, accordingly, found no violation of the State's positive obligation to protect life. In another case concerning environmental pollution from private industry and the correlative violation of an individual's private and family life, the Court observed that the duty to act to prevent harm extends so long as State authorities are aware of environmental concerns and *in the position to evaluate the hazard and take adequate measures to prevent it*.⁵⁶ The Court has also affirmed that the responsibility of a State for failing to protect is engaged if there is a 'sufficient nexus' between state omission and the harmful event;⁵⁷ or when it was within the capacity of the state to 'have a significant influence on the course of

⁵⁴ Stoyanova (n 53) 606-612.

⁵⁵ *Mikayil Mammadov v Azerbaijan* App no 4762/05 (ECtHR, 17 December 2009) para 111.

⁵⁶ *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005) para 92.

⁵⁷ *ibid.*



the events' leading to the violation;⁵⁸ or when the action of the State 'could have had a real prospect of altering the outcome or mitigating the harm'.⁵⁹

What is important to note here is that even in cases where the Court finds that the State had no capacity to act and, therefore, no responsibility for failing to exercise due diligence, the existence of the duty to protect is never in question. Take the example above, in which an individual loses his life due to the action of a private party, but it is proved the State could not prevent this loss because it could not affect the situation in question. Responsibility is ruled out not because the obligation to protect life was *non-applicable* in the circumstances of the case but because the State's duty to act *did not extend to the point of covering this particular loss*. Hence, in the framework of positive obligations to protect human rights, relevant facts like knowledge, capacity, and proximity address how far a State is expected to exercise due diligence and intervene against human rights risks. The question, hence, relates to the boundaries of the *content* of positive obligations to protect.

4. *The inversion of the capacity-impact model*

The preceding sections should have unveiled the relationship between the capacity-impact jurisdictional model and the foundations of State's human rights due diligence obligations. To operationalise human rights due diligence obligations in practice, one needs to rely upon relevant factual conditions, including a State's knowledge of the risk of violations, power over the source of such risk and the actual capacity to act upon this source and prevent human rights violations. These conditions inferred by other indicative facts, such as proximity between the State apparatus and the violation; a link of causality between the alleged omission and the human right violation; and the understanding that it was not unreasonable to expect the State to act promptly in the circumstances of the case. Under the capacity-impact model, UN treaty bodies use the

⁵⁸ *E. and others v United Kingdom* App no 33218/96 (ECtHR, 26 November 2002) para 100.

⁵⁹ *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009) para 136. See also *Stoyanova* (n 53) 612-615.



same relevant facts to establish jurisdiction. Hence, the capacity-impact model inverts the operation aimed at establishing the precise scope of a duty to act with due diligence in a particular situation with the operation aimed at ascertaining whether a positive obligation toward an individual is applicable in the first place. This inversion, which may not seem as problematic at first sight, raises two sets of issues to which I will now turn.

First, the capacity-impact model conflates the concept of State's 'power and authority toward an individual'⁶⁰ with the concept of power over the source of risk. As we have seen, UN bodies have essentially ground the State's capacity to protect an individual – and, consequently, jurisdiction – upon recognising that the State held power over the source of human rights violations in the circumstances of the case. For instance, in *A.S. and others v Italy and Malta*, the HRC affirmed that Malta had effective control over the rescue operation and, *therefore*, jurisdiction over the individuals in distress at sea. In *Sacchi et al. v Argentina et al.*, the CRC established that the effective control that a State holds toward the activities producing transboundary environmental harm engendered State's jurisdiction toward the individuals affected by these activities. Hence, power – or, borrowing the HRC and the CRC, 'effective control' – over the source of human rights violations is the medium for assuming State's power over the individual.

However, jurisdiction should be about the relationship between the State and the individual and what justifies this relationship.⁶¹ The 'relational nature' between the individual and the State is indeed at the core of jurisdiction, 'as it corresponds to the relational nature of human rights between a right-holder and a duty-bearer'.⁶² Exploring what should account for this relationship and what amounts to 'power and authority' toward the individual is outside the scope of this contribution.⁶³ But the

⁶⁰ HRC, 'General Comment No 31 on The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/add.13 para 10.

⁶¹ *Lopez Burgos v Uruguay* (1981) IHRL 2796 Human Rights Committee para 12.2

⁶² Besson, 'The Extraterritoriality of the European Convention' (n 8) 863.

⁶³ Positions vary across scholarship: M Scheinin, 'Just Another World? Jurisdiction in the Roadmaps of State Responsibility and Human Rights' in M Langford, W Vandenhoe, M Scheinin (eds) *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 212; Shany (n 8)



capacity-impact model raises the question of whether it is sufficient to construe a State's power over the individual *only* as the outcome of a State's power over a different entity – ie the source of human rights risks. As Raible puts it in her contribution to this Zoom-in, this way of understanding jurisdiction fails to provide an adequate response on why we should impose obligations on a State, if not for the fact that State's action would benefit the individual in question. Nevertheless, '[t]he existence of a jurisdictional relationship between a duty-bearing State and a potential right-holder is one of the grounds for human rights duties to arise besides the existence of fundamental and equal interests to protect'.⁶⁴

Second, if one considers that the test for jurisdiction pertains to the *applicability* of a duty to ensure human rights in a given case, then this test should logically precede the assessment on the substance of the duty. In other words, jurisdiction operates as a trigger for human rights obligations and defines the threshold above which human rights obligations, including positive ones, are applicable toward one or more individuals. The test which verifies a State's power over the source of risk, knowledge and causality between an alleged omission and the violation regards, instead, the content of a duty and follows the question of international responsibility. Hence, only once the first premise is fulfilled – jurisdiction – one should evaluate how far the duty to act of a State extended in a given situation and whether the State's action was expected to prevent specific negative outcomes.

By conflating these two separate operations, the capacity-impact model makes jurisdiction fundamentally meaningless. Foreseeability, power over the source of risk and knowledge are no longer the criteria that mark the boundaries of State responsibility when the State bears *in abstracto* a positive duty to protect but it is unclear whether its failure to intervene should be allocated to the State in question. Instead, these elements become the conditions that make the positive obligation applicable in the first place. Not only does this mean that a State's (extraterritorial) due diligence obligations exist *only* and *so long as* they can be ful-

29-30; Besson, 'The Extraterritoriality of the European Convention' (n 8) 857; Raible, *Human Rights Unbound* (n 5) 132.

⁶⁴ Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' *ESIL Reflections* 9:1 (2020) <<https://esil-sedi.eu/wp-content/uploads/2020/04/ESIL-Reflection-Besson-S.-3.pdf>>.

filled. Under the capacity-impact model, there is no more prior and separate operation aimed at assessing the relationship between the State and the individual.

5. *Conclusions*

In this contribution, I have provided further argument about whether a notion of jurisdiction grounded on capacity and impact is problematic. The critical issues raised by the model must be construed through the prism of human rights due diligence obligations, as it is with these types of obligations that UN treaty bodies have resorted to this novel concept of jurisdiction. Furthermore, the most significant potential of capacity-impact jurisdiction lies in its application to the framework of human rights positive obligations: what the model purports to achieve is indeed to expand the scope of the State's extraterritorial human rights obligations far beyond currently established scenarios.

As I have attempted to demonstrate, the capacity-impact model is problematic because it conflates the test marking the substance of human rights due diligence obligations in a given case with the test establishing their existence. In the end, this conflation makes the very concept of jurisdiction – taken as the prior assessment of the relationship between a right-holder individual and a State duty-bearer – fundamentally meaningless.

So far, the ECtHR has not recognised the capacity-impact model. The Court has resisted to its application, despite pushes from both judges (in their separate opinions),⁶⁵ parties and *amiciis curiae*.⁶⁶ It is to be seen whether the progressive consolidation of a concept of jurisdiction grounded on capacity and impact within the practice of UN bodies – which are likely to continue applying the model – at some point will influence the Court.

⁶⁵ *Georgia v Russia* App no 38263/08 (ECtHR, 21 January 2021) Partly Dissenting Opinion Judge Pinto De Albuquerque para 26.

⁶⁶ *Hanan v Germany* App no 4871/16 (ECtHR, 16 February 2021) para 130.

