A Proposal for the Implementation of Human Rights Treaty Obligations in Armed Conflict

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Adelaide Law School, University of Adelaide
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ABBREVIATIONS

ACHPR  African Charter on Human and Peoples’ Rights
ACHR  American Convention on Human Rights
AComHPR  African Commission on Human and Peoples’ Rights
AP I  Additional Protocol I
AP II  Additional Protocol II
ARCHR  Arab Charter on Human Rights
CAT  Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW  Convention on the Elimination of All Forms of Discrimination against Women
CEDAW/C  Committee on the Elimination of Discrimination against Women
CERD  Committee on the Elimination of Racial Discrimination
CESCR  Committee on Economic, Social and Cultural Rights
CPA  Coalition Provisional Authority
CRC  Convention on the Rights of the Child
CRC/C  Committee on the Rights of the Child
DRC  Democratic Republic of the Congo
ECHR  European Convention of Human Rights (European Convention for the Protection of Human Rights and Fundamental Freedoms
EComHR  European Commission of Human Rights
ECtHR  European Court of Human Rights
FRY  Federal Republic of Yugoslavia
GA  General Assembly
GA Res  General Assembly Resolution
GC I  Geneva Convention I
GC II  Geneva Convention II
GC III  Geneva Convention III
GC IV  Geneva Convention IV
<table>
<thead>
<tr>
<th>Acronym</th>
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<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<tr>
<td>IAComHR</td>
<td>Inter-American Commission on Human Rights</td>
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<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for Former Yugoslavia</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>IHRL</td>
<td>International Human Rights Law</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>MRT</td>
<td>Moldovian Republic of Transdniestria</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>SC Res</td>
<td>Security Council Resolution</td>
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<tr>
<td>TRNC</td>
<td>Turkish Republic of Northern Cyprus</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
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<td>UNICEF</td>
<td>United Nations International Children's Emergency Fund</td>
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<td>UN ESCOR</td>
<td>United Nations Economic and Social Council Official Records</td>
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<td>UN GAOR</td>
<td>United Nations General Assembly Official Records</td>
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<td>UN SCOR</td>
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<td>US or USA</td>
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ABSTRACT

This thesis proposes a framework for the application of human rights treaty obligations in extraterritorial armed conflict situations. Traditionally it is International Humanitarian Law (‘IHL’) that governs the conduct of States during military operations abroad. However the humanitarian desire to increase the protections afforded by international law to individuals affected by armed conflict has gradually resulted in the recognition that International Human Rights Law (‘IHRL’) applies alongside IHL in armed conflict situations. This development is, however, associated with significant uncertainties as to the scope of the human rights obligations of States conducting military operations abroad and the relationship between IHL and IHRL in such circumstances. The aim of this thesis is to contribute to this debate by proposing a framework for a better understanding of the dual operation of IHL and IHRL when States conduct military operations abroad.

The central argument of this thesis is that the scope of a State’s extraterritorial human rights obligations should depend upon the degree of effective control it exercises over the territory in which it is operating. IHRL is generally predicated on the capacity of the State to control territory and individuals within that territory. States frequently, however, are only able to exercise a limited amount of control beyond their territorial borders. Consequently, doubts as to the practicability of the extraterritorial application of human rights treaty obligations permeate much of the existing case law and literature. States are unlikely to accept any extraterritorial IHRL obligations that are perceived as unreasonable or unrealistic.

Against this background, this thesis argues that human rights treaty obligations should be applied with a degree of flexibility in extraterritorial armed conflict situations. This flexible approach relies on the concept of effective control in arguing that, depending on the level of control it exercises, a State may initially have a limited range and level of human rights obligations but as its level of effective control over the territory increases so does not only the range but also the level of its human rights obligations.

The exercise of effective control is thus a prerequisite for the human rights obligations of States conducting military operations abroad to arise. The existing State practice, jurisprudence and literature on the effective control test, however, are relatively
limited and somewhat confused. The thesis analyses relevant legal discourse and develops a unified structure of effective control by identifying factors relevant to determining when effective control over territory exists.

The notion of effective control as developed in this thesis is not only central for the activation of human rights treaties in armed conflict situations, but as this thesis argues, can also determine the extent of the range and level of human rights obligations of States conducting military operations abroad.

The thesis proposes a novel, practical and flexible framework for the gradual activation of the full range and level of a State’s human rights treaty obligations in extraterritorial armed conflict situations based on the degree of effective control exercised. This proposed framework takes into account the realities of extraterritorial armed conflict situations, and thus has the potential to achieve greater compliance by States with their human rights treaty obligations and hopefully might ultimately result in the enhanced protection of individuals caught up in armed conflict.
DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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Signature: Samaneh Hassanli

_____________________________
Date
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1 INTRODUCTION

In recent years, the extraterritorial application of the human rights treaty obligations of States involved in armed conflicts abroad, and the potential benefits from the application of international human rights law (‘IHRL’) alongside international humanitarian law (‘IHL’) in such situations, has emerged as a contested issue in State practice, jurisprudence and commentary.

Al-Skeini v United Kingdom arose from the claims of the relatives of Iraqi civilians who had been killed by British troops on patrol during the occupation of southern Iraq by the UK. The case examined the extraterritorial application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’),¹ in relation to the events in Iraq. The UK Courts in Al-Skeini adopted the argument advanced by the UK that the ECHR is applicable either in full or not at all.² Because the UK was not in a position to secure all Convention rights, the House of Lords dismissed any application of the ECHR.³

In keeping with many other observers, in my view this reasoning is unconvincing, will lead to unsatisfactory results and is inconsistent with the current developments in the scope of IHRL treaties.⁴ To adopt the words of Justice Bonello from the European Court of Human Rights (‘EChHR’), which disagreed with the UK Courts, ‘it ill suits the [British Government] to argue, as they have, that their inability to secure respect for all fundamental rights in Basrah, gave them the right not to respect any at all’.⁵ The applicability of the Convention rights should not depend on their enforceability as a whole, and as Lord Justice Sedley, in the UK Court of Appeal had argued, ‘it is not

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¹European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), (‘ECHR’).
²R (Al-Skeini) v Defence Secretary [2007] QB 140, 282 [124] (Brooke LJ); R (Al-Skeini) v Secretary of State for Defence [2008] 1 AC 153, 202 [79] (Lord Rodger) (UKHL). See also R (Al-Skeini) v Defence Secretary [2007] QB 140, 175 [124], 223 [278] (Queen’s Bench Divisional Court). For further elaboration of the case, see Chapters 4.3.2, 5.2 and 6.2.
³See R (Al-Skeini) v Secretary of State for Defence [2008] 1 AC 153, 202-3 [81]-[83] (Lord Rodger), 206 [97] (Lord Carswell), 215-16 [132] (Lord Brown). The case was, however, subsequently taken to the European Court of Human Rights (‘EChHR’) where the Court found the case of the five applicants killed on patrol to be within the jurisdiction of the UK.
⁴See Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) 59 [137]. For further elaboration of this issue, see Chapter 6.2.
⁵Ibid 84 [33] (Bonello J).
an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing’. 6 The solution is indeed not one of ‘all or nothing’. 7

This restricted view of the scope of human rights treaty obligations prompted me to embark on an examination of their extraterritorial operation during armed conflicts. Accordingly, it is the human rights treaty obligations of States rather than any customary international law obligations that are the focus of my thesis. 8 The reason for this is that the developments in this area focus primarily on the treaty obligations of States and to date the question of the extraterritorial application of customary international law has not received a great deal of attention from courts and scholars. 9

Traditionally it is IHL that governs the conduct of States during armed conflicts. 10 However, motivated by the pressing need and humanitarian desire to enhance and supplement the protections provided under IHL to individuals caught up in such circumstances, particularly in areas where IHL norms are claimed to be insufficient and inadequate, 11 the international community has moved towards recognising

6 R (Al-Skeini) v Defence Secretary [2007] QB 140, 300 [197] (Sedley LJ).
7 Public Committee against Torture v Government [2006] Israel Law Reports (14 December 2006) Israel Supreme Court sitting as the High Court of Justice HCJ 769/02, 459, 483 [22].
9 Furthermore, as opposed to treaty obligations, determining the customary status of human rights obligations is by no means a straightforward task. Such an analysis would initially necessitate a focus on the establishment of the customary status of any given human right obligation.
extraterritorial human rights obligations of States conducting armed conflicts abroad.\(^{12}\) Indeed, ‘the change in direction toward intrastate or mixed conflicts’, as Meron asserts, ‘has drawn humanitarian law in the direction of human rights law’.\(^{13}\)

This move toward the recognition of the extraterritorial application of IHRL in armed conflict is, however, associated with significant uncertainties as to the scope of such obligations and the relationship between IHL and IHRL in such situations. This lack of clarity impedes the ability of States to adequately factor their human rights treaty obligations into their decision making processes when planning military operations abroad.\(^{14}\) While the issue of the extraterritorial application of human rights to armed conflicts conducted outside territorial borders is now the subject of growing jurisprudence and literature, the examination of the issue has been in the main theoretically focused. There is very limited examination of the question of how such obligations might work in practice.\(^{15}\) In this thesis, I aim to reach beyond existing case law and literature to examine the complex question of how human rights could apply in extraterritorial armed conflict situations.

The extraterritorial application of human rights treaties is not limited to armed conflict, but since the relationship between IHL and IHRL is ‘a frequent issue in various scenarios of extraterritorial application of human rights treaties’\(^{16}\) and is presently the site of contested practice, jurisprudence and commentary, my thesis focuses on situations where both IHL and IHRL are applicable. Consequently, I concentrate solely on ‘armed conflicts’. There is no treaty definition of armed conflict, however, the term has been defined by the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia (‘ICTY’): ‘[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed

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\(^{12}\) The phrases ‘States conducting military operations abroad’, ‘States involved in armed conflicts abroad’ and ‘foreign States’ are used interchangeably in this thesis.


violence between governmental authorities and organized armed groups or between such groups within a State’. This definition as Sassòli et al argue has since been adopted several times by the ICTY and other international bodies. Military operations falling short of armed conflict, such as internal disturbances and tensions, operations that are not generally governed by IHL, such as ‘classic peacekeeping operations’ and cooperative law enforcement operations and instances where there is no potential for the activation of IHL are not examined in my thesis.

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17 See Prosecutor v Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [70].
18 See Sassòli, Bouvier and Quinti, above n 10, 121-7. The application of IHL to a specific situation depends on whether that situation is either an international or non-international armed conflict. IHL relating to international armed conflicts applies ‘to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them’: Common Article 2(1) to the Geneva Conventions. Common Article 2(2) further provides that the Conventions also apply where the forces of one State occupy all or part of the territory of another, even if that occupation meets with no resistance. Article 1(3), AP I provides that the Protocol will apply in the same circumstances as the Conventions. Article 1(4) also adds armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. In relation to non-international armed conflicts, Common Article 3 to the Geneva Conventions applies to any ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. AP II, Article 1, provides that the Protocol applies to all armed conflicts not of an international character which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. On scope of application of IHL treaties, see Jean S Pictet (ed), The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention (International Committee of the Red Cross, 1958) 17-25; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Martinus Nijhoff, 1987) 33-56; 1343-56; Christopher Greenwood, ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed), The Handbook of International Humanitarian Law (Oxford University Press, 2nd ed, 2008) 45.
19 According to Article 1(2) AP II, the Protocol does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.
20 See Greenwood, above n 18, 76; Viggo Jakobsen, ‘The Emerging Consensus on Grey Area Peace Operations Doctrine: Will it Last and Enhance Operational Effectiveness?’ (2000) 7(3) International Peacekeeping 36, 37. Consent of the local parties, impartiality and the use of force only in self-defence constitute the three principles of classic peacekeeping operations. See Report of the Panel on United Nations Peace Operations (The Brahimi Report), UN GAOR, 55th sess, Agenda Item 87, UN Doc A/55/305-S/2000/809 (21 August 2000) ix. However, similarly to stability and post-conflict operations, IHL may be relevant to some recent peacekeeping operations, to the extent that such operations reach the threshold of an armed conflict, for instance where sporadic hostilities are taking place by insurgents. For example, Stephens describes the environment in post-conflict Iraq and Afghanistan as ‘one of mixed peace and war’. Such operations are referred to as ‘grey area operations’. Dale Stephens, ‘Counterinsurgency and Stability Operations: A New Approach to Legal Interpretation’ (2010) 86 International Law Studies Series: U.S. Naval War College 289. After the formation of the Interim Government of Iraq, the Prime Minister of the Interim Government requested the continued presence of the multinational force in Iraq to contribute to the maintenance of security and stability in Iraq. UN Security Council Resolution 1546 (2004) and the Letter of the US Secretary of State to the UN Security Council both confirm the application of IHL to the forces. The US Secretary of State expressed that the
This thesis focuses on the extraterritorial obligations of States involved in an armed conflict abroad. The term ‘extraterritorial’ is employed to indicate ‘beyond national territory’. I examine armed conflicts, where a State acts outside its territory, not only in the traditional inter-State context, but also in a non-international setting. These conflicts are commonly known as ‘transborder’ or ‘extraterritorial’ armed conflicts such as the 2003 conflict in Iraq which engaged American, British, Australian and Polish troops. This also includes, by their extraterritorial nature, situations of occupation under IHL. However, instances of prolonged and stable occupation are not included in my examination. In the words of Justice Barak of the Israeli High Court, in defining the scope of obligations of an occupying power, ‘one must bear in mind the distinction between an [occupation] of short duration and one that is prolonged’. The specific characterisation of prolonged occupations may require different governing regulations, as ‘the scope of an occupant’s authority is influenced by the time factor’. Thus the legal obligations of States undertaking such prolonged occupations, which are anomalous in international law, as they deviate substantially from fundamental principles of equal sovereignty and the right to self-

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21 I have adopted this term from Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Elizabeth Wilmshurst (ed), International Law and the Classification of Conflicts (Oxford University Press, 2012) 32, 70-1.


23 See Adam Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories since 1967’ (1990) 84 American Journal of International Law 44, 94. As Roberts observes ‘[a]n important, but implicit, assumption of much of the law on occupation is that military occupation is a provisional state of affairs’; at 83 (emphasis added). The ‘temporary nature’ of occupation has been reaffirmed in several GA Resolutions. See, eg, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, GA Res 43/58A, UN GAOR, 43rd sess, 71st plen mtg, Agenda Item 77, UN Doc A/RES/43/58A (6 December 1988) para 7.

determination, are much more extensive and require separate detailed analysis. However, reference is made from time to time to such situations where they assist in clarifying matters directly within the scope of the thesis.

One of the main advantages of the extraterritorial application of IHRL is that the system of classification of conflicts, that has its roots deeply embedded in the structure of IHL and 1949 Geneva Conventions, no longer is the sole determinant of what protections are available to those caught up in armed conflict. In particular the dichotomy between international and non-international armed conflict, which determines the legal framework applicable to the conflict, loses some of its significance. Contemporary conflict and the ‘blurred nature of different forms of hostilities’ have increasingly brought into question the practicability and suitability of

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26 If there exists that amount of control and stability, the focus should be on the requirements of the law of occupation to respect local laws and preserve the status quo, the obligation to bring the occupation to an end and the obligation of self-determination for local people. See Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, signed 18 October 1907, (entered into force 26 January 1910) (‘1907 Hague Regulations’) art 43; Geneva Convention IV art 64; Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, GA Res 41/63A-G, UN GAOR, 41st sess, Agenda Item 71, UN Doc A/RES/41/63A-G (3 December 1986); Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, GA Res 43/58A, UN GAOR, 43rd sess, 71st plen mtg, Agenda Item 77, UN Doc A/RES/43/58A (6 December 1988). In the context of occupation, numerous GA Resolutions have reaffirmed the right to self-determination. See, eg, The Right of the Palestinian People to Self-Determination, GA Res 67/158, UN GAOR, 3rd Comm, 67th sess, 60th plen mtg, Agenda Item 68, UN Doc A/RES/67/158 (20 December 2012); Situation in Namibia Resulting from the Illegal Occupation of the Territory by South Africa, GA Res 43/26A, 43rd sess, 54th plen mtg, Agenda Item 29, UN Doc A/RES/43/26A (17 November 1988); Question of Western Sahara, GA Res 34/37, UN GAOR, 4th Comm, 34th sess, 75th mtg, Agenda Item 18, UN Doc A/RES/34/37 (21 November 1979); Question of Western Sahara, GA Res 35/19, UN GAOR, 4th Comm, 35th sess, 56th mtg, Agenda Item 18, UN Doc A/RES/35/19 (11 November 1980). See also Roberts, above n 23, 45; Yoram Dinstein, Laws of War (Hebrew, 1983) 217, reprinted in Domb, above n 22, 307, where he argues that ‘the needs of the civilian population become more valid and tangible when the occupation is drawn out’. For further elaboration of the obligations of the occupying power in a prolonged occupation, see Sassoli, above n 24, 15; Yoram Dinstein, ‘Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding’ (Occasional Paper Series No 1, Program on Humanitarian Policy and Conflict Research at Harvard University, Fall 2004) 8-10. See the further discussion of this issue at Chapter 7.4.3.
the current system of classification. The current scheme has proven challenging in practice for States, courts and tribunals and international bodies that have struggled to correctly classify particular armed conflicts, such as the recent conflict in Afghanistan.  

The exercise of effective control over either a given territory or specific individuals is a central and necessary condition for human rights treaty obligations of States involved in an armed conflict abroad to arise. Effective control being the triggering factor for the activation of human rights obligations in all armed conflict situations, the often complex and contradictory task of classifying different types of armed conflict under IHL thus becomes irrelevant.

This thesis explores the development of the, to date, neglected spatial notion of jurisdiction, where the test of ‘effective control over territory’ must be applied in order to determine the human rights obligations of a State conducting military operations abroad. While the meaning and scope of the personal notion of jurisdiction (effective control over specific individuals) constitutes an equally important topic, it has been the focus of the majority of scholarly work to date and there is overwhelming judicial and literature support for the view that in such circumstances the jurisdiction of the foreign State is activated with respect to its human rights treaty obligations. Further, an exclusive focus on personal jurisdiction,

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29 See Louise Doswald-Beck, Human Rights in Times of Conflict and Terrorism (Oxford University Press, 2011) 6. Similarly, whether there is in fact a situation of occupation under IHL is not relevant to my argument.

30 Milanovic believes that the spatial model of jurisdiction ‘is undoubtedly the model with the most textual support [and it] also fits with the general treaty practice of States, which use the term “jurisdiction” to denote control over territory’. ‘This model also fits best with the current State practice’: Milanovic, above n 16, 127.

31 For example in Al-Skeini, which dealt with both the personal and spatial notions of jurisdiction, the UK Courts recognised the case of Baha Mousa, who had been arrested by military forces and died whilst in British custody, to be within the UK’s jurisdiction (personal notion of jurisdiction). See R (Al-Skeini) v Defence Secretary [2007] QB 140, 225-6 [287]-[288] (Queen’s Bench Divisional Court); R (Al-Skeini) v Defence Secretary [2007] QB 140, 278-9 [108], 288 [142] (Brooke LJ), 297 [182] (Sedley
since it deals in particular with detention, torture, inhuman and degrading treatment, will not encompass the way in which other rights in IHRL are potentially relevant in extraterritorial armed conflict situations.\textsuperscript{32}

The central argument of this thesis is that the scope of a State’s extraterritorial human rights obligations should depend upon the degree of effective control it exercises over the territory in which it is operating.\textsuperscript{33} IHRL is generally predicated on the capacity of the State to control territory and individuals within that territory. States frequently, however, are only able to exercise a limited amount of control beyond their territorial borders. Consequently, doubts as to the practicability of the extraterritorial application of human rights treaty obligations permeate much of the existing case law and literature.\textsuperscript{34} States are unlikely to accept any extraterritorial IHRL obligations that are perceived as unreasonable or unrealistic. Accordingly, it seems reasonable and pragmatic to suggest that the human rights obligations of a State acting abroad may not be as extensive as when it acts within its own borders.

\textsuperscript{32} So, for example, the issue of obligations in relation to the rights of prisoners of war, since it invokes the personal notion of jurisdiction, is left out of my examination.

\textsuperscript{33} The human rights treaty obligations of different States involved in a joint military action may differ based on the amount of control they exercise over the given territory under their responsibility and command. For instance, the Coalition Provisional Authority (‘CPA’) was created by the foreign forces in the armed conflict in Iraq in 2003, to assume responsibility until an Iraqi government could be established. Iraq was divided into six sub-regions, four of which were under US command, one under Polish command and one under British command. See \textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 157 [41]; Brian J Bill, ‘Detention Operation in Iraq: A View from the Ground’ (2010) \textit{88 International Law Studies Series: U.S. Naval War College} 411, 417. In \textit{Al-Skeini} the issue of whether British troops were in effective control of the region under their command, comprising the provinces of Al Basrah, Maysan, Thi Qar and Al Muthanna, was assessed. Additionally, each State’s obligations may differ according to the specific human rights treaties they have ratified.

\textsuperscript{34} For example, Modirzadeh argues that one of the main doctrinal and operational criticisms of the extraterritorial application of human rights treaties on top of IHL is that it ‘dilutes the clarity of the law of armed conflict’: Naz K Modirzadeh, ‘Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance’ (2014) \textit{5 Harvard National Security Journal} 225, 228.
While some commentators have argued that extraterritorial human rights obligations would be bounded by a scope of reasonableness suggesting a narrower scope of obligations in such circumstances, they have not examined how this would work in practice.\textsuperscript{35} Answering the question as to how and on what legal basis such rights and obligations are to be prioritised is at the core of this thesis. To take the 2003 Iraq conflict as an example, at what point did the foreign forces have the obligation to observe the cultural rights of the individuals caught up in armed conflict? Or to what extent did an Iraqi student have education rights vis-à-vis the foreign forces? Currently, there is no systematic approach to such questions.

Against this background I argue that human rights treaty obligations should be applied with a degree of flexibility in extraterritorial armed conflict situations. This flexible approach relies on the concept of effective control in arguing that, depending on the level of control it exercises, a State may initially have a limited range and level of human rights obligations but as its level of effective control over the territory increases so does not only the range but also the level of its human rights obligations. In this sense, the notion of effective control as developed in this thesis is not only central for the activation of human rights treaties in extraterritorial armed conflict situations but can also determine the extent of the range and level of human rights obligations of States conducting military operations abroad.

My aim is to reach beyond existing case law and literature to examine the complex question of how human rights treaty obligations should apply in practice in extraterritorial armed conflict situations. Informed by the overarching understanding that the extent of human rights obligations of a State depends on the amount of effective control it exercises over the territory, and given that in situations of extraterritorial conduct the degree of control is less than that exercised by the State within its own territory, I propose a novel framework for the gradual activation of human rights treaty obligations of States involved in an armed conflict abroad as the level of their control increases. My framework is based on the proposition that both the range and level of human rights obligations incumbent upon a State conducting military operations abroad expand as its level of effective control increases. This

proposal I believe has the potential to work well in practice and achieve greater compliance by States with their human rights treaty obligations. Moreover, it could ultimately result in the enhanced protection of individuals caught up in armed conflict.

The literature on the extraterritorial applicability of human rights treaties in armed conflict situations, generally speaking, has not addressed the central question of whether adding human rights to the legal regime governing armed conflict has any practical advantages. This thesis argues that the application of IHRL alongside IHL in times of armed conflict has considerable potential to fill in normative gaps in the scope of protection afforded to individuals under IHL. In order to support my argument I conduct a comparative analysis of the substantive rights and protections guaranteed under major IHL and IHRL treaties. As the Israeli Supreme Court has expressly articulated, where IHL ‘has a lacuna, it can be filled by means of international human rights law’.

This potential can be seen in the context of the right to education. While IHL treaties contain provisions to ensure, in broad terms, the continuity of education during armed conflict, these protections differ based on the type of conflict. According to Article 50 of Geneva Convention IV relative to the Protection of Civilian Persons in Times of War (‘Geneva Convention IV’), ‘[t]he Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the [...] education of children’. This obligation to ensure the orderly operation of educational institutions, which includes avoiding interfering with their activities and moreover, actively supporting them, applies only to an occupying State and does not cover other situations of armed conflicts falling short of occupation. In contrast, IHRL draws no such distinctions and extends the protection to all types of armed conflicts ensuring comprehensive protection regardless of their

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37 Public Committee against Torture v Government [2006] Israel Law Reports (14 December 2006) Israel Supreme Court sitting as the High Court of Justice HCJ 769/02, 459, 477-8 [18].

38 Pictet, above n 18, 286.

39 See also AP I arts 77 and 78(2) and AP II art 4(3)(a) which provide protections in relation to education in regards to international and non-international armed conflicts respectively.
classification under IHL. Additionally, the protections provided under IHL are generally speaking only owed to a limited category of persons. The obligation of the Parties to the conflict under Article 24 of Geneva Convention IV to take all necessary measures to ensure that the education of children is facilitated in all circumstances only covers children under fifteen, who are orphaned or separated from their families as a result of war. Accordingly, only limited classes of children as enumerated in Geneva Convention IV are entitled to benefit from this provision. Thus, given that IHRL recognises the right of everyone to education, the additional application of IHRL can broaden the limited protections in relation to education provided under IHL.

Further, IHRL may function as a supplementary source of interpretation to give meaning and content to the protections provided under IHL, particularly when such provisions are unclear, vague or abstract. The applicability of IHRL may also have institutional advantages by increasing the available legal forums and accountability measures for the implementation and enforcement of IHL provisions. Accordingly, as Meron asserts, human rights bodies ‘fill an institutional gap and give international humanitarian law an even more pro-human-rights orientation’.

1.1 Thesis Structure

This thesis in essence is concerned with the interpretation and application of human rights treaties. The proper construction of human rights obligations depends on a thorough examination of the text of the treaties. The practice of States is also

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40 See Doswald-Beck, above n 29.
41 See, eg, Geneva Convention IV arts 24, 50; AP I arts 77, 78(2); AP II art 4(3)(a).
45 See, eg, Doswald-Beck, above n 29, 1. See further discussion of this issue at 3.4.3.
significant in the interpretation of treaties,\textsuperscript{48} as are the jurisprudence of courts and human rights bodies\textsuperscript{49} and the writings of commentators.\textsuperscript{50} I will draw on all of these normative and interpretive sources as I develop my argument regarding how human rights treaties should be applied in an extraterritorial armed conflict situation.

**Part One** of the thesis (Chapters Two and Three) examines the interplay between IHL and IHRL. In Chapter Two I analyse the theoretical understanding and development of the relationship between IHL and IHRL. I introduce two opposed strands of thinking with respect to the interplay between the two bodies of law: (a) the traditional theory of separation; and (b) the modern theory of convergence and co-application. I conclude that the co-application of IHL and IHRL during armed conflict has gradually become the dominant view amongst States, international and regional judicial and quasi-judicial bodies, and commentators. However, opinions diverge on the exact relationship between these two bodies of law and particularly the relevance in this context of the \textit{lex specialis} principle. I argue that the \textit{lex specialis} principle does not operate so as to prioritise one body of law to the exclusion of the other but that the general law continues to be relevant to the interpretation and application of the more specific law. To apply \textit{lex specialis} and determine the co-application of IHL and IHRL, the starting point is to determine which rule is specific and which rule is general in any given situation. Therefore, in order to move from the abstract to the concrete, the focus must inevitably shift from the relationship of the two regimes as such, to the relationship of the particular norms belonging to the two regimes controlling specific factual situations.

\textsuperscript{48} See ibid art 31(3).
\textsuperscript{49} See ibid; \textit{Statute of the International Court of Justice} art 38(1)(d).
\textsuperscript{50} See \textit{Statute of the International Court of Justice} art 38(1)(d). ‘The Court…. shall apply:…judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’. As Shaw asserts Article 38(1) of the Statute is ‘widely recognised as the most authoritative and complete statement as to the sources of international law’. Although the formulation of Article 38(1) ‘is technically limited to the sources of international law which the International Court must apply, in fact since the function of the Court is to decide disputes submitted to it “in accordance with international law” and since all member states of the United Nations are \textit{ipso facto} parties to the Statute by virtue of article 93 of the United Nations Charter […], there is no serious contention that the provision expresses the universal perception as to the enumeration of sources of international law’: Shaw, above n 27, 70-1. See also Stephen Hall, \textit{Principles of International Law} (Lexis Nexis, 3\textsuperscript{rd} ed, 2011) 30. On Article 38, see generally Alain Pellet, ‘Article 38’ in Andreas Zimmermann et al (eds), \textit{The Statute of the International Court of Justice: A Commentary} (Oxford University Press, 2\textsuperscript{nd} ed, 2012) 731-870.
In Chapter Three, I examine the practical benefits of the relationship between IHL and IHRL. In doing so, I compare the substantive rights and protections guaranteed under the *International Covenant on Civil and Political Rights* (‘*ICCPR*’),\(^{51}\) and the *International Covenant on Economic, Social and Cultural Rights* (‘*ICESCR*’),\(^{52}\) which form the basis of the *International Bill of Human Rights*, with those of the four 1949 *Geneva Conventions* and their 1977 *Additional Protocols I* and *II*. While the main objective of IHL was always to protect individuals, that protection, in contrast to IHRL, ‘was not expressed in the form of subjective rights of victims’.\(^{53}\) Accordingly, if the protective rules of IHL are translated into rights, these ‘protective rights’ as termed by Sassòli et al, can be compared with those of IHRL.\(^{54}\)

This comparative analysis serves the purpose of first, determining the extent of protection of particular rights under each of the two regimes. Secondly, it addresses doubts as to the practical advantages of the co-application of IHRL treaties alongside IHL in times of armed conflict. As Provost observes, ‘[o]ne of the by-products of comparative analysis is the possibility of finding in one system answers which may be borrowed and adapted to solve challenges faced by another legal system. Such cross-pollination between human rights and humanitarian law is also made possible by their similarity’.\(^{55}\)

I employ two categories to describe the relationship between relevant IHL and IHRL norms. First, I identify and analyse norms common to both IHRL and IHL, which I then further sub-categorise into three groups: (a) comparable normative protection; (b) enhanced normative protection under IHL; and (c) enhanced normative protection under IHRL. Secondly, I identify norms which are not manifested in IHL treaties and are exclusive to IHRL. This analysis provides an essential step in my argument that the additional application of IHRL treaties complements IHL and enhances the protections it offers to individuals. I further employ this categorisation in Chapter Six.

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\(^{51}\) *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’).

\(^{52}\) While the focus is on the *ICCPR* and *ICESCR*, reference is made to other international and regional human rights instruments where useful to advancing the argument of the thesis.

\(^{53}\) Sassòli, Bouvier and Quintin, above n 10, 445.

\(^{54}\) Ibid 452.

\(^{55}\) Provost, above n 11, 2.
to develop a framework for the gradual application of the range of human rights in extraterritorial armed conflict situations.

**Part Two** of the thesis (Chapters Four and Five) explores the question of the extraterritorial applicability of IHRL treaties in armed conflicts. In Chapter Four, I examine the text of the treaties, the practice of States and human rights treaty bodies, international and regional jurisprudence and the writings of commentators to conclude that human rights treaties apply extraterritorially in armed conflict situations. Having established the extraterritorial applicability of IHRL treaties, I proceed to examine when States conducting military operations abroad have extraterritorial human rights treaty obligations.

The exercise of jurisdiction is a ‘threshold criterion’\(^\text{56}\) which, if satisfied, gives rise to treaty obligations. The extraterritorial application of human rights treaties thus depends on where (spatial notion of jurisdiction) and over whom (personal notion of jurisdiction) the State exercises jurisdiction so it can practically and effectively ensure respect for human rights.\(^\text{57}\) Without this requirement, States would be held accountable for violations over which they have no control.\(^\text{58}\) In Chapter Five, I concentrate on the spatial notion of jurisdiction and the concept of effective control over a given area,\(^\text{59}\) as a test for the extraterritorial application of human rights norms in times of armed conflict.\(^\text{60}\) There is also considerable inconsistency in the jurisprudence and associated literature as to the components of effective control. To clarify the issue, I conduct a detailed factual analysis of the relevant case law and the

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\(^{56}\) See *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [130]; *Catan v Moldova and Russia* (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [103].


\(^{59}\) As the size of an area diminishes, ‘the spatial concept of state jurisdiction as control over an area tends to collapse into the personal model of jurisdiction as control over individuals’: Milanovic, above n 16, 134. Consequently, my focus is on control over territory or parts of a territory, not control over specific places or objects such as military bases, prisons or buildings.

\(^{60}\) I argue that while there is overlap between the concept of effective control in IHL as a threshold for the application of the law of occupation and the effective control test for the purposes of human rights law, these two tests are not identical. See Chapter 5.2 below n 56.
practice of human rights supervisory bodies, and develop a coherent framework that identifies factors relevant to determining whether there is in fact effective control over a given area. I conclude that based on an overall assessment of the relevant factors, States conducting military operations abroad may exercise different degrees of control, which I argue determines the extent of their human rights treaty obligations.

**Part Three** of the thesis (Chapters Six, Seven and the Conclusion) considers how human rights treaty obligations should apply in an extraterritorial armed conflict situation. The often limited amount of effective control exercised by States conducting military operations abroad has been argued to be insufficient for the activation of the full scope of human rights obligations or indeed insufficient to activate any human rights obligations. I argue that considerations of reasonableness and practicability require that a State’s human rights treaty obligations while conducting military operations abroad be limited by the extent of effective control exercised by the State over the territory in question. Therefore, these obligations will not usually be as extensive as when a State acts within its own borders. A ‘leaner’ approach towards the extraterritorial application of human rights treaties in the conduct of armed conflict appears to be a workable compromise between the amount of control exercised by the foreign State and the extent of its human rights obligations. To achieve such an outcome, modifications can be made both in relation to the range of applicable rights as well as to the level of human rights obligations.

In Chapter Six, I address the range of applicable rights. I demonstrate that the approach of the courts has evolved from initial attempts to maintain the indivisibility of human rights\(^{61}\) to nowadays a growing acceptance of the necessity of dividing and tailoring a State’s human rights obligations in an extraterritorial armed conflict situation.\(^{62}\) However, both the jurisprudence and the associated literature to date have failed to systematically address which rights apply in any given situation. Therefore I propose a model for the progressive application of the full range of a State’s human rights obligations in an extraterritorial armed conflict situation in three distinct phases, depending on the amount of effective control it exercises.

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61 See, eg, *Banković v Belgium* [2001] XII Eur Court HR 333, 357 [76].
62 See, eg, *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [137].
I turn in Chapter Seven to suggest that the level of human rights obligations of a State conducting military operations abroad, might not in practice consist of all three of the levels of obligations identified within human rights law. I examine how the tertiary model of human rights obligations, ranging from the predominantly cost free and passive duty to respect, to the more active obligation to protect, and finally to the most onerous duty to fulfil, will arise in an extraterritorial armed conflict situation, as the level of control is increased. I illustrate the operation of the tertiary model in extraterritorial armed conflict situations by examining the specific case of the right to education, as one of the norms that is most likely to become an issue in real life situations, yet is to a large extent unstudied.63 Finally, I draw together my ideas in relation to the range and level of obligations and propose a four-stage framework for the gradual activation of human rights treaty obligations in extraterritorial armed conflict situations based on the level of control exercised. My model, notwithstanding very limited practice on the extent of extraterritorial human rights treaty obligations of States involved in an armed conflict abroad, is based on and consistent with relevant treaties and cases, the current practice of international and regional human rights bodies and a critical reading of relevant literature.

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63 See, however, Kristin Hausler, Nicole Urban and Robert McCorquodale, Protecting Education in Insecurity and Armed Conflict (British Institute of International and Comparative Law, 2012) 1. See also Chapter 7.1 on why I have chosen to examine the right to education.


**Part One**

**Relationship between IHL and IHRL**

The relationship between IHL and IHRL has evolved from initial perceptions of divergence and separation to be seen now as complementary regimes, mutually reinforcing each other. Part One of this thesis examines the legal foundation in relation to the interplay between IHL and IHRL. Chapter Two presents a historical, judicial and legal overview of the development of the relationship between IHL and IHRL. The Chapter examines the critical concept of *lex specialis*, providing a summary of existing literature on the complementarity of the two regimes. Even amongst those who accept the complementarity of IHL and IHRL, there are doubts as to the practical advantages of the co-application of IHRL treaties alongside IHL.¹ The analysis in Chapter Three is designed to dispel these doubts. It consists of a comparative study of substantive rights and protections within major IHL and IHRL treaties and concludes that the co-application of IHRL treaties has significant advantages by, most importantly, filling normative gaps in the scope of protection afforded to individuals by IHL.

¹ For example, it has been argued that the co-application paradigm has significant costs. It ‘results in a normative vagueness that engenders chaos and insecurity on the ground’. Further, ‘[b]y aiming to reshape the legal relationship between military forces and an enemy population, co-application may delegitimize both IHL and IHRL’: Kristin Bergtora Sandik, ‘International Human Rights and Humanitarian Law in the Global Legal Order’ (Policy Brief 01, Peace Research Institute Oslo, 2012) 2-3. The assumption that more formal rights means greater enjoyment of rights and more humanitarian outcome is also questioned. See Naz K Modirzadeh, ‘The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict’ (2010) 86 *International Law Studies Series: U.S. Naval War College* 349; Naz K Modirzadeh, ‘Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance’ (2014) 5 *Harvard National Security Journal* 225, 228.
2 DIVERGENCE, CONVERGENCE, COMPLEMENTARITY AND LEX SPECIALIS

2.1 Introduction

In this Chapter, I first trace two main strands of thinking in regard to the interplay between IHL and IHRL. I begin by outlining the traditional theory of separation, which is based on a distinction between laws regulating peace-time and war-time. This theory of divergence presupposes that the application of IHRL is suspended in situations of armed conflict.²

Contrary to this theory, the applicability of IHRL norms alongside IHL during armed conflict - the convergence view - has gradually become the dominant view among international bodies and legal scholars.³ The majority of scholars support the view that the dichotomy between IHL and IHRL is not so sharp today, and that the two bodies of law have various overlapping fields of application and apply simultaneously.⁴ The question of applicability is no longer a question of ‘if’ as much as ‘how’ and the debate is now shifting to the scope of applicability and to the


practical problems encountered in its implementation. This shift has led to the complementarity approach which holds that while the two bodies of law are distinct, they do not merge, but complement and mutually reinforce each other. The complementarity view seeks to harmonise the interplay between the two regimes in order to provide enhanced protection to individuals caught up in armed conflict. I explain why the theory of complementarity has emerged as the dominant view in the twenty-first century.

Secondly, I analyse the jurisprudence of the International Court of Justice (‘ICJ’) in regard to two issues: the applicability of IHRL in times of armed conflict; and the relationship between IHL and IHRL with particular focus on the lex specialis principle. I conclude that either IHL or IHRL may be the lex specialis based on the context of the right and in any event the general law will remain relevant to the interpretation of the lex specialis. The challenge then becomes, as Olson asserts ‘to assess appropriately the general rule and the specific rule in order to apply the maxim’.  

2.2 The Traditional Theory of Divergence between IHL and IHRL

Traditionally IHL and IHRL were viewed as two distinct branches of law that govern mutually exclusive situations. IHRL was formulated to regulate peace-time situations whereas IHL, or to use the more traditional terminologies, the ‘law of war’ or the ‘law of armed conflict’, governed armed conflict situations. It was thought that the

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8 See, eg, Ben-Naftali and Shany, above n 3, 29.

9 The language and philosophy of human rights law has undoubtedly influenced international law as a whole, and in particular humanitarian law. Accordingly the increasing substitution of ‘international
The attempt to confuse the two regimes of law is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed [...] At the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or organized armed groups, and in internal rebellions.

In the twenty-first century, some scholars still hold the view articulated by Draper in 1979 that ‘IHL and IHRL are ‘mutually exclusive since there is a distinct contradiction between them’. Proponents of distinction base their reasoning on the separate origins, theories, nature, purposes, scope of application and implementing mechanisms of the two disciplines of law. It is claimed that IHL and IHRL historically emerged and developed independently from each other, and that IHL
was established as a discipline of international law long before IHRL.\textsuperscript{16} Whereas IHL originally had a purely international focus and was primarily designed to govern inter-State relations,\textsuperscript{17} human rights law, by way of contrast, was originally a matter of internal affairs between the government and its citizens and formed part of domestic law rather than international law.\textsuperscript{18} Modern IHRL, emerging from the ashes of the Second World War, only entered the arena of public international law through its inclusion in the \textit{Charter of the United Nations}\textsuperscript{19} and the adoption of the \textit{Universal Declaration of Human Rights} (‘UDHR’) in 1948.\textsuperscript{20}

Furthermore, while IHL is of ‘a specific and exceptional nature’, primarily designed to govern relations between belligerent States and protected persons, including enemy nationals and neutrals,\textsuperscript{21} IHRL embodies general principles governing relations between the State and all individuals under its jurisdiction and is designed to protect individuals from the abuse of power by their own governments.\textsuperscript{22} Accordingly, IHL is formulated as a series of duties and obligations imposed on the combatants, while

\textsuperscript{16}IHL was the first part of international law to be subjected to codification. See Dietrich Schindler and Jiří Toman (eds), \textit{The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents} (Martinus Nijhoff, 3\textsuperscript{rd} revised ed, 1988). See also G.I.A.D. Draper, ‘Humanitarianism in the Modern Law of Armed Conflicts’ in Michael A Meyer (ed), \textit{Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention} (British Institute of International and Comparative Law, 1989) 3, 8; Bowring, above n 2, 489; Ben-Naftali and Shany, above n 3, 29.

\textsuperscript{17}See, eg, Louise Doswald-Beck and Sylvain Vité, ‘International Humanitarian Law and Human Rights Law’ (1993) 33(293) \textit{International Review of the Red Cross} 94, 95-100; Ben-Naftali and Shany, above n 3, 30.


\textsuperscript{19}\textit{Charter of the United Nations} art 1(3).

\textsuperscript{20}\textit{Universal Declaration of Human Rights}, GA Res 217A (III), UN GAOR, 3\textsuperscript{rd} sess, UN Doc A/810 (10 December 1948). See Provost, above n 9, 5; Henkin, above n 18, 5; Sandik, above n 3; Noëlle Quénéhet, ‘The History of the Relationship between International Humanitarian Law and Human Rights Law’ in Roberta Arnold and Noëlle Quénéhet (eds), \textit{International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law} (Martinus Nijhoff, 2008) 1, 2.

\textsuperscript{21}Pictet, above n 6. It is argued that IHL regulates the state of exception from day-to-day governance. See Modirzadeh, above n 5, 352. See also Provost, above n 9, 7; Asbjørn Eide, ‘The Laws of War and Human Rights: Differences and Convergences’ in Christophe Swinarski (ed), \textit{Studies and Essays on International Humanitarian Law and Red Cross Principles: In Honour of Jean Pictet} (Martinus Nijhoff, 1984) 675, 677.

\textsuperscript{22}See, eg, Fleck, above n 3; Pictet, above n 6.
IHRL focuses on its subjects and is therefore formulated in a rights-based language. It is argued that IHL being specifically designed to apply in times of armed conflict and with military considerations in mind, is practically better suited to military operations and is more likely to be complied with. As such, war is ‘far too complex and brutal a phenomenon to be capable of being constrained by rules designed for peacetime’.

Accordingly, the theory of separation is based on a distinction between laws regulating peace-time and war-time and presupposes that the application of IHRL is suspended in situations of armed conflict. However, the next section argues that this conventional theory has been roundly challenged by both doctrine and practice.

2.3 The Convergence of IHL and IHRL

The twenty-first century has seen significant challenges to the traditional view of a clear and unquestioned separation between IHL and IHRL. The suggestion that both regimes might operate during times of armed conflict and the question of the relationship between IHL and IHRL, appeared in legal and political debate in the late 1960s. The 1968 Tehran International Conference on Human Rights has been seen as a turning point, marking a change in thinking about the relationship between IHL and IHRL. The pressing need and humanitarian desire to increase the protection afforded by international law to individuals affected by armed conflict was compounded by the political context in which the conference took place. Following the Six Day War,

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25 See, eg, Ben-Naftali and Shany, above n 3, 31.


27 International Conference on Human Rights, Tehran, 12 May 1968. See, eg, Doswald-Beck and Vité, above n 17, 119; Quénivet, above n 20, 4.

the Arab States demanded the condemnation of Israeli actions in the occupied territories.\textsuperscript{29} The first Resolution of the Conference, entitled ‘Respect for and Implementation of Human Rights in Occupied Territories’ called on Israel to respect and implement both the UDHR and the 1949 Geneva Conventions in occupied territories.\textsuperscript{30} The Conference also adopted the more general Resolution XXIII (1968) entitled ‘Human Rights in Armed Conflict’ marking the starting point to the interplay between IHL and IHRL.\textsuperscript{31}

Following Resolution XXIII of the Tehran Conference, the UN General Assembly (‘GA’) in the same year adopted Resolution 2444 (XXIII) entitled ‘Respect for Human Rights in Armed Conflicts’\textsuperscript{32} in which it invited the Secretary-General, in consultation with the International Committee of the Red Cross (‘ICRC’) and other appropriate international organisations, to study, \textit{inter alia}, the need for ‘appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts’.\textsuperscript{33} From 1968 onwards, a series of annual UN General Assembly Resolutions entitled ‘Respect for Human Rights in Armed Conflicts’ was adopted.\textsuperscript{34} Accordingly, the Tehran Conference and GA Resolutions that followed are

\textsuperscript{29} Draper, ‘Humanitarian Law and Human Rights’, above n 2, 194; Provost, above n 9, 3.

\textsuperscript{30} See \textit{Respect for and Implementation of Human Rights in Occupied Territories}, GA Res 2443 (XXIII), UN GAOR, 3\textsuperscript{rd} Comm, 23\textsuperscript{rd} sess, Agenda Item 62, UN Doc A/RES/2443 (19 December 1968) para (d).

\textsuperscript{31} See \textit{Human Rights in Armed Conflicts}, Resolution XXIII adopted by the International Conference on Human Rights, Tehran, 25\textsuperscript{th} plen mtg, UN Doc A/CONF.32/41 (12 May 1968) printed in the \textit{Final Act of the International Conference on Human Rights}, (22 April-13 May 1968) (Sales No. 68.XIV.2) 18, reprinted in Dietrich and Toman, above n 16, 261. The Resolution submitted, in a more vague and general manner than its title would suggest, that ‘even during times of armed conflict, humanitarian principles must prevail’. The ambiguous reference to ‘humanitarian principles’ has been criticised as it could reasonably be interpreted to refer to either human rights or humanitarian law: Provost, above n 9, 3.

\textsuperscript{32} See \textit{Respect for Human Rights in Armed Conflict}, GA Res 2444 (XXIII), UN GAOR, 3\textsuperscript{rd} Comm, 23\textsuperscript{rd} sess, Agenda Item 62, Supp No 18, UN Doc A/RES/2444 (19 December 1968) reprinted in Dietrich and Toman, above n 16, 263.

\textsuperscript{33} Ibid para 2(b).

\textsuperscript{34} See \textit{Respect for Human Rights in Armed Conflict}, GA Res 2597 (XXIV), UN GAOR, 3\textsuperscript{rd} Comm, 24\textsuperscript{th} sess, Agenda Item 61, UN Doc A/RES/2597 (16 December 1969); \textit{Respect for Human Rights in Armed Conflict}, GA Res 2674 (XXV), UN GAOR, 3\textsuperscript{rd} Comm, 25\textsuperscript{th} sess, Agenda Item 47, UN Doc A/RES/2674 (9 December 1970); \textit{Respect for Human Rights in Armed Conflict}, GA Res 2676 (XXV), UN GAOR, 3\textsuperscript{rd} Comm, 25\textsuperscript{th} sess, Agenda Item 47, UN Doc A/RES/2676 (9 December 1970); \textit{Respect for Human Rights in Armed Conflict}, GA Res 2677 (XXV), UN GAOR, 3\textsuperscript{rd} Comm, 25\textsuperscript{th} sess, Agenda Item 47, UN Doc A/RES/2677 (9 December 1970); \textit{Respect for Human Rights in Armed Conflict}, GA Res 2852 (XXVI), UN GAOR, 3\textsuperscript{rd} Comm, 26\textsuperscript{th} sess, UN Doc A/RES/2852 (20 December 1971); \textit{Respect for Human Rights in Armed Conflict}, GA Res 2853 (XXVI), UN GAOR, 3\textsuperscript{rd} Comm, 26\textsuperscript{th} sess, UN Doc A/RES/2853 (20 December 1971); \textit{Respect for Human Rights in Armed Conflict}, GA Res 3032 (XXVII), UN GAOR, 6\textsuperscript{th} Comm, 27\textsuperscript{th} sess, Agenda Item 49a, UN Doc A/RES/3032 (18 December 1972); \textit{Respect for Human Rights in Armed Conflict}, GA Res 3102 (XXVIII), UN GAOR,
seen as part of a movement to increase the protection of civilians in armed conflicts and the humanisation of IHL. From around the same time, the application of IHRL treaties to armed conflicts was supported by GA Resolution 2675 (XXV), adopted with 109 votes in favour, none against with 18 States abstaining or absent. The Resolution affirmed that ‘[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict’. 35 Further, GA Resolution 3318 (XXIX), clearly referred to IHRL treaties applying in armed conflicts. 36

A growing corpus of jurisprudence supports the proposition that human rights law applies in armed conflict situations. Both the ECtHR37 and the Inter-American Commission and Court of Human Rights38 have confirmed the application of human rights norms in armed conflict. Similarly, various UN human rights treaty bodies,

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36 See Declaration on the Protection of Women and Children in Emergency and Armed Conflict, GA Res 3318 (XXIX), UN GAOR, 25th sess, 2319th plen mtg, Agenda Item 92, Supp No 31, UN Doc A/RES/29/3318 (14 December 1974) para 6, reprinted in Dietrich and Toman, above n 16, 205. The Declaration was adopted by a vote of 110 in favour, none against and 14 abstentions.
including the Human Rights Committee (‘HRC’),39 the Committee on Economic, Social and Cultural Rights (‘CESCR’),40 the Committee on the Elimination of Discrimination against Women (‘CEDAW/C’),41 the Committee on the Elimination of Racial Discrimination (‘CERD’)42 and the Committee on the Rights of the Child (‘CRC/C’)43 have interpreted human rights treaties as applying in situations of armed conflict, both in their concluding observations on country reports as well as in their opinions in individual cases. Further, General Comment No 31 of the HRC expressly provides that ‘the Covenant [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are also applicable’.44 In the same way, Resolutions by the UN Security Council (‘SC’), the General Assembly, the Human Rights Council and the Commission on Human Rights have consistently reaffirmed the application of human rights norms in situations amounting to armed conflict.45 The United Nations has also conducted investigations into violations of human rights.


40 See, eg, CESCR, Concluding Observations: Colombia, 27th sess, UN Doc E/C.12/1/Add.74 (30 November 2001); CESCR, Concluding Observation: Guatemala, 31st sess, UN Doc E/C.12/1/Add.93 (12 December 2003); CESCR, Concluding Observations: Israel, 30th sess, UN Doc E/C.12/1/Add.90 (23 May 2003) [14]-[15].


42 See, eg, CERD, Concluding Observations: Israel, 52nd sess, UN Doc CERD/C/304/Add.45 (30 March 1998).


human rights, for example, in connection with the conflicts in Liberia,\textsuperscript{46} Sierra Leone\textsuperscript{47} and Israel’s military occupation of the Palestinian Territories.\textsuperscript{48}

These actions within UN organs and treaty bodies have been supported by State practice confirming that human rights law applies at all times, including during times of armed conflict.\textsuperscript{49} By and large, States have not objected to the co-application of IHRL alongside IHL in armed conflict situations, with limited exceptions, including

\begin{itemize}
  \item \textsuperscript{47} See, eg., First Progress Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, UN Doc S/1998/750 (12 August 1998) 8–9 [33]–[38], [40].
  \item \textsuperscript{48} See, eg., Grave and Massive Violations of the Human Rights of the Palestinian People by Israel, Commission on Human Rights Res S-5/1, 6th mtg, UN Doc E/CN.4/RES/S-5/1 (19 October 2000) paras 3, 6(b) and (c).
  \item \textsuperscript{49} As evidence of ‘extensive state practice to the effect that human rights law continues to apply during armed conflict’, Henckaerts and Doswald-Beck rely on the subsequent reaction of States to various resolutions adopted by the UN General Assembly and UN Commission on Human Rights, UN investigations into violations of human rights in relation to specific armed conflicts and reports of UN Special Rapporteurs emphasising that both IHL and IHRL apply in armed conflict (as discussed above). See Henckaerts and Doswald-Beck, above n 6, 303–5. See also Doswald-Beck, above n 4; Jean-Marie Henckaerts, ‘Concurrent Application of International Humanitarian Law and Human Rights Law: A “Victim Perspective”’ in Roberta Arnold and Noëlle Quénivet (eds), \textit{International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law} (Martinus Nijhoff, 2008) 237, 249–52; Sandik, above n 3, 1, arguing that various Norwegian policy documents and statements appear to presume: (a) the existence of a harmonious and complementary regime between IHL and IHRL; and (b) that the convergence of the two bodies of law is necessarily a good thing. See also ‘Written Statement of the League of Arab States’, \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)} [2003] ICJ Pleadings [10.1]–[10.7].
\end{itemize}
Israel\textsuperscript{50} and the United States.\textsuperscript{51} However, in its Fourth Periodic Report to the HRC in late 2011, the US appears to have softened its stance in relation to the question of the applicability of IHRL in times of armed conflict; whether this tendency will continue will only become apparent over time.\textsuperscript{52}

Commentators also generally support the view that a strict distinction between IHL and IHRL is no longer viable.\textsuperscript{53} In the view of the majority essentially, the two regimes ‘share as a basis a fundamental concern for humanity’\textsuperscript{54} and have overlapping fields of application. IHRL while primarily governing stable and peaceful relations, is also applicable, subject to only limited derogations, in times of ‘public emergency which threatens the life of the nation’,\textsuperscript{55} including times of armed conflict.\textsuperscript{56}

Additionally, the operation of IHRL that was traditionally limited to territorial

\textsuperscript{50}See, eg, Report of the Secretary General Prepared Pursuant to GA Res ES-10/13, UN GAOR, Agenda Item 5, UN Doc A/ES-10/248 (24 November 2003) [4]; Second Periodic Report of Israel to the Human Rights Committee, UN Doc CCPR/C/ISR/2001/2 (4 December 2001) [8]. Israel argues that the simultaneous application of IHL and IHRL is a contradiction in terms, and the applicability of the former in the Occupied Territories excludes the applicability of the latter. See Ben-Naftali and Shany, above n 3, 26. It is, however, important to note that the position of Israel is not consistent in this regard, and that the Israeli judiciary has taken a more nuanced approach towards the applicability of IHRL in the Occupied Territories. See, eg, Marab v Commander of the IDF Forces in the West Bank [2002] Israel Law Reports (5 February 2003) Israel Supreme Court sitting as the High Court of Justice HCJ 3239/02, 173, 188-9 [19]; Public Committee against Torture v Government [2006] Israel Law Reports (14 December 2006) Israel Supreme Court sitting as the High Court of Justice HCJ 769/02, 459, 477-8 [17]-[18].

\textsuperscript{51}See, eg, Second and Third Periodic Reports of the United States of America to the Human Rights Committee, UN Doc CCPR/C/USA/3 (28 November 2005) [3], [130], Annex I: Territorial Scope of the Application of the Covenant; HRC, Consideration of Reports under Article 40 of the Covenant: Second and Third Periodic Reports of the United States of America to the Human Rights Committee, 87\textsuperscript{th} sess, Summary Record of the 2380\textsuperscript{th} Meeting, UN Doc CCPR/C/2380 (27 July 2006).


\textsuperscript{53}See, eg, Schindler, above n 4; Tobin, above n 3; Espiell, above n 4; Modirzadeh, above n 5, 393.

\textsuperscript{54}Provost, above n 9, 5. See also Ingrid Detter, The Law of War (Cambridge University Press, 2\textsuperscript{nd} ed, 2000) 161; Picet, above n 6.

\textsuperscript{55}See ICCPR art 4.

\textsuperscript{56}See, eg, Eide, above n 21, 681; Greenwood, ‘Scope of Application of Humanitarian Law’, above n 18; Sandik, above n 3. The HRC has interpreted the ICCPR to require that ‘even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation’: HRC, General Comment No 29: States of Emergency (Article 4), 1950\textsuperscript{th} mtg, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [3]. See the further discussion of this issue at Chapter 6.3.1.1.
boundaries and regulated the relationship between States and their citizens has expanded beyond territorial borders, as Chapter Four will demonstrate. At the same time, given the rapid changes in the nature of conflict since the end of the Second World War, the scope of IHL has expanded to cover contemporary situations of conflict including non-international armed conflict and certain relationships between a State and its own nationals.\(^{57}\) ‘The change in direction toward intrastate or mixed conflicts’ as Meron asserts ‘has drawn IHL in the direction of human rights law’.\(^{58}\) Accordingly, the interaction between IHL and IHRL has evolved from initial perceptions of divergence and separation to recognition that IHRL applies alongside IHL in times of armed conflict.

### 2.4 The Complementarity of IHL and IHRL and the *Lex Specialis* Principle

Acceptance of the convergence of IHL and IHRL raises the question of how to determine their relationship if they can apply to the same situation. The dominant approach is one of ‘mutual complementarity’.\(^{59}\) The majority of scholarly opinion accepts co-applicability of human rights norms in armed conflict situations, so that while the two systems are distinct, they complement each other\(^ {60}\) and are seen as

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\(^{57}\) See, eg, *AP II* relating to the Protection of Victims of Non-International Armed Conflicts. See also Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press, 2012) 32, 33. Common Article 3 to the *Geneva Conventions* applies basic humanitarian norms to non-international armed conflicts. Additionally, Part II (arts 13-26) of *Geneva Convention IV* also contains minimal norms applicable to the populations of all Parties to a conflict, including a State’s own nationals.

\(^{58}\) Meron, ‘The Humanization of Humanitarian Law’, above n 9, 244, 260-3. See also Ben-Naftali and Shany, above n 3, 46.


mutually supportive regimes.61 ‘The two laws are two crutches on which the individual may lean to avoid - insofar as possible - the disastrous consequences of armed conflict.’62 The ICRC supports this view and speaks of ‘the necessity of maintaining the two distinct yet complementary systems’.63 The HRC also is of the view that ‘both spheres of law are complementary, not mutually exclusive.’64

In the next Chapter, I will analyse how the additional application of IHRL complements and further enhances the protections provided under IHL. Before that analysis can occur, it is necessary to examine the co-application of IHL and IHRL in more depth.

The application of IHRL in times of armed conflict was considered in 1996 in the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) where the ICJ had to assess the legitimacy of the threat or use of nuclear weapons in an armed conflict. The ICJ rejected the argument that the ICCPR was directed to the protection of human rights in peacetime, and that questions relating to the unlawful loss of life in hostilities were solely governed by the law of armed conflict.65 The Court advised that:

[T]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities.66

In the 2004 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) the Court rejected Israel’s view that human rights treaties are not applicable in the Occupied Territories on the basis that this

\[61\] See, eg, Quénivet, above n 20, 9; Tobin, above n 4, 357.
\[63\] See Robertson, above n 6, 793.
\[64\] HRC, General Comment No 31, above n 3, [11].
\[66\] Ibid 240 [25].
situation was one of armed conflict and extended the application of human rights conventions generally to situations of armed conflict.

The Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.

The ICJ also confirmed the parallel application of IHRL alongside IHL in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* in respect of acts done by a State in the exercise of its jurisdiction outside its own territory and particularly in occupied territories. Since this case deals with extraterritoriality it will be examined in greater detail in Chapter Four.

Thus, the ICJ has confirmed the applicability of IHRL in armed conflict. The more complicated question that must now be examined is how co-application works in practice. The ICJ examined the interplay between IHL and IHRL in its *Nuclear Weapons Advisory Opinion*, where it specifically identified the right to life, as expressed in Article 6 of the *ICCPR*, as continuing to apply in times of armed conflict. Yet, the ICJ relying on the *lex specialis* principle gave primacy to the law of armed conflict when interpreting Article 6 of the *ICCPR*.

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of

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71 See Chapter 4.3.1.
life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.\textsuperscript{72}

The Advisory Opinion provides little further guidance as to the relationship between IHL and IHRL during times of armed conflict across the whole spectrum of human rights, whatever its usefulness might be in the context of Article 6 of the ICCPR. Scholars, however, have assessed the application of the lex specialis maxim in some detail seeking insights into the relationship between IHL and IHRL more generally.\textsuperscript{73}

The maxim lex specialis derogat legi generali\textsuperscript{74} assists in interpretation and conflict resolution in international law.\textsuperscript{75} According to this maxim, whenever two or more norms deal with the same subject matter, the specific norm prevails over the general norm.\textsuperscript{76} The Report of the International Law Commission (‘ILC’) on the Fragmentation of International Law explains that the rationale of the lex specialis principle lies in the fact that:

\textquote{...such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often

\begin{footnotesize}
\begin{enumerate}
\item See Koskenniemi, Fragmentation of International Law, above n 73, [56].
\item The idea that special prevails over general has a long pedigree in international jurisprudence. Its rationale is explained clearly by Grotius: ‘What rules ought to be observed in such cases [i.e. where parts of a document are in conflict]?’ ‘Among agreements which are equal […] , that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general’: Hugo Grotius, ‘The Law of War and Peace’ in James Brown Scott (ed), The Classics of International Law (Francis W Kelsey trans, Clarendon Press, 1925) vol II, Book II, 409, 428 [trans of: De Jure Belli ac Pacis Libri Tres]. See also Michael Barton Akehurst, ‘The Hierarchy of the Sources of International Law’ (1974-75) 47 British Yearbook of International Law 273.
\end{enumerate}
\end{footnotesize}
create a more equitable result and it may often better reflect the intent of the legal subjects.77

For *lex specialis* to operate, the two rules of international law must deal with the same subject matter78 and an inconsistency or conflict must exist between the two rules.79 Indeed, what is required, ‘is not so much a conflict, but that the two rules have a relationship in the sense that they must have the same characteristics, and the special rule must either supplement or displace one of the characteristics of the general rule’.80 The point of the *lex specialis* maxim is to indicate which rule should be applied: ‘the special [rule will] become applicable instead of the general’.81 This is not, however a complete displacement: ‘[s]uch replacement remains, however, always only partial. The more general rule remains in the background providing interpretative direction to the special one’.82

Against this background, scholars differ as to the meaning given to the *lex specialis* principle by the Court in its Advisory Opinion on *Nuclear Weapons*.83 It has been

79 See, eg, *Report of the International Law Commission on the Work of its Fifty-Third Session*, above n 78; Fitzmaurice, above n 73, 237. A strict notion of inconsistency presumes that conflict exists whenever two valid norms cannot be applied simultaneously to the same set of factual circumstances, without violating one of them or without leading to irreconcilable results. See Koskenniemi, *Fragmentation of International Law*, above n 73, [24]. See also Arai-Takahashi, above n 60, 416.
80 Lindroos, above n 73, 46. See also Koskenniemi, *Fragmentation of International Law*, above n 73, [24]. According to the ILC study, there are two ways in which law may take account of the relationship of a particular rule to a general one. A particular rule may either be considered ‘an application of a general standard in a given circumstance’ or ‘as a modification, overruling or a setting aside’ of the general rule: at [88]. The former relates to a situation where the two rules of international law may deal with the same subject from different points of view or be applicable in different circumstances, or one may embody obligations more far-reaching than, but not inconsistent with, the other. See C Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 *British Yearbook of International Law* 401, 426. In this sense, it is sometimes seen as not a situation of normative conflict at all, but as the ILC study asserts, ‘is taken to involve the simultaneous application of the special and the general standard’: Koskenniemi, *Fragmentation of International Law*, above n 73, [88]. See also Pauwelyn, above n 74, 386.
81 Koskenniemi, *Fragmentation of International Law*, above n 73, [102].
82 ibid.
83 The existence of sharply opposed interpretations in relation to the *lex specialis* principle in the *Nuclear Weapons Advisory Opinion* appears to be based on the vagueness and elusiveness of the
construed by some as conferring an unqualified primacy of IHL over IHRL. The better view, supported by the majority of commentators, is that the Court took the approach that the principle of lex specialis is not capable of ‘an abstract determination of an entire area of law being more specific towards another area of law’. International law is a ‘decentralised and fragmented legal system’ in which the formation, application and implementation of norms is built on a structure and logic that lacks a systematic basis and a centralised law-making process. In such a legal system, it appears difficult if not impossible to identify what is general and specific, in its totality, and decide whether one field of law should prevail over the other. Thus the lex specialis maxim in international law is invoked to regulate the conflict of two particular norms rather than to offer a general guideline for the relations between two specialised regimes. Additionally, it is argued that a sweeping application of lex specialis as a device to exclude the applicability of general rules in their totality in favour of more specific ones, could enable States to evade many of their international obligations. Accordingly, most scholars are of the view that the ICJ concluded that IHRL does not cease in times of war and as Lindroos asserts, IHRL is ‘not

principle. See Prud’homme, above n 73, 383. See also Kristin Hausler, Nicole Urban and Robert McCorquodale, Protecting Education in Insecurity and Armed Conflict (British Institute of International and Comparative Law, 2012) 50. See, eg, Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge University Press, 2nd ed, 2010) 24; Yoram Dinstein, ‘Concluding Observations: The Influence of the Conflict in Iraq on International Law’ (2010) 86 International Law Studies Series: U.S. Naval War College 479, 490; Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ above n 11, 139-41. Dinstein believes that in the event of an international armed conflict, IHL norms - as lex specialis - prevail over the lex generalis of human rights. Dennis also suggests that the supremacy afforded to IHL by the ICJ in the specific context of the right to life should be interpreted more broadly to give precedence to IHL over IHRL at least during international armed conflict and occupation.


86 Lindroos, above n 73, 28. See also Koskenniemi, Fragmentation of International Law, above n 73, [5].

87 See, eg, Lindroos, above n 73, 43; Arai-Takahashi, above n 60, 417; Olson, above n 7; Sassòli, Bouvier and Quintin, above n 23, 454.

88 See, eg, Ben-Naftali and Shany, above n 3, 56.
Koskenniemi points out that in this case:

[T]he use of the lex specialis maxim did not intend to suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an aspect of the pragmatics of the Court’s reasoning. However desirable it might be to discard the difference between peace and armed conflict by abolishing the latter altogether, the exception that war continues to be to the normality of peace could not simply be overlooked when determining what standards should be used to judge behaviour in those (exceptional) circumstances.90

The dominant view is, thus, that the Nuclear Weapons Advisory Opinion and its application of IHL as lex specialis is limited to the specific situation in question. The right to life is an instance where the lex specialis of IHL is used to interpret the terms of another, more general norm, namely the meaning of ‘arbitrary deprivation’ in IHRL. However, IHL does not overrule IHRL, but rather, both the lex specialis (IHL) and the lex generalis (IHRL) could be applied side by side, the lex specialis playing the greater role of the two.91 Such interpretation of the lex specialis principle treats IHL and IHRL as closely linked, with both bodies of law relevant to the interpretation of the other, and excludes any rigid application of the lex specialis principle which gives priority to one body of law to the exclusion of the other.92 The general law continues to have an effect on the interpretation and application of the more specific law: the two laws work concurrently.93 Considering IHL as being lex specialis in the context of the right to life does not mean that IHRL is irrelevant; it will continue to be relevant to the interpretation of IHL.94

Consequently, the lex specialis principle grants the primary role to IHL in the specific context of the right to life during armed conflict, but would apply differently in relation to other substantive rights.95 As Doswald-Beck writes, ‘the lex specialis principle makes complete sense in the context of the arbitrary deprivation of life (a

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89 Lindroos, above n 73, 43.
90 Koskenniemi, Study on the Function and Scope of the Lex Specialis Rule, above n 74.
91 See Pauwelyn, above n 74, 410.
93 See HRC, General Comment No 31, above n 3.
94 See Koskenniemi, Fragmentation of International Law, above n 73, [90], [103].
95 The ILC in its report on the Fragmentation of International Law supports the view that when the Court ‘came to determine what was an “arbitrary deprivation of life” under Article 6(1) of the [ICCPR], this fell “to be determined by the applicable lex specialis, namely the law applicable to armed conflict”’: ibid [96].
vague formulation in human rights law, whereas humanitarian law is full of purpose-built rules to protect life as far as possible in armed conflict). On this view, IHL as *lex specialis*, would determine the assessment of ‘arbitrariness’ in Article 6 of the **ICCPR**. Similarly, IHL as the most precise and detailed legal framework, would apply in situations concerning targeting during armed conflict.

This may be as far as the Court’s reasoning in the **Nuclear Weapons Advisory Opinion** goes. It is possible that where a human rights norm is more specific and detailed than an IHL norm, IHRL will be the *lex specialis*. In this way, IHL and IHRL could both be either the *lex specialis* or *lex generalis*, depending on the specific context. What constitutes the specific law cannot be determined in a general way; rather it should be addressed contextually. The HRC in its General Comment 31 is supportive of the view that IHRL is not always displaced by IHL as *lex specialis*:

> The Covenant [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specifically relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

Accordingly, the best understanding of the application of the *lex specialis* principle in an armed conflict situation is that based on the context of the right, either IHL or IHRL may be the *lex specialis*, and in any event that the general law will remain relevant to the interpretation of the *lex specialis*. For example, the right to housing is an example where IHRL provides more detailed rules as compared to IHL and should be regarded as *lex specialis*. However, IHL as the more general law, continues to be relevant to the interpretation and application of IHRL. IHRL prohibits

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96 Doswald-Beck, ‘International Humanitarian Law and the International Court of Justice’, above n 85. See also Lubell, above n 85; Mottershaw, above n 68, 456.

97 See Koskenniemi, above n 73, [104].


100 HRC, *General Comment No 31*, above n 3, [11]. The HRC did not use the term *lex specialis* and instead, referred to both spheres of law as mutually reinforcing.

101 See Ferraro, above n 99.

102 This will be explored in greater detail in Chapter 3.2.3.3.
arbitrary or unlawful interference with one’s home and provides for the right to protection of the law against such interference or attacks. The prohibition of forced eviction is therefore implied in the right to housing. However, in the context of armed conflict, the CESCR in its General Comment ‘takes note’ of the obligations in the 1949 Geneva Conventions and 1977 Additional Protocols. Thus, under IHRL it is reasonably justified that evictions may take place in an occupied territory, as deportations of the civilian population may occur if necessary for the security of the population, or imperative military reasons. This is an example where IHL as the general rule, continues to be relevant to the interpretation and application of IHRL, as lex specialis.

This does mean that there is a difficult question to be addressed in any situation regarding which regime is lex specialis. Given that the lex specialis principle lacks substantive content, a determination of what is general or specific cannot be deduced from the principle itself, meaning that some means of differentiating between general and specific must be found.

There will be circumstances in which IHL cannot operate as lex specialis in relation to IHRL. Where the rules of IHL lack the necessary precision while IHRL provides the higher degree of specificity, IHRL should be regarded as lex specialis. For example, as will be illustrated in detail in Chapter Three, IHRL provides more detailed and concrete obligations in relation to the education of children than the more abstract rules of IHL. Consequently, in this specific context, IHRL will apply as lex specialis, while still being interpreted in light of any relevant IHL principles.

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103 See, eg, ICCPR art 17; ICESCR art 11.
105 See ibid [6].
106 See Doswald-Beck, above n 4, 480.
107 See Arai-Takahashi, above n 60, 418.
108 ‘The maxim of lex specialis does not provide any criteria to guide the decision whether one area of law is generally more important than another. And indeed, no tribunal seems to have attempted application of the doctrine to that effect... Thus, the maxim remains a juridical assumption that we may give priority to a special rule when a relationship exists between the special and the general. It is not a substantive rule of international law that might show which rule is special in relation to a more general rule’: Lindroos, above n 73, 44. See also Olson, above n 7.
109 See, eg, Arai-Takahashi, above n 60, 422; Kreiger, above n 85. Kreiger asserts that ‘[t]he prevalence of humanitarian law is [...] doubtful when its rules lack greater specificity in comparison with human rights law’.
This approach conforms with the statement of the Inter-American Commission on Human Rights (‘IAComHR’) in relation to situations where there are differences between legal standards governing the same or similar rights in the American Convention and IHL treaties. The Commission stated that it ‘is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question’.110 Thus for the Commission, the *lex specialis* is the body that provides the higher standard of protection and therefore is most favourable to the individual.

The ICJ once again grappled with the question of the interplay between IHL and IHRL and the *lex specialis* principle in the *Wall Advisory Opinion*. The Court proposed three possible situations when considering the co-application of the two fields:

[S]ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.111

A literal reading of the last statement would again suggest that, whenever there are rights provided by both IHL and IHRL, the standards of IHL would override those of IHRL.112 For the reasons already mentioned, such a literal reading should not be adopted. Following an examination of the two Advisory Opinions, it has been argued that ‘IHL is *lex specialis complementa* (complementary) and not *derogata* (derogatory) of human rights law.’113 This means that IHL is not conceived as an exception to IHRL and consequently, does not derogate from IHRL but rather is considered as an *application* of human rights norms in a given circumstance of armed conflict. Based on this understanding, legal reasoning, instead of establishing definite relationships of priority between IHL and IHRL, aims to harmonise the apparently

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110 *Juan Carlos Abella v Argentina* (1997) IAComHR, Case No 11.137, Report No 55/97, OEA/Ser.L/V/II.98 [165]. (Also known as the *La Tablada* Case).


113 ‘Expert Meeting on the Supervision of the Lawfulness of Detention during Armed Conflict’ (University Centre for International Humanitarian Law, Geneva, 24-25 July 2004) 45 [xii].
conflicting standards through interpretation for the simultaneous application of IHL and IHRL. What is promoted by the term lex specialis in this context is much closer to the concept of the complementarity of the two bodies. This is consistent with the Court’s later approach in Armed Activities where the Court quoted from the above passage from the Wall Advisory Opinion and observed: ‘that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration’.114

In summary these ICJ decisions support the view that human rights provisions continue to apply alongside IHL in times of armed conflict. In such circumstances it appears that the best understanding of the complementarity approach to the lex specialis maxim in situations of armed conflict is that the lex specialis is to be determined contextually based on the content of each norm. In this sense, either IHL or IHRL may be the lex specialis.

Hence, the relationship between IHL and IHRL cannot be dealt with in the abstract.115 IHL operates as lex specialis only where IHL is in fact more specific. The starting point then is to determine which rule is specific and which rule is general.116 This issue is examined in the next Chapter.

2.5 Conclusion

The parallel application of IHL and IHRL during armed conflict has gradually replaced the more traditional view of a separation between the two disciplines. It is generally recognised today that IHRL is not automatically displaced by IHL at the outbreak of armed conflict and that the two bodies of law apply concurrently, although the exact nature of their relationship is not settled.

In this Chapter, I demonstrated the evolution of the understanding of the relationship between IHL and IHRL from an approach of separation to one of convergence. Under the convergence approach, IHL and IHRL can be best described as complementary, meaning that the two bodies of law are not mutually exclusive but mutually

114 Armed Activities (Judgment) [2005] ICJ Rep 168, 242-3 [216].
115 See Olson, above n 7, 448.
116 See ibid 447.
reinforcing, and can therefore provide greater protection to individuals in times of armed conflict.

The abstract reference to the *lex specialis* principle by the ICJ in the *Nuclear Weapons Advisory Opinion* must be supplemented by a more nuanced understanding of its application. The Court’s later statements in the *Wall Advisory Opinion* and *Armed Activities* case indicate that the view that IHL necessarily operates as the *lex specialis* to the exclusion of IHRL is not the correct approach. In my view, the *lex specialis* principle should be assessed according to the situation at hand, meaning that depending on the context of the particular right, either IHL or IHRL may be the *lex specialis*. Moreover, *lex specialis* does not prioritise one body of law to the exclusion of the other, but the general law continues to be relevant to the interpretation and application of the more specific law.

To apply *lex specialis* and determine the co-application of IHL and IHRL, an initial determination of which rule is more specific and which rule is the more general in any given situation is required. So as to move from the abstract to the concrete, the focus of our attention must shift from the relationship of the two regimes as such, to the relationship of the particular norms belonging to the two regimes that control specific factual situations. In the next Chapter, I compare human rights norms protected in key IHL and IHRL treaties to determine which regime provides greater specificity in relation to each given right. In doing so, I also address doubts as to the practical advantages of the concurrent application of IHL and IHRL and conclude that the co-application of IHRL in times of armed conflict in fact complements IHL and provides greater protection to individuals.
3 IHL AND IHRL PROTECTIONS

3.1 Introduction

In Chapter Two I argued that the prevailing view amongst States, international bodies and scholars is that IHRL applies alongside IHL in times of armed conflict and that the relationship between these two bodies of law is one of complementarity. Scholarly discussions regarding the complementarity of IHL and IHRL have identified three dominant benefits of co-application. First, IHRL may fill normative gaps in the scope of protection afforded by IHL. As the Israeli Supreme Court has expressly articulated, where IHL ‘has a lacuna, it can be filled by means of international human rights law’. In some instances, IHRL has a greater scope of application compared to IHL and will thus make a difference to the protection of individuals on the ground. Secondly, when IHL rules are unclear, vague or abstract, IHRL may function as a supplementary source of interpretation to give meaning and content to IHL provisions. Thirdly, IHRL may provide specific mechanisms for implementing, monitoring and enforcing IHL provisions. Due to the absence of effective monitoring and adjudication mechanisms within IHL, human rights tribunals and courts have been regarded as an effective forum to discuss States’ compliance with IHL.

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2 See, eg, Ben-Naftali and Shany, above n 1.

3 Public Committee against Torture v Government [2006] Israel Law Reports (14 December 2006) Israel Supreme Court sitting as the High Court of Justice HCJ 769/02, 459, 477-8 [18].

4 See, eg, Lindsay Moir, The Law of Internal Armed Conflict (Cambridge University Press, 2002) 196.


7 See, eg, Heintze, above n 5; Emiliano J Buis, ‘The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System’ in Roberta
Questions remain, however, as to the practical advantages of this concurrent application. This Chapter aims to demonstrate how IHRL complements IHL and particularly fills in normative gaps in the scope of protection afforded under IHL. The other two advantages of the application of IHRL alongside IHL in armed conflicts are also examined briefly.

I further argued in Chapter Two that the *lex specialis* maxim should be assessed contextually depending on the situation at hand, meaning that based on the context of the particular right, either IHL or IHRL may be the *lex specialis*. I argued against a rigid and sweeping application of *lex specialis* as a device to exclude the applicability of general rules in their totality in favour of more specific ones. Thus, whatever law is being considered as general continues to be relevant to the interpretation and application of the more specific law. The challenge then is to determine the specific as opposed to the general rule in any given situation.

In this Chapter, I conduct a detailed comparative analysis of the substantive rights and protections guaranteed under major IHL and IHRL treaties. I compare the provisions of the ICCPR and ICESCR with those of the four Geneva Conventions and Additional Protocols I and II with a view to, first, determine how the two systems regulate particular rights and the extent of specificity in relation to each particular norm under


the two regimes, and secondly, address doubts that have been raised as to the practical advantages of the co-application of IHRL treaties alongside IHL. I further employ this comparison in Chapter Six to examine the range of applicable rights in extraterritorial armed conflict situations.

I conduct the comparison between IHL and IHRL treaties in two separate sections. First, I identify and analyse human rights norms which are common to both regimes. Secondly, I identify norms which are exclusive to IHRL and are not manifested within IHL treaties.

The comparative analysis undertaken in this Chapter demonstrates that the additional application of IHRL treaties complements IHL and enhances the protections provided to individuals under IHL in several distinct ways. Since IHRL has a greater scope of application, it broadens the often restricted protections provided to limited categories of individuals under IHL. Additionally, IHL protections differ based on the classification of conflicts. IHRL expands the protection to all types of conflict, thus, a greater number of individuals are protected under IHRL. Further, in relation to some rights, IHRL extends the mere negative obligation under IHL to refrain from interfering with the free enjoyment of the rights to a positive obligation to take steps to ensure the realisation of the rights. The comparative analysis also illustrates how the determination of *lex specialis* may be made in the context of specific human rights.

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10 Schindler writing in 1982 suggested that a comparison of the substantive rights guaranteed by IHL and IHRL treaties results in three categories of rights: (a) rights common to both IHL and IHRL; (b) rights specific to the human rights conventions that have no relevance in IHL; and (c) provisions specific to the IHL conventions enacted to meet needs arising in armed conflict situations and normally not applicable in peacetime. Dietrich Schindler, ‘Human Rights and Humanitarian Law: Interrelationship of the Laws’ (1982) 31 American University Law Review 935, 939-40. Similarly the ICJ in 2004 in the *Wall Advisory Opinion* as regards the relationship between IHL and IHRL recognised three possible situations, as discussed in Chapter 2.4, above n 111. See *Wall (Advisory Opinion)* [2004] ICJ Rep 136, 178 [106]. See also Marco Sassòli, Antonie A Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (International Committee of the Red Cross, 3rd ed, 2011) vol I, 452. Since the subject of this thesis is the application of human rights treaties, I will not be assessing rights that are exclusive to IHL.
3.2 Human Rights Norms Common to both IHL and IHRL

Many provisions of IHRL treaties overlap in substance with those of IHL and provide a concurrent protection of particular rights.11 As the ICJ stated in its 2004 *Wall Advisory Opinion*, some rights ‘may be matters of both ... branches of international law’.12 My assessment compares the relevant provisions of IHL to similar provisions of IHRL on the basis of treaty provisions, relevant comments and *travaux préparatoires*. In order to determine the exact nature of the interplay between IHL and IHRL treaties in times of armed conflict, I employ three sub-categories describing the relationship between IHL and IHRL norms.13 These are based on the identifications of: (a) comparable normative protection under both regimes; (b) enhanced normative protection under IHL; and (c) enhanced normative protection under IHRL. The categorisation is created as an analytical tool with the intention of translating the complexities of reality into simpler academic notions and consequently providing a framework for a better understanding of the interplay between IHL and IHRL.14

3.2.1 Comparable Normative Protection15

Some human rights norms are protected under both regimes by identical or virtually identical rules.16 These are human interests that both IHL and IHRL seek to protect

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13 Doswald-Beck categorises human rights that are protected under both IHL and IHRL as ‘either in the form of identical or virtually identical rules, or in the form of rules that are more detailed in one body of law than the other’: Doswald-Beck, above n 6, 122. Sassòli et al categorise rights which are protected by both branches into: (a) areas in which details provided by IHL are more adapted to armed conflicts; and (b) areas in which IHRL gives more details: Sassòli, Bouvier and Quintin, above n 10, 452-6.
14 See Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 170. As Shue states ‘typologies are at best abstract instruments for temporarily fending off the complexities of concrete reality that threaten to overwhelm our circuits. Be they dichotomous or trichotomous, typologies are ladders to be climbed and left behind, not monuments to be caressed or polished’: Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press, 2nd ed, 1996) 52.
15 Doswald-Beck categorises ‘the prohibition of discrimination in the application of rules, the prohibition of torture, inhuman and degrading treatment, slavery, collective punishments, and retroactive criminal convictions or punishments, as well as rules which require humane treatment, the right to fair trial, respect for religious convictions, and the respect for family life,’ as virtually identical rules: Doswald-Beck, above n 6, 122. I partially agree with Doswald-Beck, however, I place the prohibition of collective punishments in the category of enhanced normative protection under IHL and the prohibition of slavery in the category of enhanced normative protection under IHRL.
16 See ibid.
and safeguard in similar ways. These norms are usually benchmark principles and abstract in nature.\textsuperscript{17}

3.2.1.1 Prohibitions of Adverse Distinction and Discrimination

The prohibition of adverse distinction as guaranteed under IHL\textsuperscript{18} is the equivalent of the principle of non-discrimination in IHRL.\textsuperscript{19} Adverse distinction ‘founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’ is expressly prohibited under IHL.\textsuperscript{20} Similarly, discrimination of any kind as to ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ is prohibited under human rights treaty law.\textsuperscript{21}

Within IHL, the concept of ‘adverse distinction’ implies that while discrimination between persons is prohibited, distinction may be made to give priority to vulnerable groups\textsuperscript{22} and those in most urgent need of care.\textsuperscript{23} Similarly, the enjoyment of rights and freedoms on an equal footing, under IHRL, does not mean identical treatment in

\textsuperscript{17} The right to fair trial is an exception in that it is very detailed.
\textsuperscript{18} Geneva Conventions Common Article 3; Geneva Convention IV art 13; AP I Preamble, arts 9(1), 75(1); AP II art 2(1), 4(1).
\textsuperscript{19} The principle of non-discrimination is included in major human rights instruments such as: Charter of the United Nations art 1(3); ICCPR arts 2(1), 4(1), 26; ICESCR arts 2(2), 3; ECHR art 14; ACHR art 1(1), 27; ACHPR art 2; Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘CRC’) art 2(1); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (‘ICERD’) art 2; Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (‘CEDAW’) art 2. The HRC in its General Comment No 18 stated that: ‘the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground …, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms’: HRC, General Comment No 18: Non-discrimination, 37\textsuperscript{th} sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) [7]. The CESC also stated that ‘discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights’: CESC, General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights, 42\textsuperscript{nd} sess, Agenda Item 3, UN Doc E/C.12/GC/20 (2 July 2009) [7].
\textsuperscript{20} Geneva Conventions Common Article 3.
\textsuperscript{21} ICCPR art 2(1); ICESCR art 2(2).
\textsuperscript{22} For example, women and children benefit from special protection from particular forms of attacks. IHL treaties also contain many provisions ensuring that these groups also benefit from preferred access to, \textit{inter alia}, humanitarian aid and medical care. See, eg, Geneva Convention IV arts 27, 38(5), 132.
\textsuperscript{23} In this light, no distinction may be made among the wounded, sick and shipwrecked on any ground other than medical. See Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (Cambridge University Press, 2005) vol I, 309. Similarly, Article 16 of Geneva Convention III provides that all prisoners of war must be treated alike, ‘taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications’.
every instance.\textsuperscript{24} The HRC has stated that, ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.\textsuperscript{25} The CESCR, likewise, permits differential treatment subject to ‘an assessment whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society’\textsuperscript{26} and proportional.\textsuperscript{27}

Thus the rules relating to adverse distinction and discrimination are similar in IHL and IHRL. Both bodies of law provide similar non-exhaustive lists of grounds of prohibiting discrimination.\textsuperscript{28} Further, differential treatment is permitted under both regimes, although IHRL is more detailed in this regard. Accordingly, since the rules are relatively similar under the two regimes, the additional application of the IHRL provisions of non-discrimination does not significantly add to the content of adverse distinction provided under IHL.

### 3.2.1.2 Prohibition of Torture and Cruel, Inhuman or Degrading Treatment

The prohibition of torture and cruel, inhuman or degrading treatment is contained in numerous human rights instruments.\textsuperscript{29} Under IHL treaties, torture or inhuman and degrading treatment or practices are regarded as grave breaches.\textsuperscript{30} Article 3 common to the 1949 Geneva Conventions also explicitly prohibits ‘violence to life and person, in particular […] cruel treatment and torture’\textsuperscript{31} and ‘outrages upon personal dignity, in

\textsuperscript{24} See HRC, General Comment No 18, above n 19, [8]. Article 6, paragraph 5, of the ICCPR for example prohibits the death sentence from being imposed on persons below eighteen years of age.

\textsuperscript{25} HRC, General Comment No 18, above n 19, [13].

\textsuperscript{26} CESCR, General Comment No 20, above n 19, [13].

\textsuperscript{27} See ibid.

\textsuperscript{28} See, eg, ibid [15].

\textsuperscript{29} See, eg, ICCPR art 7; ECHR art 3; ACHR art 5(2); ACHPR art 5; CRC art 37(a); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 1984, 1465 UNTS 85 (entered into force 26 June 1987), (‘CAT’), Inter-American Convention to Prevent and Punish Torture, opened for signature 9 December 1985, OAS Treaty Series No 67 (entered into force 28 February 1987); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, opened for signature 26 November 1987, UNTS 1561 (entered into force 1 March 2002).

\textsuperscript{30} See, eg, Geneva Convention I art 50; Geneva Convention II art 51; Geneva Convention III art 130; Geneva Convention IV art 147; AP I art 85(4)(c).

\textsuperscript{31} Geneva Conventions Common Article 3(1)(a).
particular humiliating and degrading treatment" with respect to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. Article 32 of *Geneva Convention IV* prohibits Contracting Parties from ‘taking any measures of such a character as to cause the physical suffering or extermination of protected persons in their hands’, including torture. Specific examples of torture, cruel or inhuman and degrading treatment are also prohibited in IHL treaty law.

Additionally, the prohibition of torture under IHRL and IHL is absolute. The prohibitions of torture under IHL and IHRL are therefore similar.

The definition of ‘inhuman treatment’ is also similar under IHL and IHRL. The ICTY determined that inhuman treatment is that which ‘causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity’. In their case law, human rights bodies have mainly stressed the severity of the physical or mental pain or suffering in assessing inhuman treatment. ‘Degrading treatment’ is generally

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32 Ibid 3(1)(c).
33 See, eg, *Geneva Convention IV* arts 118, second paragraph (prohibition of imprisonment without daylight and, in general, prohibition of all forms of cruelty) and 119, second paragraph (prohibition of inhuman, brutal or dangerous penalties).
35 The *ICCPR* unlike the *CAT*, Article 1(1), does not require the conduct of torture to be inflicted ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. This is implied in General Comment No 20 of the HRC, which recognises the duty of the State Party to afford everyone protection against torture and cruel, inhuman or degrading treatment whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity: HRC, *General Comment No 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, 44th sess, UN Doc A/44/40 (10 March 1992) [2], [13]. Similar to the *ICCPR*, the presence of a State official in the process of torture is not required under IHL. In its judgment in the Kunarac Case in 2001, the ICTY Trial Chamber departed from its earlier findings on the definition of torture confirmed in the Furundžija Case, (*Prosecutor v Anto Furundžija (Trial Judgement)*) (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [162] and *Prosecutor v Anto Furundžija (Appeals Chamber Judgement)* (International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Case No IT-95-17/1-A, 21 July 2000) [111]), and concluded that ‘the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under [IHL]’: *Prosecutor v Kunarac et al (Trial Judgement)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-23, 22 February 2001) [496]. See also [483]-[484], [497]. Thus the definition of torture under the *ICCPR* and IHL is similar and is broader than what is provided under the *CAT*.
36 *Prosecutor v Zejnil Delalić (Trial Judgement)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [543]. See also [511], [544], [552]; *Prosecutor v Kordić (Trial Judgement)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [246], [256], [261], [263], [266].
understood as deliberate humiliation in both IHL and IHRL. Accordingly, the prohibitions of torture and cruel, inhuman or degrading treatment are similar under both IHL and IHRL.

3.2.1.3 Right to a Fair Trial

The right to a fair trial is also protected under both bodies of law in similar ways. The right to a fair trial appears in many IHRL treaties. IHL treaties also guarantee the right to a fair trial. Depriving a protected person of the rights of fair and regular trial is a grave breach under both Geneva Convention IV and AP I. Additionally, Common Article 3 to the Geneva Conventions prohibits ‘the passing of sentences and the carrying out of executions without previous judgments pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples’. Article 5 of Geneva Convention IV also preserves the right of fair and regular trial to an individual protected person suspected of or engaged in activities hostile to the security of the State in the territory of a Party to the conflict or an individual protected person detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the occupying power.

1969) printed as ‘Report of the European Commission of Human Rights on the Greek Case’ (1969) 12(b) Yearbook of the European Convention on Human Rights 1, 186, where the Commission stated that ‘[t]he notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable’. See also A and Others v United Kingdom [2009] II Eur Court HR 137, 205 [127].

38 The EComHR in its Greek Case stated that ‘[t]reatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience’. Denmark, Sweden, Norway and the Netherlands v Greece (The Greek Case) (European Commission of Human Rights, Application Nos 3321/67, 3322/67, 3323/67, 3344/67, 5 November 1969) printed as ‘Report of the European Commission of Human Rights on the Greek Case’ (1969) 12(b) Yearbook of the European Convention on Human Rights 1, 186. See also Öcalan v Turkey [2005] IV Eur Court HR 131, 191 [181].


41 See, eg, ICCPR art 14(1); CRC art 40(2)(b)(iii); ECHR art 6(1); ACHR art 8(1); ACHPR art 7.

42 Geneva Convention IV art 147; AP I art 85(4)(e).
The elements of fair trial are similar under IHL and IHRL. These include: (a) the presumption of innocence;\(^{43}\) (b) trial by an independent, impartial and regularly constituted court;\(^{44}\) (c) public proceedings\(^{45}\) and right to have the judgment pronounced publicly;\(^{46}\) (d) necessary rights and means of defence including the assistance of a qualified defence lawyer\(^{48}\) and interpreter\(^{49}\) and adequate time and facilities to prepare the defence;\(^{50}\) (e) prohibition of compelling accused persons to testify against themselves or to confess guilt;\(^{51}\) (f) information on the nature and cause of the accusation;\(^{52}\) (g) examination of witnesses;\(^{53}\) (h) presence of the accused at the trial;\(^{54}\) (i) trial without undue delay;\(^{55}\) (j) right to appeal;\(^{56}\) (k) prohibition of trial more

\(^{43}\) See, eg, *AP I* art 75(4)(d); *AP II* art 6(2)(d); *ICCRC* art 14(2); *ECHR* art 6(2); *ACHPR* art 8(2); *ACHPR* art 7(1)(b).

\(^{44}\) See, eg, *Geneva Convention IV* art 3, 66; *AP I* art 75(4); *AP II* art 6(2); *ICCRC* art 14(1); *ECHR* art 6(1); *ACHPR* art 8(1). The *ACHPR* only specifies an impartial court or tribunal: art 7(1)(d).

\(^{45}\) See, eg, *Geneva Convention IV* art 74, first paragraph. Article 74 gives representatives of the Protecting Power the right to be present at sessions of any court trying a protected person in occupied territories, unless the hearing in exceptional circumstances must take place in camera in the interests of the security of the Occupying Power. In this case the Protecting Power must be informed. Article 14(1) of the *ICCRC* provides that: ‘...everyone shall be entitled to a ... public hearing ... The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children’. See also *ECHR* art 6(1); *ACHPR* art 8(5).

\(^{46}\) See, eg, *AP I* art 75 (4)(i).

\(^{47}\) See, eg, *Geneva Convention IV* arts 72, first paragraph, 123, first paragraph; *AP I* art 75(4)(a); *AP II* art 6(2)(a); *ICCRC* art 14(3)(b) and (d); *ECHR* art 6(3)(c); *ACHPR* art 8(2)(d) and (e).

\(^{48}\) See Sandoz, Swinarski and Zimmermann, above n 39, 880.

\(^{49}\) See, eg, *Geneva Convention IV* arts 72, third paragraph, 123, second paragraph; *ICCRC* art 14(3)(f); *ECHR* art 6(3)(e); *ACHPR* art 8(2)(a).

\(^{50}\) See, eg, *Geneva Convention IV* art 72, first paragraph; *ICCRC* art 14(3)(b); *ECHR* art 6(3)(b); *ACHPR* art 8(2)(c).

\(^{51}\) See, eg, *AP I* art 75(4)(f); *AP II* art 6(2)(f); *ICCRC* art 14(3)(g); *ACHPR* art 8(3).

\(^{52}\) See, eg, *Geneva Convention IV* arts 71, second paragraph, 123, second paragraph; *AP I* art 75(4)(a); *AP II* art 6(2)(a); *ICCRC* art 14(3); *ECHR* art 6(3)(a); *ACHPR* art 8(2)(b).

\(^{53}\) See, eg, *Geneva Convention IV* arts 72, first paragraph, 123, second paragraph; *AP I* art 75(4)(a); *ICCRC* art 14(3)(e); *ECHR* art 6(3)(d); *ACHPR* art 8(2)(f).

\(^{54}\) See, eg, *Geneva Convention IV* art 72, second paragraph; *AP I* art 75(4)(e); *AP II* art 6(2)(e). The right of an accused person to be present at his trial would not exclude the possibility of trial in absentia if the accused person had, for example escaped or absconded: *ICCRC* art 14(3)(d). The *ECHR* and the *ACHPR* do not specify this directly, however, as they include the right of an accused person to defend himself in person, then this must be implied. See Doswald-Beck, above n 6, 365.

\(^{55}\) See, eg, *Geneva Convention IV* art 71, second paragraph. It provides that accused persons shall be brought to trial as rapidly as possible. IHRL treaties provide for the right to trial within a reasonable time: *ICCRC* art 14(3)(c); *ECHR* art 6(1); *ACHPR* art 8(1). This provision, despite similar wording, is not the same as the right to be tried within a reasonable time or released, that is applicable to persons held in detention pending trial. See also *ICCRC* art 9(3); *ECHR* art 5(3); *ACHPR* art 5(7).

\(^{56}\) See, eg, *Geneva Convention IV* art 73, first paragraph; *ICCRC* art 14(5); Protocol 7 of the *ECHR* art 2; *ACHPR* art 8(2)(h).
than once for the same offence (*ne bis in idem)*;\(^57\) and (l) advising convicted persons of available remedies and of their time limits.\(^58\) IHRL treaties further provide for the right to equality before courts and tribunals, which is not expressly provided under IHL.\(^59\)

In summary, the normative protections provided in relation to a fair trial are virtually identical under IHL and IHRL.\(^60\)

### 3.2.1.4 Principle of Legality (Prohibition of Retrospective Criminal Laws)

The principle of legality is protected under major IHRL treaties which provide that no one may be convicted for an action that was not a criminal offence under national or international law at the time of commission.\(^61\) The principle provides that only the law can define a crime and prescribe a penalty. This requires that the offence be clearly defined in law.\(^62\) The principle also includes the prohibition on imposing a heavier penalty than that applicable at the time of the commission of the offence.\(^63\)

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\(^{57}\) See, eg, *Geneva Convention IV* art 117, third paragraph; *AP I* art 75(4)(h); *ICCPR* art 14(7); Protocol 7 of the *ECHR* art 4; *ACHR* art 8(4). The wording of the *ACHR*, unlike the *ICCPR* and the *ECHR*, limits the prohibition to persons acquitted.

\(^{58}\) See, eg, *Geneva Convention IV* art 73, first paragraph; *AP I* art 75(4)(j); *AP II* art 6(3); *ICCPR* art 9(4); *ECHR* art 5(4); *ACHR* art 7(6); *Arab Charter on Human Rights*, adopted by the League of Arab States 22 May 2004 (entered into force 15 March 2008) (‘*ARCHR*’) art 14(6).

\(^{59}\) The principle of equality before a tribunal is specified in Article 14(1) of the *ICCPR* which provides that ‘all persons shall be equal before the courts and tribunals’. The *ACHR* in Article 8, second paragraph also provides that during criminal proceedings ‘every person is entitled, with full equality’ to the guarantees listed. The concept of equality is also reflected in provisions requiring an accused person to be able to produce and question witnesses on the same basis as the prosecution: *ICCPR* art 14(3)(e); *ECHR* art 6(3)(d). Human rights bodies have introduced the concept of ‘equality of arms’ for all types of procedure and thus added to the limited reference to equality in the treaties. The HRC has described the ‘equality of arms’ as meaning: ‘...the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant’; HRC, General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 19th sess, CCPR/C/GC/32 (23 August 2007) [13]. See also Doswald-Beck, above n 6, 348.

\(^{60}\) A significant difference, however, is that while IHRL treaties permit derogations from the guarantees to a fair trial in times of public emergency which threatens the life of the nation, the guarantees contained in IHL are not subject to any possibility of derogation or suspension. See, eg, *ICCPR* art 4(1) and (2). See also Sandoz, Swinarski and Zimmermann, above n 39, 879. Thus, although the content of the right to a fair trial is similar under both regimes, the impossibility of derogation under IHL means that the right to a fair trial even if derogated under IHRL in armed conflict situations is still incumbent upon States under IHL.

\(^{61}\) See, eg, *ICCPR* art 15(1); *ECHR* art 7(1); *ACHR* art 9; *ACHPR* art 7(2).

\(^{62}\) See, eg, *Kokkinakis v Greece* (1993) 260-A Eur Court HR (ser A) 22 [52]. The IACtHR has stressed that the principle of legality requires that crimes be classified and described in ‘precise and unambiguous language that narrowly defines the punishable offence’: *Castillo-Petruzzi et al v Peru* (Judgment) (1999) IACtHR (Ser C) No 54 [121].

\(^{63}\) See, eg, *ICCPR* art 15(1); *CRC* art 40(2)(a); *ECHR* art 7(1); *ACHR* art 9; *ACHPR* art 7(2).
Furthermore if subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit from this.\(^{64}\)

*Geneva Convention IV* similarly provides safeguards against retroactive penal provisions by the occupying power.\(^{65}\) *Additional Protocols I* and *II* also prohibit retrospective criminal laws and regulate that a heavier penalty may not be imposed than that applicable at the time the act was committed but that if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit from this.\(^{66}\)

The principle of non-retroactivity is provided for in similar ways under both IHL and IHRL.\(^ {67}\)

3.2.1.5 Respect for Convictions and Religious Practices (Right to Freedom of Religion)

Major human rights treaties provide for the right of everyone to freedom of ‘conscience and religion’.\(^{68}\) These treaties also provide for the right to practice and manifest one’s religion and beliefs, including for example, access to places of worship and religious personnel.\(^{69}\) Such practice is subject to limitations prescribed by law, which are necessary to protect public safety, order, health, morals or the rights and freedoms of others.\(^{70}\) Subjecting a person to coercion which impairs the right to free

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\(^{64}\) See, eg, ICCPR art 15(1); ACHR art 9.

\(^{65}\) See, eg, *Geneva Convention IV* arts 65, 67.

\(^{66}\) See, eg, AP I art 75(4)(c); AP II art 6(2)(c).

\(^{67}\) There is an express exception to the prohibition of retroactive national criminal laws in IHRL. Article 15(2) of the ICCPR provides that a person may be held guilty of an act or omission that was not punishable by the applicable national law at the time the offence was committed so long as this was punishable under international law in force at the time of the commission of the offence. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2\(^{nd}\) revised ed, 2005) 360, 367-8. IHL, however, does not contain an express exception to the principle of non-retroactivity in relation to international crimes.

\(^{68}\) See, eg, ICCPR art 18(1); CRC art 14(1); ECHR art 9(1); ACHR art 12(1); ACHPR art 8; UDHR art 18; *American Declaration on the Rights and Duties of Man*, adopted by the Ninth International Conference of American States (1948) art III; *Declaration on the Elimination of All forms of Intolerance and of Discrimination based on Religion or Belief*, UN GAOR, UN Doc A/RES/36/55 (25 November 1981) art 1; *Charter of Fundamental Rights of the European Union*, Official Journal of the European Communities (2000/C 364/01) (entered into force 1 December 2009) art 10.

\(^{69}\) See, eg, Henckaerts and Doswald-Beck, above n 23, 379.

\(^{70}\) See, eg, ICCPR art 18(3); CRC art 14(3), ECHR art 9(2); ACHR art 12(3); ACHPR art 8. The limitation clauses in all human rights treaties do not mention ‘national security’ as a purpose or a valid ground for restricting the exercise of a person’s belief. This fact was raised in the HRC’s General Comment No 22, in which the Committee stated that ‘restrictions are not allowed on grounds not specified [in Article 18(3)], even if they would be allowed as restrictions to other rights protected in the
choice of a religion or belief is explicitly prohibited under the ICCPR. The right to religion is also protected in IHL treaties. The obligation to respect the religious convictions and practices of all protected persons is guaranteed in Geneva Convention IV. Respect for convictions and religious practices is also recognised in Additional Protocols I and II as a fundamental guarantee for civilians and persons hors de combat. Additionally Geneva Convention IV requires respect for religion and religious practices in a series of detailed rules concerning burial rites and cremation of the dead, religious activities of interned persons, and the education of orphaned children or children separated from their parents by the occupying power. Article 58 sets out obligations for the occupying power in relation to religious rights, inter alia, to accept the ‘consignments of books and articles required for religious needs’ and to facilitate ‘their distribution in occupied territory’. Article 69 of AP I goes further since it imposes a positive obligation on the occupying power itself to provide to the fullest extent of the means available to it and without any adverse distinction, objects necessary for religious worship. The right of detainees and internees to receive religious and spiritual assistance is also laid down in IHL.

Covenant, such as national security’: HRC, General Comment No 22: The Right to Freedom of Thought, Conscience and Religion CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8]. The HRC also stated that limitations must be directly related and proportionate to the specific need, and that limitations applied for the protection of morals must not derive exclusively from a single tradition. It added that persons under legal constraints, such as prisoners, continue to enjoy their right to manifest their religion or belief ‘to the fullest extent compatible with the specific nature of the constraint’: at [8]. See ICCPR art 18(2). The HRC stated that the prohibition of coercion protects the rights to change one’s belief, to maintain the same belief or to adopt atheistic views: HRC, General Comment No 22, above n 70, [5].

72 The IAComHR accordingly stated that laws or methods of investigation and prosecution must not be purposefully designed or implemented in a way that distinguishes to their detriment members of a group based on, inter alia, their religion: IAComHR Reports, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 (22 October 2002) [363].

73 See, eg, Geneva Convention IV arts 27, first paragraph, 38(3) (protected persons found in an enemy territory), 58 (protected persons in an occupied territory).

74 See AP I art 75(1); AP II art 4(1).

75 See, eg, Geneva Convention IV art 130, first and second paragraphs.

76 See, eg, ibid arts 76, third paragraph (spiritual assistance for persons detained in occupied territory), 86 (religious services for interned persons), 93 (religious activities of interned persons).

77 See ibid art 50, third paragraph

78 See ibid art 58, second paragraph.

79 The inclusion of the phrase “to the fullest extent of the means available to it” shows that the authors of the Convention did not wish to disregard the material difficulties with which the occupying power might be faced in wartime (financial and transport problems, etc); but the occupying power is nevertheless under an obligation to utilise all the means at its disposal”: Pictet, above n 34, 310.
treaties. Additionally, places of worship are protected under the *Additional Protocols.* Reservations also exist in relation to respect for convictions and religious practices under IHL. Parties to the conflict may take various security and control measures that may be necessary as a result of war under Article 27, *Geneva Convention IV.*

Thus, respect for religious convictions and practices are provided for under IHL and IHRL in a relatively similar way and both regimes permit certain limitations and restrictions on the right to the manifestation of religion.

### 3.2.1.6 Respect for Family Life

The protection of the family is provided for in various IHRL conventions. Extensive practice indicates that respect for family life requires, to the degree possible, the maintenance of family unity, contact between family members and the provision of information on the whereabouts of family members.

The general obligation to respect the family rights of all protected persons is contained in *Geneva Convention IV,* Article 26. Specific protections include speedy correspondence between members of a family, facilitating enquiries made by members of dispersed families, and in case of internment, family unity and providing ‘facilities for leading a proper family life’.

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80 See, eg, *Geneva Convention IV* arts 76, third paragraph, 86, 93, 130.
81 See, eg, *AP I* art 53; *AP II* art 16.
82 It seems reasonable to claim that unlike IHRL, national security can also be a justified and valid ground for limitations on religious rights in times of armed conflict.
83 See, eg, *ICCPR* art 23(1); *ICESCR* art 10(1); *ACHR* art 17(1); *ACHPR* art 18.
84 See, eg, *CRC* arts 10, 22(2); *Eriksson Case* (1989) 156 Eur Court HR (ser A) 26 [71]; *Rieme v Sweden* (1992) 226-B Eur Court HR (ser A) 77 [56], 79 [61]; *Olsson v Sweden* (1992) 250 Eur Court HR (ser A) 35-6 [90]; *Impact of Armed Conflict on Children,* UN ESCOR, 52nd sess, Agenda Item 20, UN Doc E/CN.4/1996/110 (5 February 1996) [44].
85 Human rights case law confirms that the right to family life includes the right of detainees to communicate with their family through correspondence and receiving visits, subject to reasonable restrictions concerning timing and censorship of mail. See, eg, *Brannigan and McBride v United Kingdom* (1993) 258-B Eur Court HR (ser A) 55-6 [64]; IAComHR Reports, *Report on the Situation of Human Rights in Peru,* OEA/Ser.L/V/II.83 (12 March 1993) [87]; *Constitutional Rights Project and Civil Liberties Organisation / Nigeria* (AComHPR, 26th sess, Com Nos 143/95-150/96, 5 November 1999) [29].
86 See Henckaerts and Doswald-Beck, above n 23, 382.
87 See *Geneva Convention IV* art 25
88 See ibid art 26
89 See ibid art 82, second paragraph.
90 See ibid art 82, third paragraph. The principle of respect for family life is the basis for more specific rules relating to family unity contained in *Additional Protocols I* and *II.* See, eg, *AP I* art 74; *AP II* arts
family life requires, to the degree possible, the maintenance of family unity,\(^91\) contact between family members,\(^92\) the provision of information on the whereabouts of family members\(^93\) and the prohibition of separation and dispersion of families.\(^94\)

Accordingly, the protection of the family unit and the obligation to respect family rights are comparatively similar under both regimes.

### 3.2.1.7 Conclusion: Comparable Normative Protection

To sum up, this category of rights, which include: (a) the prohibition of adverse distinction and discrimination; (b) the prohibition of torture and cruel, inhuman or degrading treatment; (c) the right to a fair trial; (d) the principle of legality (prohibition of retrospective criminal laws); (e) respect for convictions and religious practices (right to freedom of religion); and (f) respect for family life, are protected and provided for in similar ways under both IHL and IHRL. Accordingly, there is no scope for the operation of the *lex specialis* maxim since no conflict arises between the protections provided by these norms under the two regimes.

Although the application of IHRL treaties in armed conflict does not add to the normative content of such rights the fact that States have these obligations under two bodies of law is in itself significant in that it has the potential to confer institutional benefits both in terms of the protection of individuals and the development of jurisprudence. Due to the absence of effective enforcement and judicial mechanisms within IHL, IHRL may provide specific mechanisms for implementing, monitoring and possibly adjudicating provisions of IHL.\(^95\) Additionally, since various international and regional treaty bodies exist within human rights law to interpret and apply the relevant treaty law, the comments, recommendations and interpretations of

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4(3)(b) (reunion of families temporarily separated), 5(2)(a) (accommodation of men and women of the same family in detention or internment).

91 See *Geneva Convention IV* arts 49, third paragraph, 26; *AP I* art 74; *AP II* art 4(3)(b).

92 See *Geneva Convention IV* art 25, first paragraph.

93 See *AP I* art 32 (right of families to know the fate of their relatives, in relation to missing and dead persons).


95 See, eg, Quénivet, ‘The History of the Relationship’, above n 1; O’Donnell, above n 5, Heintze, above n 5; Moir, above n 4, 197; Doswald-Beck, above n 6; Arai-Takahashi, above n 6; Buis, above n 7, 269; Ben-Naftali and Shany, above n 1.
these bodies could be helpful in clarifying any uncertainties in the content of such norms under IHL.

3.2.2 Enhanced Normative Protection under IHL

Some human rights that are reflected in IHL treaties offer more extensive, detailed and relevant protection as compared to IHRL. These are either expressly protected under IHL rather than implied as is the case in IHRL, or are in greater detail in IHL as compared to IHRL. Often these norms are specifically matters of IHL and primarily reflect the nature of armed conflict situations or were earlier prohibitions in IHL which later found their way into IHRL.96

3.2.2.1 Prohibition of Human Shields

The use of human shields is expressly prohibited in Geneva Convention IV (with respect to protected civilians) and AP I (with respect to civilians in general).97 AP I distinguishes between two situations: first, military objectives must not be installed in a civilian area in order to gain protection from the prohibition of attacks against the civilian population; and, secondly, civilians may not be deliberately ‘used’ as a shield for covering a potential military objective.98 In relation to non-international armed conflicts, AP II does not explicitly mention the use of human shields, but such practice would be prohibited by the requirement that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”.99 IHRL does not explicitly prohibit the use of human shields, although its prohibition is implied in the right not to be arbitrarily deprived of life.100

The prohibition on the use of human shields in IHL thus provides greater protection than IHRL which does not specifically address this issue.

96 See Doswald-Beck, above n 6, 122. See also Adam Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories since 1967’ (1990) 84 American Journal of International Law 44, 73.
97 See, eg, Geneva Convention IV art 28; AP I art 51(7).
98 See Gasser, above n 94, 246.
99 AP II art 13(1).
100 See ICCPR art 6 in relation to the right to life. See also HRC, General Comment No 6: The Right to Life, 16th sess, HRI/GEN/1/Rev.9 (Vol I) (27 May 2008) [5]; Demiray v Turkey [2000] XII Eur Court HR 91, 106 [41]; Henckaerts and Doswald-Beck, above n 23, 337-40.
3.2.2.2 Prohibition of Hostage-Taking

The 1949 Geneva Conventions prohibit hostage-taking.\(^{101}\) Additionally, the prohibition of hostage-taking is recognised as a fundamental guarantee for civilians and persons hors de combat in Additional Protocols I and II.\(^{102}\) Major IHRL treaties do not specifically prohibit hostage-taking, but the practice is prohibited by virtue of the prohibition of arbitrary deprivation of liberty.\(^{103}\) The prohibition of hostage-taking is thus clearer under IHL than IHRL.

3.2.2.3 Humane Treatment

Within IHL, Common Article 3 to the Geneva Conventions provides that ‘[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.’ Geneva Convention IV, Article 27, also demands that protected persons ‘shall at all times be humanely treated’. Article 5 further provides for the humane treatment of an individual protected person suspected of or engaged in activities hostile to the security of the State in the territory of a Party to the conflict or an individual protected person detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the occupying power.\(^{104}\) Additionally, AP I provides for the humane treatment of persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment.\(^{105}\) AP II also requires the humane treatment of all persons who do not take a direct part or who have ceased to take part in hostilities, in all circumstances, whether or not their liberty has been restricted.\(^{106}\) Additional Protocols I and II provide that ‘in all circumstances [all the wounded, sick

\(^{101}\) See, eg, Geneva Convention IV arts 3, 34, 147; AP I art 75(2)(c); AP II art 4(2)(c). Hostage-taking is considered a grave breach of Geneva Convention IV.

\(^{102}\) See, eg, AP I art 75(2)(c); AP II art 4(2)(c).


\(^{104}\) See Geneva Convention IV art 5.

\(^{105}\) See AP I art 75(1).

\(^{106}\) See AP II art 4(1).
and shipwrecked] shall be treated humanely’. 107 Similar to IHRL, 108 IHL provides for the humane treatment of persons deprived of their liberty. 109

IHRL is generally based on the principle of humane treatment of persons. 110 The concept of ‘humane treatment’ is not defined in any of the international treaties, 111 however some texts refer to respect for the ‘dignity’ of a person or the prohibition of ‘ill-treatment’ in this context. 112 Specifically, the humane treatment and respect for human dignity of persons deprived of their liberty is emphasised in IHRL instruments. 113

While humane treatment is not defined in either of the two regimes, in IHL, what constitutes humane treatment is confirmed by an express prohibition of all acts contrary to it. 114 These are explicitly spelled out as, for example, the prohibition of murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of the person concerned. 115 Thus, the principle of humane treatment in IHL is more detailed and comprehensive than is the case in IHRL.

107 See AP I art 10(2); AP II art 7(2).
108 See ICCPR art 10(1).
109 See, eg, Geneva Convention III arts 13, 25-32; Geneva Convention IV arts 3(1), 37, 76, 85; AP II art 5(3).
111 The ECtHR provides the following definition: ‘ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (ECHR, in relation to torture or inhuman or degrading treatment or punishment). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc’: Ireland v United Kingdom (1978) 25 Eur Court HR (ser A) 65 [162].
112 See, eg, ICCPR art 10(1); ACHR art 5(2); ACHPR art 5. See also HRC, General Comment 21: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Article 10), 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992); HRC, General Comment No 29, above n 103. For more references, see Henckaerts and Doswald-Beck, above n 23, 307; Prosecutor v Zlatko Aleksovski (Trial Judgement) (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) [53].
113 See, eg, ICCPR art 10 (1); ACHR art 5(2); American Declaration on the Rights and Duties of Man art XXV. The HRC provides that the humane treatment of persons deprived of their liberty ‘is a fundamental and universally applicable rule’: HRC, General Comment 21, above n 112, [4].
114 See Pictet, above n 34, 204.
115 See Geneva Convention IV arts 3, 32; AP I art 75(2); AP II art 4(2). For a comprehensive analysis of the meaning of ‘inhumane treatment’, see Prosecutor v Zlatko Aleksovski (Trial Judgement) (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) [47]-[57].
3.2.2.4 Principle of Individual Criminal Responsibility

While not expressly specified in IHRL treaties, the principle of individual criminal responsibility is a basic and fundamental principle of IHRL, that only those individuals that committed a crime bear criminal responsibility.\textsuperscript{116}

Conversely, the punishment of a protected person for an offence he or she has not personally committed is expressly prohibited under \textit{Geneva Convention IV}.\textsuperscript{117}

Furthermore, the requirement for individual criminal responsibility is recognised as a fundamental rule of criminal procedure in \textit{Additional Protocols I} and \textit{II}.\textsuperscript{118}

Unlike IHRL, IHL provides a solid foundation for the principle of individual criminal responsibility which is expressly spelled out and detailed in IHL treaties.

3.2.2.5 Prohibition of Collective Punishments

The prohibition of collective punishments, as contained in \textit{Geneva Convention IV} and \textit{Additional Protocols I} and \textit{II},\textsuperscript{119} is not expressly specified in IHRL treaties as such. However, such acts would constitute a violation of specific human rights, in particular the right to liberty and security of person, the right to a fair trial and the principle of individual criminal responsibility.\textsuperscript{120}

The prohibition of collective punishments has a solid foundation and is expressly provided for by IHL, in contrast to its implied prohibition under IHRL.

3.2.2.6 Prohibition of Rape and Other Forms of Sexual Violence

Sexual violence is expressly prohibited under IHL. Rape, enforced prostitution and any form of indecent assault including sexual assault are expressly prohibited under Geneva Convention IV and Additional Protocols I and II.\textsuperscript{121}

\begin{footnotes}
\textsuperscript{116} See, eg, \textit{ACHR} art 5(3); \textit{ACHPR} art 7(2). See also Doswald-Beck, above n 6, 316.
\textsuperscript{117} See \textit{Geneva Convention IV} art 33, first paragraph.
\textsuperscript{118} See \textit{AP I} art 75(4)(b); \textit{AP II} art 6(2)(b).
\textsuperscript{119} See \textit{Geneva Convention IV} art 33, first paragraph; \textit{AP I} art 75(2)(d); \textit{AP II} art 4(2)(b).
\textsuperscript{120} The prohibition of collective punishments is an aspect of the ‘universally accepted principle of fair trial’: Gasser, above n 94, 247. See also HRC, \textit{General Comment No 29}, above n 103, [11] where the HRC stated that the imposition of collective punishments would be a violation of ‘preemptory norms of international law’ and therefore would not be tolerable even during states of emergency.
\textsuperscript{121} See \textit{Geneva Convention IV} art 27; \textit{AP I} art 76(1); \textit{AP II} art 4(2)(e).
\end{footnotes}
Sexual violence is also prohibited under IHRL primarily through the prohibition of torture and cruel, inhuman or degrading treatment or punishment. Human rights bodies have found instances of rape of detainees to amount to torture. In addition, IHRL recognises gender-based violence as a form of discrimination.

The prohibition of rape and other forms of sexual violence is explicit under IHL, whereas such practices are prohibited by virtue of the more general prohibition of discrimination on gender grounds and torture and cruel, inhuman or degrading treatment or punishment in IHRL.

### 3.2.2.7 Prohibition of Mutilation

IHL expressly prohibits mutilation whereas the prohibition of such practice is not explicit in IHRL treaties but would be covered by the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

### 3.2.2.8 Prohibition of Medical or Scientific Experiments

Article 7 of the ICCPR expressly prohibits medical or scientific experimentation without the free consent of the person concerned. Additionally, General Comment No 20 specifies that special protection against such experiments is necessary in the case of persons not capable of giving valid consent, in particular those under any form of detention or imprisonment. Accordingly, under IHRL, if the person concerned gives their consent, the prohibition does not apply.

Medical or scientific experiments not justified by the medical treatment of the person concerned are prohibited, even with the person’s consent, under Geneva Convention IV and AP I. In relation to persons who are in the power of the adverse Party or

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122 See, eg, Martín de Mejía v Peru (1996) IACOMHR, Case No 10.970, Report No 5/96; Aydin v Turkey [1997] VI Eur Court HR 1866, 1891 [83]. See also Prosecutor v Jean-Paul Akayesu (Judgement) (International Criminal Tribunal for Rwanda, Chamber, Case No ICTR-96-4-T, 2 September 1998) [597]; Prosecutor v Zejnil Delalić (Trial Judgement) (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [495].

123 See, eg, CEDAW art 6. Furthermore CEDAW/C requires States to take all appropriate measures to suppress all forms of exploitation of prostitution of women. CEDAW/C, General Recommendation No 19: Violence against Women, 11th sess, (29 January 1992) [1].

124 See Geneva Convention IV arts 3, 32; AP I arts 11(2)(a), 75(2)(iv); AP II art 4(2)(a).

125 See Henckaerts and Doswald-Beck, above n 23, 322.

126 See HRC, General Comment No 20, above n 35, [7].

127 See Geneva Convention IV art 32; AP I art 11(2).
deprived of liberty, ‘any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards’ is prohibited under Additional Protocols I and II. It is a grave breach of the AP I if the medical procedure undertaken seriously endangers the physical or mental health or integrity of the person concerned.

The prohibition of medical or scientific experiments under IHL is broader as compared to the similar prohibition under IHRL and covers instances not protected under IHRL.

3.2.2.9 Prohibition of Corporal Punishment

Corporal punishment is explicitly prohibited by Geneva Convention IV in relation to protected persons. It is also recognised as a fundamental guarantee for civilians and persons hors de combat by Additional Protocols I and II.

Corporal punishment is not explicitly prohibited under IHRL treaties. However, as the HRC has indicated the prohibition of torture and cruel, inhuman or degrading treatment or punishment ‘must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure’.

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128 AP I art 11(1).
129 See AP II art 5(2)(e).
130 See AP I art 11(1) and (4).
132 See Geneva Convention IV art 32.
133 See AP I art 75(2)(iii); AP II art 4(2)(a).
134 HRC, General Comment No 20, above n 35, [5]. This view was applied by the Committee in several cases, as well as in its Concluding Observations on State reports, where the countries concerned used various forms of corporal punishment for criminal offences. See, eg, HRC, Views of the HRC under the Optional Protocol to the ICCPR: Communication No 759/1997, 68th sess, UN Doc CCPR/C/68/D/759/1997 (13 April 2000) (‘George Osbourne v Jamaica’)[9,1] in which the author of the communication had been sentenced to ten strokes of a tamarind switch and the HRC stated: ‘it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that by imposing a sentence of whipping with the tamarind switch, the State party has violated the author’s rights under article 7’. See also Manfred Nowak, Special Rapporteur, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GAOR, 60th sess, Agenda Item 73(a), UN Doc A/60/316 (30 August 2005) [19]-[23].
3.2.2.10 Prohibition of Forced or Compulsory Labour

IHRL prohibits ‘forced or compulsory labour’\(^{135}\) with limited exceptions, such as labour by prisoners within prison establishments, labour required for the community to overcome calamity situations or normal civic obligations.\(^{136}\)

The exceptions to forced labour under IHL are much broader than those provided under IHRL. Geneva Convention III permits forced labour of ‘prisoners of war who are physically fit’,\(^ {137}\) although not if it has a ‘direct connection with the operations of the war’,\(^ {138}\) ‘would be looked upon as humiliating for a member of the Detaining Power’s own forces’\(^ {139}\) or is of an unhealthy or dangerous nature.\(^ {140}\) Protected civilians may be compelled to work (with some exceptions) under Geneva Convention IV.\(^ {141}\) Protected persons do, however, enjoy some additional protections from forced labour particularly in relation to occupying powers.\(^ {142}\) The prohibition of forced labour is thus more comprehensive under IHL than in IHRL.

3.2.2.11 Conclusion: Enhanced Normative Protection under IHL

Norms where protection is enhanced under IHL include: (a) the prohibition of human shields; (b) the prohibition of hostage-taking; (c) humane treatment; (d) the principal of individual criminal responsibility; (e) the prohibition of collective punishments; (f)

\(^{135}\) See, eg, ICCPR art 8(3); Forced Labour Convention, opened for signature 28 June 1930, 14th ILC sess (entered into force 1 May 1932) art 1; Abolition of Forced Labour Convention, opened for signature 25 June 1957, 40th ILC sess (entered into force 17 January 1959) arts 1, 2; ECHR art 4(2); ACHR art 6(2); ACHPR art 15 (right to work under equitable and satisfactory conditions).

\(^{136}\) See ICCPR art 8(3)(b) and (c); ECHR art 4(3); ACHR art 6(3).

\(^{137}\) See Geneva Convention III art 49.

\(^{138}\) See ibid art 31. Furthermore, compelling persons to serve in the forces of a hostile power is a specific type of forced labour that is prohibited in international armed conflicts. See Geneva Convention III art 130; Geneva Convention IV art 147.

\(^{139}\) Geneva Convention III art 52.

\(^{140}\) See ibid. The Convention continues to enumerate in detail the categories of work that prisoners of war may be compelled to perform. See Geneva Convention III art 50.

\(^{141}\) See Geneva Convention IV arts 40, 51. In relation to protected persons of enemy nationality additional restrictions apply. They may only be compelled to ‘work which is normally necessary to ensure the feeding, sheltering clothing, transport and health of human beings and which is not directly related to the conduct of military operations’. See Geneva Convention IV art 40, second paragraph. They benefit from the same working conditions as national workers. See Geneva Convention IV art 40, third paragraph.

\(^{142}\) See Geneva Convention IV art 51, second paragraph. It is prohibited for the occupying power to compel persons under eighteen to work. Such prohibition is unconditional and is valid for all types of work authorised by the Convention. Protected persons over eighteen may be compelled to work by the occupying powers but only on work which is necessary either for the needs of the army of occupation, or for public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.
the prohibition of rape and other forms of sexual violence; (g) the prohibition of mutilation; (h) the prohibition of medical or scientific experiments; (i) the prohibition of corporal punishments; and (j) the prohibition of forced or compulsory labour. In these cases, the additional application of IHRL treaties does not in reality add to the protection they provide, beyond the possibility of providing a supplementary source of interpretation and access to complaint mechanisms. Indeed, human rights tribunals and courts have become an effective forum to discuss States’ compliance with IHL.¹⁴³

For this category of rights, IHL will be the *lex specialis* with IHRL being relevant only to provide general guidance to assist in applying the more specific norms of IHL to particular situations. This may be compared with the category of rights enjoying comparable normative protection where I concluded that the *lex specialis* maxim is not applied since no conflict arises between the protections offered by such norms under the two regimes.

### 3.2.3 Enhanced Normative Protection under IHRL

Some human rights enjoy greater protection under IHRL than IHL. These rights are either expressly guaranteed under IHRL but only implied in IHL or are provided in greater detail in IHRL as compared to IHL. In this category, I argue that IHRL enriches the protections provided under IHL and thus adds to IHL in several distinct ways.¹⁴⁴ For example, IHRL can play a gap-filling role in the scope of protection afforded to individuals by IHL. IHRL broadens the restricted protections provided to limited categories of people and limited instances under IHL.

#### 3.2.3.1 Prohibition of Slavery, Servitude and Slave Trade

Slavery, servitude and the slave trade are expressly and comprehensively prohibited under the *ICCPR* and regional human rights conventions.¹⁴⁵ Although the prohibition of slavery is not explicit in IHL treaties relating to international armed conflicts, the

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¹⁴³ See, eg, Heintze, above n 5; Buis, above n 7; Ben-Naftali and Shany, above n 1.

¹⁴⁴ See Ben-Naftali and Shany, above n 1, 50.

¹⁴⁵ See, eg, *ICCPR* art 8; *ECHR* art 4(1); *ACHR* art 6(1); *ACHPR* art 5; *Cairo Declaration on Human Rights in Islam* (5 August 1990) UN GAOR, World Conference on Human Rights, 4th sess, Agenda Item 5, UN Doc A/CONF.157/PC/157/PC/62/Add.18 (1993) art 11(a). It is also prohibited under specific IHRL treaties including the *Slavery Convention*, opened for signature 25 September 1926, 60 UNTS 254 (entered into force 9 March 1927) and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957).
various provisions of the *Geneva Conventions* relating to the labour of prisoners of war and civilians and concerning their release and return, presume the prohibition of slavery in such armed conflicts.\footnote{See, eg, *Geneva Convention III* arts 49-68, 109-119; *Geneva Convention IV* arts 40, 51-52, 95-96, 132-135. As Henckaerts and Doswald-Beck state, there is no doubt that ‘enslaving persons in an international armed conflict is prohibited’: Henckaerts and Doswald-Beck, above n 23, 327.} The prohibition of ‘slavery and the slave trade in all their forms’ in non-international armed conflicts is recognised in *AP II* as a fundamental guarantee for civilians and persons *hors de combat*.\footnote{See AP II art 4(2)(f).} Additionally, enslavement is listed as a crime against humanity under the Statues of the International Criminal Court (‘*ICC*’), ICTY and the International Criminal Tribunal for Rwanda (‘*ICTR*’).\footnote{Rome Statute of the International Criminal Court art 7(1)(c); *Statute of the International Criminal Tribunal for the former Yugoslavia* art 5(c); *Statute of the International Tribunal for Rwanda* art 3(c).} The prohibition on slavery and the slave trade is thus explicit and more comprehensive in IHRL.

### 3.2.3.2 Right to Work

The *ICESCR* in Article 6 recognises ‘the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’. Additionally, Article 7 recognises the right of everyone to the enjoyment of just and favourable conditions of work which ensure fair and equal wages for work of equal value that provides a decent living for themselves and their families, safe and healthy working conditions, equal opportunity for everyone to be promoted in his employment, and rest, leisure and reasonable limitation of working hours.\footnote{See *ICESCR* art 7.}

States Parties are required under IHRL to take steps to achieve the full realisation of the right to work which in addition to fair wages, equal remuneration and safe and healthy working conditions includes, amongst others, training programmes and policies to achieve economic and social development.\footnote{See ibid art 7, 6(2).}

As for IHL Article 39, *Geneva Convention IV* merely provides that ‘protected persons who, as a result of the war, have lost their gainful employment shall be granted the opportunity to find paid employment’, subject to security considerations and the right to compel protected persons to do work. It further provides that if the protected person is unable to support himself and find paid employment due to applied security

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\footnote{146 See, eg, *Geneva Convention III* arts 49-68, 109-119; *Geneva Convention IV* arts 40, 51-52, 95-96, 132-135. As Henckaerts and Doswald-Beck state, there is no doubt that ‘enslaving persons in an international armed conflict is prohibited’: Henckaerts and Doswald-Beck, above n 23, 327.}

\footnote{147 See AP II art 4(2)(f).}

\footnote{148 Rome Statute of the International Criminal Court art 7(1)(c); *Statute of the International Criminal Tribunal for the former Yugoslavia* art 5(c); *Statute of the International Tribunal for Rwanda* art 3(c).}

\footnote{149 See *ICESCR* art 7.}

\footnote{150 See ibid art 7, 6(2).}
measures and methods of control, the Party to the conflict shall ensure his support and that of his dependants.\(^{151}\) However, IHL provides no safeguards in relation to conditions of work. The nearest equivalent to IHRL with respect to safeguards concerning working conditions, duration of labour, working pay, preliminary training, occupational accidents and medical supervision are either those required of occupying powers\(^{152}\) or those in relation to prisoners of war, civilian internees and persons deprived of their liberty.\(^{153}\)

### 3.2.3.3 Right to an Adequate Standard of Living

The *ICESCR* provides for ‘the right of everyone to an adequate standard of living’, including ‘adequate food, clothing and housing’ and to the continuous improvement of living conditions.\(^{154}\) Similarly, IHL treaties require the supply of food, clothing and shelter to both prisoners of war and civilians in the power of the adverse Party.\(^{155}\) However, the majority of these provisions deal only with the protection and welfare of the civilian population in occupied territories.

(a) Right to Food

The human right to adequate food is provided for in Article 11 of the *ICESCR*, which requires States ‘to take steps to achieve progressively the full realization of the right to adequate food’.\(^{156}\) Article 11 further recognises the fundamental right of everyone to be free from hunger and malnutrition by improving methods of production, conservation and distribution of food.\(^{157}\) Thus, while the right to adequate food is to

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151 See Geneva Convention IV art 39.
152 In relation to safeguards provided by the occupying powers, the law in force in the occupied country is applicable to the protected persons assigned to the work. See Geneva Convention IV arts 51-52. Furthermore, the occupying power is prohibited from carrying out measures aimed at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the occupying power. See Geneva Convention IV art 52, second paragraph.
153 In relation to the labour of prisoners of war, see Geneva Convention III arts 51, 53-55; in relation to civilian internees, see Geneva Convention IV art 95; in relation to persons deprived of their liberty for reasons related to the armed conflict in non-international armed conflicts, see AP II art 5(1)(e) (adopted by consensus).
154 See ICESCR art 11(1). Article 25(1) of the UDHR also provides that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services’.
156 CESCR, General Comment No 12: The Right to Adequate Food (Art. 11), 20th sess, UN Doc E/C.12/1999/5 (12 May 1999) [14].
157 See ICESCR art 11(2)(a).
be realised progressively, ‘more immediate and urgent steps may be needed’\textsuperscript{158} to ensure the fundamental rights to freedom from hunger and malnutrition.\textsuperscript{159} The right to adequate food is interpreted by the CESCR to be realised ‘when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement’.\textsuperscript{160}

Given that the absence of food supplies and the use of food as a political weapon during armed conflicts has been a major source of suffering,\textsuperscript{161} various provisions in IHL prohibit starvation as a method of warfare and regulate the supply of food, at least within occupied territories.\textsuperscript{162} In addition Additional Protocols I and II provide protection for objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, and livestock.\textsuperscript{163} The occupying power is also obliged to ensure the food supplies of the population, including the bringing in of necessary foodstuffs when the resources of the occupied territory are inadequate.\textsuperscript{164} Further, the occupying power must not only guarantee but also protect the free passage of relief consignments from third parties.\textsuperscript{165}

In situations other than occupation, Geneva Convention IV requires the free passage of any consignment of essential foodstuffs for the exclusive use of children under fifteen and expectant mothers and maternity cases, to save these civilians from the consequences of blockades.\textsuperscript{166} In non-international armed conflicts, AP II provides that ‘if the civilian population is suffering undue hardship owing to the lack of supplies essential for its survival, such as foodstuffs,’ relief actions for the civilian population, must be undertaken subject to the consent of the Contracting Party concerned.\textsuperscript{167} In addition IHL treaty rules also provide for the food supply of detained

\textsuperscript{158} CESCR, \textit{General Comment No 12}, above n 156, [1].
\textsuperscript{159} See ibid [6].
\textsuperscript{160} Ibid. The CESCR continues to assert that this shall not be interpreted in a narrow sense which equates it with a minimum package of calories, proteins and other specific nutrients.
\textsuperscript{161} See ibid [5].
\textsuperscript{162} See, eg, AP I art 54(1); AP II art 14. This prohibition is comparable to the freedom from hunger as prescribed within IHRL.
\textsuperscript{163} See AP I art 54(2); AP II art 14.
\textsuperscript{164} See Geneva Convention IV art 55. See also AP I art 69(1).
\textsuperscript{165} Geneva Convention IV art 59. See Arai-Takahashi, above n 6, 359.
\textsuperscript{166} See Geneva Convention IV art 23(1). The Article stipulates that only essential foodstuffs are entitled to free passage. That should be understood to mean ‘basic foodstuffs, necessary to the health and normal physical and mental development of the persons for whom they are intended’: Pictet, above n 34, 180. See also Arai-Takahashi, above n 6, 358.
\textsuperscript{167} See AP II art 18(2).
or interned civilians. IHL also has provisions that are specific to armed conflict, which have no equivalent in IHRL.

The right to food and freedom from hunger are guaranteed under both IHL and as rights to be progressively realised under IHRL. However, under IHL, the majority of provisions regarding the right to food apply only in occupied territories. In situations other than occupation, protections are much more limited. In the Additional Protocols, some of the protections are extended to cover the civilian population generally, but only in terms of negative obligations not to interfere rather than a positive obligation to protect. In summary, the additional application of IHRL in relation to the right to food can substantially broaden the limited protections provided by IHL during times of armed conflict.

(b) Right to Housing and Prohibition of Forced Evictions

The human right to adequate housing is provided in the ICESCR. Additionally the ICCPR prohibits arbitrary or unlawful interference with one’s home and provides for the right to protection of the law against such interference or attacks. Prohibition of forced eviction is implied in the right to housing. The Commission on Human Rights has also indicated that ‘forced evictions are a gross violation of human

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168 See Geneva Convention IV arts 76 (sufficient conditions of food for convicted detainees), 87 (instalment of canteens of foodstuffs in places of internment), 89 (daily food rations sufficient in quantity, quality and variety for internees), 127, second paragraph, (supply internees during transfer with food sufficient in quantity, quality and variety); AP II art 5(b) (persons whose liberty has been restricted in non-international armed conflicts be provided with food).

169 For example, possible transfers, evacuations or displacements are ‘to the greatest practicable extent’ to be conducted in ‘satisfactory conditions of nutrition’: Geneva Convention IV art 49, third paragraph (in relation to the obligation of occupying powers). In relation to displacement of the civilian population in non-international armed conflicts, see AP II art 17(1). Additionally, Article 15, Geneva Convention IV provides for the establishment of neutralised zones, intended to shelter civilian persons taking no part in hostilities, from the effects of war. Parties concerned shall agree upon the food supply of such neutralised zones.

170 See ICESCR art 11.

171 See, eg, ICCPR art 17; ECHR art 8; ACHR art 11. The term ‘home’ as used in Article 17 ‘is to be understood to indicate the place where a person resides or carries out his usual occupation’: HRC, General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17), 32nd sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (8 April 1988) [5]. The ACHPR does not expressly refer to the right to one’s ‘home’.

172 The terms ‘illegal evictions’ and ‘unfair evictions’ are also often used to confer similar meaning. The term ‘forced evictions’ as used in the CESCR General Comment is defined as ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection’: CESCR, General Comment No 7: The Right to Adequate Housing (art 11(1) of the Covenant): Forced Evictions, 16th sess, UN Doc E/1998/22paras. Annex IV (1 January 1998) [3].
The CESCR, in its General Comment No 7, lays down some of the circumstances in which evictions are justifiable. Forced evictions are also regulated under IHL by means of provisions limiting the displacement of the civilian population. The right to adequate housing is protected to some extent by general rules that restrict or limit hostilities in order to protect the civilian population. Adequate shelter in relation to detainees is also required.

IHL provisions in relation to housing primarily impose negative obligations on Parties to the conflict requiring them to refrain from interfering with the free enjoyment of the right to housing. This is in contrast to IHRL where States are to ‘take appropriate steps to ensure the realisation’ of the right to housing. Consequently the application of IHRL will expand the protections in IHL from a mere negative obligation of refraining from interference to a positive obligation of providing shelter and accommodation.

### 3.2.3.4 Right to Health

The right of everyone to enjoy the highest attainable standard of physical and mental health is protected in Article 12 of the ICESCR. Article 12 further specifies the required steps to be taken by States Parties to achieve the full realisation of the right. These include provision for the reduction of the stillbirth rate and infant mortality and for the healthy development of the child, the improvement of all aspects of environmental and industrial hygiene, the prevention, treatment and control of epidemic, endemic, occupational and other diseases, and the creation of conditions which would assure to all access to medical service and attention in the event of sickness.

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174 See CESCR, General Comment No 7, above n 172, [14].
175 See, eg, Geneva Convention IV arts 49 (prohibition of individual or mass forcible transfers, prohibition on total or partial evacuation unless security or imperative military reasons demand, limitations and safeguards in relation to transfers or evacuations), 78 (assigned residence of protected persons due to imperative reasons of security); AP II art 17 (prohibition of forced movement of civilians unless security or imperative military reasons demand subject to satisfactory conditions of shelter).
176 See in particular AP I arts 48-60.
177 See Geneva Convention IV art 127.
178 See ICESCR art 11(1).
179 See ibid art 12(2).
Given the nature of armed conflict, it is not surprising that the right to the highest attainable standard of physical and mental health is the most comprehensively regulated right in IHL. It is the subject of Geneva Conventions I and II which are devoted to the protection of the health of military wounded and sick. The protection of health is additionally extended to civilian wounded and sick in Geneva Convention IV and the Additional Protocols. The requirement is not only to collect and treat the wounded and sick, but also to protect medical workers, medical buildings, vehicles and equipment, which may not be the object of attack. Any measure causing physical suffering or extermination of protected persons is prohibited. The Convention demands that aliens shall receive medical attention and hospital treatment to the same extent as nationals of the State concerned, if their state of health so requires.

An occupying power, to the fullest extent of the means available to it, has the duty of ensuring medical supplies to the population. Should the resources of the occupied territory be inadequate, Article 55 requires the occupying power to import the necessary medical supplies. It has the duty to accept relief schemes including consignments of medical supplies and facilitate them by all the means at its disposal. Additionally, IHL prohibits the occupying power from requisitioning medical supplies available in the occupied territory, except in limited circumstances. To ensure that medical supplies are adequate, the protecting power is at liberty to verify the state of medical supplies in occupied territories, at any time. The occupying power, to the fullest extent of the means available to it, has the duty of ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory. AP I also requires the occupying power to ensure

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180 See Doswald-Beck, above n 6, 473.
181 See Geneva Convention IV arts 16-23; AP I arts 8-20; AP II arts 7-12.
182 See Geneva Convention IV art 18; AP I art 12(1); AP II arts 9(1), 11.
183 See Geneva Convention IV art 32.
184 See Geneva Convention IV art 38(2).
185 See Geneva Convention IV art 59. See also AP II art 18 (in relation to relief schemes in non-international armed conflicts).
186 See, eg, Geneva Convention IV art 55, first and second paragraph; AP I art 14(2) and (3).
187 See Geneva Convention IV art 55, third paragraph.
188 See Pictet, above n 34, 313.
189 See Geneva Convention IV art 56, first paragraph. See also Pictet, above n 34, 314.
that the medical needs of the civilian population in occupied territory continue to be met. AP I prohibits endangering the physical and mental health of persons who are in the power of the adverse Party by any unjustified act or omission. In case the displacement of the civilian population is required, all possible measures shall be taken so that the civilian population are granted satisfactory conditions of hygiene and health. Specific provisions also regulate the health and hygiene of internees and detainees and require that they be afforded medical care and attention.

In conclusion, while this is an area of extensive detailed regulation in IHL, similar to the right to food, the guarantees provided under IHL are nevertheless considerably limited. The majority of the provisions are in relation to occupying States. In situations other than occupation, the main focus is on the prohibition of endangering the physical and mental health of persons who are in the power of the adverse Party and all persons who do not take a direct part or who have ceased to take part in hostilities and the prohibition of methods of warfare whose effect may prejudice the health of the population. Accordingly, the additional application of IHRL in relation to the right to health substantially broadens the protections provided to the restricted cases of occupation by IHL.

3.2.3.5 Right to Freedom of Expression

The provisions of IHRL provide greater protection of the right to freedom of expression than IHL. Human rights treaties recognise the importance of the freedom

190 See AP I art 14(1). See also Sandoz, Swinarski and Zimmermann, above n 39, 182.
191 See Geneva Convention IV art 56, first paragraph. The occupying power’s duty of maintaining hospitals, medical services and establishments and public health and hygiene services necessarily involves measures to safeguard the activities of medical personnel, who must therefore be exempted from any measures (such as restrictions on movement, requisitioning of vehicles, supplies or equipment) liable to interfere with the performance of their duty. See Pictet, above n 34, 314.
192 See AP I art 11. AP II prohibits violence to the health and physical or mental well-being of all persons who do not take a direct part or who have ceased to take part in hostilities.
193 See AP II art 17(1).
194 See, eg, Geneva Convention IV arts 76, 91, 92, 127; AP I art 11(1); AP II art 5(1)(a) and (b), 5(2)(d) and (e).
195 See, eg, AP I art 11.
196 See, eg, AP II art 4(2)(a).
197 See, eg, ibid art 55(1).
of expression,\textsuperscript{198} subject to restrictions ‘provided by law’ and justified as ‘necessary’\textsuperscript{199} to achieve respect for the rights of others and the protection of national security or of public order, or of public health and morals.\textsuperscript{200} The ICCPR also prohibits any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.\textsuperscript{201}

In IHL, the protection of freedom of expression is very limited. Geneva Convention IV provides that protected persons shall not be arrested, prosecuted or convicted by occupying powers for opinions expressed before the occupation, or during a temporary interruption thereof.\textsuperscript{202}

3.2.3.6 Right to Freedom of Movement

IHRL treaties include provisions allowing freedom of movement for persons lawfully within a territory.\textsuperscript{203} They also provide the freedom to everyone to leave any country, including their own.\textsuperscript{204} All such provisions include possible limitations to this right.\textsuperscript{205} For example, restrictions on movements for security reasons are common in armed conflict situations. Similar to all restrictions, they will be based on the general rules regulating their necessity and proportionality.\textsuperscript{206}

The freedom of movement is a limited right within IHL treaties. All protected persons\textsuperscript{207} who may desire to leave the territory at the outbreak of, or during a

\textsuperscript{198} See, eg, ICCPR arts 19, 20; ECHR art 10; ACHR art 13; ACHPR art 9(2).
\textsuperscript{199} See, eg, ICCPR art 19(3); HRC, General Comment No 10: Freedom of Expression (Art. 19), 19\textsuperscript{th} sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (29 June 1983) [4].
\textsuperscript{200} See, eg, ICCPR art 19(3)(a) and (b).
\textsuperscript{201} See ibid art 20. See also HRC, General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art. 20), 19\textsuperscript{th} sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (29 July 1983) [2].
\textsuperscript{203} See, eg, ICCPR art 12 (1); Protocol 4, ECHR art 2(1); ACHR art 22(1). In principle, citizens of a State are always lawfully within the territory of that State. The question of whether an alien is ‘lawfully’ within the territory of a State, in the view of the HRC ‘is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations’. HRC, General Comment No 27: Freedom of Movement (Art. 12), 67\textsuperscript{th} sess, 1783\textsuperscript{rd} mtg, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [4].
\textsuperscript{204} See, eg, ICCPR art 12 (2); Protocol 4, ECHR art 2(2); ACHR art 22(2).
\textsuperscript{205} See, eg, ICCPR art 12 (3); Protocol 4, ECHR art 2(3); ACHR art 22(3).
\textsuperscript{206} See Doswald-Beck, above n 6, 395.
\textsuperscript{207} Since Article 35 Geneva Convention IV comes under the title of ‘Aliens in the territory of a party to the conflict’, it covers all protected persons, including aliens.
conflict, are entitled to do so, unless their departure is contrary to the national interests of the State.\textsuperscript{208} IHL provides limited guarantees in relation to the freedom of movement. Therefore, the additional application of IHRL broadens the protection provided under IHL.

3.2.3.7 Prohibition on Arbitrary or Unlawful Interference with Correspondence

Article 17 of the \textit{ICCPR} provides for the right of every person to be protected against arbitrary\textsuperscript{209} or unlawful\textsuperscript{210} interference with his or her correspondence. IHL treaties do not contain a general prohibition on arbitrary or unlawful interference with correspondence as such. However, some provisions deal with the right to the forwarding of family news.\textsuperscript{211} IHL also recognises the right of internees and prisoners of war to carry on correspondence.\textsuperscript{212} While restrictions may be imposed on such a right in certain circumstances, the right must never be completely suppressed.\textsuperscript{213} The detaining power, however, retains its right to censor internees’ correspondence.\textsuperscript{214} The additional application of IHRL thus broadens the limited protections provided under IHL treaties.

3.2.3.8 Rights of Women

The 1979 \textit{UN Convention on the Elimination of All Forms of Discrimination against Women} (‘\textit{CEDAW}’) provides special protection for the rights of women. General protection is also provided under the \textit{ICCPR} and \textit{ICESCR}.\textsuperscript{215} The vulnerable status of women in times of armed conflict is specifically recognised by the HRC. The

\textsuperscript{208} See \textit{Geneva Convention IV} art 35, first paragraph. Articles 35 and 36 lay down the regulations for such departures. A wide discretionary power is granted to the authorities, who may interpret ‘national interests’ as applying to many different spheres.

\textsuperscript{209} The introduction of the concept of arbitrariness, as stated by the HRC, ‘is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’: HRC, \textit{General Comment No 16}, above n 171, [3].

\textsuperscript{210} The term ‘unlawful’ means that ‘no interference can take place except in cases envisaged by the law’: HRC, \textit{General Comment No 16}, above n. 171, [3].

\textsuperscript{211} See, eg, \textit{Geneva Convention IV} art 25. See also Pictet, above n 34, 192.

\textsuperscript{212} See, eg, \textit{Geneva Convention IV} art 107; \textit{Geneva Convention III} arts 70, 71, 76; \textit{AP II} art 5(2)(b).

\textsuperscript{213} See Pictet, above n 34, 449.

\textsuperscript{214} See, eg, \textit{Geneva Convention IV} art 112.

\textsuperscript{215} See, eg, \textit{ICCPR} arts 3 (equal rights of men and women to the enjoyment of civil and political rights), 6(5) (death sentence not to be carried out on pregnant women); \textit{ICESCR} arts 3 (equal rights of men and women to the enjoyment of economic, social and cultural rights), 7(a)(i) (guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work).
Committee provides that ‘the States Parties should inform the Committee of all measures taken during [armed conflict] situations to protect women from rape, abduction and other forms of gender-based violence’.  

Women benefit from general provisions of IHL that deal with the protection of victims of armed conflict as well as specific provisions providing particular protections. Protection of women’s rights under IHL can be classified under three main categories: (a) some are intended to protect women against rape, forced prostitution and any other form of indecent assault; (b) some provisions, similar to IHRL, provide protections and facilities for women prisoners and those detained or interned by the foreign forces; and (c) the majority of such provisions deal with pregnant women, maternity cases, and mothers of children under seven years. These categories of women are equated with the wounded, sick and the aged and enjoy particular respect and protection in matters such as medical care, foodstuffs and physical safety.

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216 HRC, General Comment No 28: Equality of Rights between Men and Women (Art. 3), 68th sess, 1834th mtg, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [8].


218 See, eg, Geneva Convention IV art 27; AP I art 76(1). See above 3.2.2.6.

219 See HRC, General Comment No 28, above n 216, [15].

220 See, eg, Geneva Convention IV arts 76, 124 (separate quarters for women prisoners and internees), 89 (additional food provided to expectant and nursing mothers who are interned), 91 (adequate medical treatment of interned maternity cases), 97 (women internees only to be searched by women), 127 (restrictions on transfer of interned maternity cases), 132 (release and repatriation of pregnant women and mothers with infants and young children); AP I arts 75(5) (separate quarters for women whose liberty has been restricted), 76(2) (priority to be given to the consideration of cases of pregnant women and mothers having dependant infants who are arrested, detained or interned); AP II art (5)(2)(a) (separate quarters for women).

221 See, eg, Geneva Convention IV arts 14 (establishment of hospital and safety zones and localities to protect expectant mothers and mothers of children under seven from the effects of war), 16 (expectant mothers shall be the object of particular protection and respect), 17 (removal of maternity cases from besieged or encircled areas), 23 (free passage of all consignments of essential foodstuffs intended for expectant mothers and maternity cases), 38(5) (in relation to aliens, preferential treatment of pregnant women and mothers of children under seven years), 50 (prohibition of hindering the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of expectant mothers and mothers of children under seven); AP I art 70(1) (priority given to expectant mothers, maternity cases and nursing mothers, in the distribution of relief consignments). Furthermore, Additional Protocols I and II similarly to Article 6 of the ICCPR, prohibit the death penalty being imposed on a pregnant woman. The Protocols extend this prohibition to mothers having dependent infants and mothers of young children. AP I art 76(3) (no pronouncement of death penalty on pregnant women or mothers having dependent infants for an offence related to the armed conflict); AP II art 6(4) (prohibition on the carrying out of the death penalty on pregnant women or mothers of young children). The word ‘respect’ means ‘to spare, not to
Thus, both IHRL and IHL provide special protection for the rights of women. However, IHL provisions are limited in their scope of application and do not cover all women. Accordingly, while the special status of women is recognised under IHL, the additional application of IHRL adds to the protections provided under IHL.

### 3.2.3.9 Rights of Children

Children require special safeguards and care and therefore are accorded ‘privileged treatment’ and ‘special protection’ under both regimes. The *Convention on the Rights of the Child* (‘CRC’) specifically provides protection to children and entitles them to numerous rights. Article 24 of the *ICCPR* provides generally for the right of every child, without discrimination, to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the State.

Article 77, *AP I*, similarly provides that ‘children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require...’. Many of the protections provided to children under IHL are comparable with those of IHRL. For instance, both regimes have provisions that acknowledge the importance of the family unit to the well-being of a child and thus seek to protect it. Similar to IHRL, IHL

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222 See, eg, *Declaration of the Rights of the Child*, Proclaimed by UN General Assembly Resolution 1386 (XIV), (10 December 1959), Preamble; *ICCPR* arts 14(1) (law suits not to be made public where the interest of juvenile persons so require), 18(4) (religious and moral education of children to be in conformity with the convictions of their legal guardians), 23(4) (necessary protection of children in case of dissolution of marriage), 24; *ICESCR* arts 10(1) (widest possible protection and assistance to be accorded to the family as it is responsible for the care and education of dependent children), 10(3) (protection of children from economic and social exploitation, limitation on child labour), 12(2)(a) (provision on the healthy development of the child) 13(3) (religious and moral education of children to be in conformity with the convictions of their legal guardians); *ICESCR* art 10(3); *Geneva Convention IV* arts 24, 50; *AP I* arts 70(1), 77; *AP II* art 4.

223 These include, for example, arts 6 (inherent right to life), 7 (registration at birth), 8 (right to preserve identity, including nationality, name and family relations), 9 (prohibition on separation of the child from his parents), 10 (family reunification), 19 (protection from all forms of physical or mental violence), 32-34 (protection from economic and other forms of exploitation), 37 (detention and punishment of children and prohibition of capital punishment and life imprisonment for those under eighteen).

224 See also *Geneva Convention IV* arts 24, 50; *AP II* art 4.

225 See, eg, *CRC* arts 7 (right to know and be cared for by parents), 8 (right to preserve identity, name, nationality and family relations), 9 (prohibition on separation of child from parents), 10 (family reunification), 20 (special care to those deprived of family care); *Geneva Convention IV* arts 50 (prohibition on changing the family or personal status of children by the occupying power), 82 (interned families); *AP I* art 75(5) (interned families).
provides safeguards for the protection of detained or interned children and prohibits the execution of the death penalty upon persons under eighteen. IHL and IHRL both prohibit the recruiting of children under fifteen. A number of provisions within IHL are similar to IHRL and relate to the general welfare and fostering of individual development of the child. Article 24, *Geneva Convention IV*, for example provides that ‘[t]he Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances’. Under Article 50 of that Convention the occupying power is required to facilitate the proper working of all institutions devoted to the care of children and make arrangements for the maintenance of children who are orphaned or separated from their parents, if they cannot be adequately cared for by a near relative or friend.

IHL also provides special measures for children, such as the establishment of safety zones and temporary evacuation of children, identification of children, free passage of foodstuffs, clothing and tonics intended for children, priority to children in the distribution of relief consignments and accommodation of children in neutral countries.

The additional application of IHRL strengthens the protections provided to children under IHL and broadens the scope of beneficiaries to include children not covered by

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226 See, eg, *CRC* art 37.
227 See, eg, *Geneva Convention IV* arts 76 (special treatment of minors), 89 (additional food to be provided to children under fifteen); *AP I* art 77(4) (separate quarters from adults for arrested, detained or interned children).
228 See, eg, *ICCPR* art 6(5); *CRC* art 37(a); *Geneva Convention IV* art 68, fourth paragraph; *AP I* art 77(5); *AP II* art 6(4).
229 See, eg, *CRC* art 38; *AP I* art 77(2); *AP II* art 4(3)(c).
230 Pictet, above n 34, 187.
232 See, eg, *Geneva Convention IV* art 17; *AP I* art 78; *AP II* art 4(3)(e). Evacuation is only permitted as a temporary measure necessary for reason of the child’s health, for medical treatment, or to ensure the safety of the child.
233 See, eg, *Geneva Convention IV* arts 24, third paragraph, 50, second and fourth paragraph. In occupied territories, the occupying power must facilitate the identification of children, with the registration of their parentage, whilst it is prohibited to change their personal status. Occupying powers are strictly prohibited from enlisting children in formations or organisations subordinate to them.
234 See, eg, *Geneva Convention IV* art 23; *AP I* art 70(1).
235 See, eg, *AP I* art 70(1).
236 See, eg, *Geneva Convention IV* art 24, second paragraph.
IHL. Additionally, it appears that the concept of ‘children’ within IHL is limited to persons under fifteen years of age whereas under IHRL it is eighteen years of age.  

3.2.3.10 Right to Education

The right to education is a clear example of a norm that is provided more comprehensively in IHRL treaties than in the case of IHL treaties where the protection offered is narrow and limited. Article 13 of the ICESCR provides for the right of everyone to education. It stipulates the right to different levels of education, each level involving different obligations. Article 13 further highlights the liberty of parents to choose their children’s schools to ensure the religious and moral education of their children conforms with their own convictions. It also prohibits the State from interfering with the liberty of individuals and bodies to establish and direct educational institutions, subject to the observance of certain principles and standards. Article 14 provides details on the responsibility of States for the progressive implementation of the principle of compulsory primary education free of charge for all. General Comment No 13 stipulates that education in all its forms and at all levels shall exhibit the interrelated and essential features of ‘availability’, ‘accessibility’, ‘acceptability’ and ‘adaptability’.

The provisions regarding education under IHL are intended to ensure that students, education staff and educational facilities are protected from attacks through the

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237 See, eg, *Geneva Convention IV* arts 14, 23, 24, 38(5), 50, fifth paragraph, 89, fifth paragraph; *AP I* art 77(2) and (3); *AP II* art 4(3)(c) and (d); CRC art 1. However, the threshold of eighteen is also used in limited provisions of IHL, for example *Geneva Convention IV* arts 51, second paragraph (prohibition to compel protected persons to work unless they are over eighteen years of age), 68, fourth paragraph; *AP I* art 77(5); *AP II* art 6(4) (the prohibition to pronounce death penalty on persons under eighteen).

238 See, eg, *ICESCR* arts 13, 14; *CRC* arts 28, 29; *CEDAW* art 10; *Protocol 1, ECHR* art 2; *ACHPR* art 17(1).

239 Primary education, which is one of the eight Millennium Development Goals to be achieved by 2015, is to be ‘compulsory’ and ‘available free to all’. Secondary education ‘shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education,’ while higher education is to be available ‘on the basis of capacity’; *ICESCR* art 13(2)(a), (b) and (c). This means that while States must prioritise the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. See CESCR, *General Comment No 13: The Right to Education (Art. 13)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [14].

240 See *ICESCR* art 13(3). See also *ICCPR* art 18(4).

241 See *ICESCR* art 13(4).

242 See CESCR, *General Comment No 13*, above n 239, [6].
principle of distinction\textsuperscript{243} and that education, where it existed before the outbreak of hostilities, continues.\textsuperscript{244} Occupying powers shall, with the co-operation of the national and local authorities, facilitate the proper working of all institutions devoted to the education of children.\textsuperscript{245} The occupying power must therefore refrain from requisitioning staff, premises or equipment which are being used by educational establishments.\textsuperscript{246} Furthermore, occupying powers, subject to the inadequacy of the local institutions, have a positive obligation to make arrangements for the maintenance and education of children who are orphaned or separated from their parents as a result of the war.\textsuperscript{247} Education is to be provided by an occupying power in a manner consistent with the removed Government.\textsuperscript{248}

In situations other than occupation, Geneva Convention IV requires parties to take all necessary measures to ensure that the education of children under fifteen, who are orphaned or separated from their families as a result of armed conflict, is facilitated in all circumstances.\textsuperscript{249} Their education shall as far as possible be entrusted to persons of similar cultural tradition.\textsuperscript{250} Furthermore, Article 77 of AP I has been interpreted to require the provision of facilities necessary to pursue children’s education.\textsuperscript{251}

\textsuperscript{243} AP I art 48, 49, 51(3); AP II art 13. See Hausler, Urban and McCorquodale, above n 11, 101, 141-66, 192. Typically, students and education staff are civilians and are protected from attacks unless they lose their status by taking ‘a direct part in hostilities’. See AP I arts 49, 51(3); AP II art 13(2) and (3). Likewise, educational facilities are protected from attacks by the principle of distinction between ‘civilian objectives’ and ‘military objectives’, as long as they qualify as civilian objectives. See AP I arts 48, 52. A civilian object is negatively defined as any object that is not a military object in AP I art 52(1). For details on the meaning of ‘military object’ in IHL see, eg, AP I art 52(2) and (3). And for the protection of educational facilities generally under IHL see, eg, Hausler, Urban and McCorquodale at 192-213; Marco Sassoli, ‘Legitimate Targets of Attacks under International Humanitarian Law’ (Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Program on Humanitarian Policy and Conflict Research at Harvard University, 27-29 January 2003) 1.

\textsuperscript{244} See Hausler, Urban and McCorquodale, above n 11, 100.

\textsuperscript{245} See Geneva Convention IV art 50, first paragraph

\textsuperscript{246} See Pictet, above n 34, 286. See also Hausler, Urban and McCorquodale, above n 11, 106.

\textsuperscript{247} The education of war orphans and other homeless children, if possible, should be facilitated through persons of their own nationality, language and religion. See Geneva Convention IV art 50, third paragraph.


\textsuperscript{249} See Geneva Convention IV art 24, first paragraph. The idea of education in this context, according to the commentary, ‘must be understood in its broadest sense as including moral and physical education as well as school work and religious instruction’: Pictet, above n 34, 187.

\textsuperscript{250} See ibid. Article 24 applies to all the children in question who are living in the territory of a Party to the conflict, whether they are nationals of that country or aliens. See Pictet, above n 34, 186.

\textsuperscript{251} See Sandoz, Swinarski and Zimmermann, above n 39, 899, 1377; Hausler, Urban and McCorquodale, above n 11, 105.
Additionally, AP I stipulates that in case of evacuation, ‘each child’s education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity’.

AP II, in relation to non-international armed conflict, provides that children shall receive an education, including religious and moral education, in keeping with the wishes of their parents or those responsible for their care.

Accordingly, the additional applicability of IHRL in situations of armed conflict enhances the protection provided in relation to education under IHL treaties. Since IHRL recognises ‘the right of everyone to education’, it broadens the limited protections in relation to education provided to specific categories of persons under IHL. Additionally, free and compulsory primary education for all is given strong emphasis under IHRL.

3.2.3.11 Conclusion: Enhanced Normative Protection under IHRL

This category of rights is provided either in express terms or more comprehensively in IHRL than IHL. These include: (a) prohibition of slavery, servitude and the slave trade; (b) right to work; (c) right to an adequate standard of living including (i) right to food and (ii) right to housing and prohibition of forced evictions; (d) right to health; (e) right to freedom of expression; (f) freedom of movement; (g) prohibition on arbitrary or unlawful interference with correspondence; (h) rights of women; (i) rights of children; and (j) right to education.

252 AP I art 78(2). The provision does not cover nationals of the State arranging for the evacuation. It is mainly concerned with children of enemy nationality, of refugees or of stateless persons, and of nationals of States without diplomatic representation. While the text stipulates for the continuity of providing education to children, specifically ‘in case of evacuation’, this seems to imply that the obligation to provide education is not only restricted to cases of evacuation. Such a literal reading of the text is unwarranted. Legislation in this case is an emphasis that education shall be resumed even in case of evacuation.

253 See AP II art 4(3)(a). Several provisions also deal with the education and studies of detainees and internees, a topic that is beyond the scope of my thesis. See, eg, Geneva Convention III art 38; Geneva Convention IV art 94, first and second paragraph. See also Hausler, Urban and McCorquodale, above n 11, 103.

254 See Hausler, Urban and McCorquodale, above n 11, 112.

255 See ICESCR art 13(1).

256 For example, the obligation of the Parties to the conflict under Article 24 of Geneva Convention IV to take all necessary measures to ensure that the education of children is facilitated in all circumstances only covers children under fifteen, who are orphaned or separated from their families as a result of the war. Accordingly, only specific children as enumerated in the Geneva Convention are entitled to benefit from this provision. See also Pictet, above n 34, 186.

257 See ICESCR arts 13, 14.
The theory of complementarity is particularly relevant in relation to this category of protections where the applicability of IHRL standards is argued to be ‘highly desirable’.258 These rights are provided either in express terms or more comprehensively in IHRL as compared to IHL and the additional application of human rights treaties complements and further enhances the abstract and limited protections provided under IHL treaties in several distinct ways. Most importantly, IHRL fills normative gaps in the scope of protection afforded to individuals by IHL. First, IHRL broadens the often restricted protections provided to limited categories of individuals under IHL. Secondly, IHL protections differ based on the classification of conflicts. IHRL expands the protection to all types of conflict. Thus, a greater number of individuals are protected under IHRL. Additionally, in relation to some rights particularly the right to housing, IHRL extends the mere negative obligation under IHL to refrain from interfering with the free enjoyment of the rights to a positive obligation to take steps to ensure the realisation of the rights.259

For this category of rights, IHRL will be the *lex specialis* with IHL being relevant to provide general guidance to assist in applying the more specific norms of IHRL to particular situations.260

### 3.3 Human Rights Norms Exclusive to IHRL

A number of human rights norms are not reflected in IHL treaties and, as the ICJ stated in the *Wall Advisory Opinion*, are ‘exclusively matters of human rights law’.261 These rights include for example, the right to recognition everywhere as a person before the law,262 the prohibition of arbitrary or unlawful interference with privacy, family or home and unlawful attacks on honour and reputation,263 freedom to hold opinions without interference,264 the right to peaceful assembly,265 freedom of association with others266 and the right to form trade unions,267 recognition of the right

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258 See Roberts, above n 96, 73.
259 There are also some other advantages to the application of IHRL which will be examined further in this Chapter (see 3.4).
260 See Chapter 2.4.
262 See, eg, *ICCPR* art 16; *ACHR* art 3; *ACHPR* art 5.
263 See, eg, *ICCPR* art 17; *ECHR* art 8; *ACHR* art 11(2) and (3).
264 See, eg, *ICCPR* art 19(1); *ECHR* art 10(1); *ACHR* art 13.
265 See, eg, *ICCPR* art 21; *ECHR* art 11; *ACHR* art 1; *ACHPR* art 11.
266 See, eg, *ICCPR* art 22; *ECHR* art 11; *ACHR* art 16; *ACHPR* art 10.
to marry (but free consent to marriage required of both spouses),\textsuperscript{268} the right to be registered immediately after birth and the right to have a name,\textsuperscript{269} the right to acquire nationality,\textsuperscript{270} the right to take part in public affairs,\textsuperscript{271} certain minority rights,\textsuperscript{272} the right to social security, including social insurance,\textsuperscript{273} the right to take part in cultural life,\textsuperscript{274} the right to enjoy the benefits of scientific progress and its applications,\textsuperscript{275} the right to benefit from the protection of the moral and material interests resulting from any scientific literary or artistic production of which he or she is the author,\textsuperscript{276} and the prohibition on imprisonment for inability to fulfil a contractual obligation.\textsuperscript{277} Given such norms do not exist within IHL, the only source for their application is IHRL, and as Roberts argues in the context of prolonged occupation ‘the application of [IHRL] standards is highly desirable’ in relation to such rights.\textsuperscript{278} I will argue in Chapter Six that, although such norms are not provided under IHL treaties, once a certain level of effective control is met, the obligation of States conducting military operations is activated in relation to these rights.\textsuperscript{279}

### 3.4 Practical Advantages of the Application of IHRL alongside IHL in Armed Conflict Situations

The additional application of IHRL treaties alongside IHL in armed conflict situations has several practical advantages.

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\textsuperscript{267} See, eg, ICESCR art 8; ICCPR art 22(1); ECHR art 11.
\textsuperscript{268} See, eg, ICCPR art 23; ICESCR art 10(1); ECHR art 12; ACHR art 17(2) and (3).
\textsuperscript{269} See, eg, ICCPR art 24(2); ACHR art 18.
\textsuperscript{270} See, eg, ICCPR art 24(3); ACHR art 20.
\textsuperscript{271} See, eg, ICCPR art 25; ACHR art 23; ACHPR art 13.
\textsuperscript{272} See, eg, ICCPR art 27. IHL provisions do not regulate the right of minorities as such, however, the Geneva Conventions provide that internees and prisoners of war are to be accommodated as far as possible according to their nationality, language and customs. See, eg, Geneva Convention III art 22; Geneva Convention IV art 82.
\textsuperscript{273} See, eg, ICESCR art 9.
\textsuperscript{274} See, eg, ICESCR art 15(1)(a); ACHPR art 17(2).
\textsuperscript{275} See, eg, ICESCR art 15(1)(b)
\textsuperscript{276} See, eg, ICESCR art 15(1)(c)
\textsuperscript{277} See, eg, ICCPR art 11; Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto ("ECHR Additional Protocol 4") art 1.
\textsuperscript{278} Roberts, above n 96, 73.
\textsuperscript{279} See Chapter 6.3.3.
3.4.1 IHRL Broadens the Scope of Protection under IHL

In the previous section, I demonstrated that since IHRL has a broader scope of application, it protects a wider range of individuals than IHL.

3.4.2 IHRL as a Supplementary Source of Interpretation

In many instances, IHRL provisions and the interpretations provided by the various human rights treaty bodies can function as a supplementary source of interpretation to give meaning and content to the protections provided under IHL, particularly when the latter are unclear, vague or abstract.\(^{280}\) This is highlighted in the Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ‘[t]o the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law’.\(^{281}\) The ICRC Study on Customary International Humanitarian Law also notes that IHRL may serve ‘to support, strengthen and clarify analogous principles of humanitarian law’.\(^{282}\)

IHRL and more specifically the principles of humanity and humanitarian considerations have influenced and continue to influence and affect IHL and its interpretation.\(^{283}\) This trend has been described by Meron as the ‘humanization of humanitarian law’.\(^{284}\) As Meron explains the notion of rights and personal autonomy embodied in the human rights regime has proved particularly important in the reinterpretation and ‘modification’ of Article 118 *Geneva Convention III* (governing the repatriation of prisoners of war at the end of hostilities) so as to incorporate their


\(^{281}\) Philip Alston, *Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions*, 14\(^{th}\) sess, Agenda Item 3, UN Doc A/HRC/14/24/Add.6 (28 May 2010) [29].

\(^{282}\) Henckaerts and Doswald-Beck, above n 23, 299.


consent and willingness to such repatriation.\textsuperscript{285} Accordingly, IHRL may result in a ‘reinterpretation of traditional IHL norms and concepts in ways that correspond to human rights principles’.\textsuperscript{286}

President Barak of the Israeli Supreme Court, for example, was of the view in the \textit{Targeted Killing} case that the principle of proportionality, a key principle within IHL, should be reconceptualised so as to incorporate \textit{inter alia} the duty to opt for the least harmful measure even in relation to enemy combatants.\textsuperscript{287} In the words of President Barak,

…of the possible military measures one should choose the measure whose violation of the victim’s human rights is the least. Therefore, if is possible to arrest, interrogate and prosecute a terrorist who is taking a direct part in hostilities, these steps should be followed.\textsuperscript{288}

Accordingly, on this approach non-State actors should not be killed when they can be arrested, a result that departs from classic IHL which does not prohibit the killing of enemy combatants. Similarly, in its Interpretive Guidance on the Notion of Direct Participation in Hostilities, the ICRC states that ‘it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force’.\textsuperscript{289}

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Guideline concludes that ‘the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances’. In the words of Pictet, ‘if we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil’.  

3.4.3 IHRL providing Mechanisms for Implementing and Monitoring Compliance with IHL Provisions

In recent years, a growing number of cases in relation to armed conflict are being litigated in judicial and quasi-judicial human rights bodies and an increasing number of individuals directly affected by armed conflicts are pursuing such paths open to them under IHRL. Human rights courts and tribunals have been regarded as an effective forum to partly remedy the absence of effective adjudication mechanisms within IHL. In fact, it is argued that one of the main aims of promoting co-application of IHRL is to increase the available legal forums and accountability measures within IHL, which could ultimately contribute to a greater degree of compliance with their international obligations by States conducting military operations, with a consequent improvement in the humanitarian conditions of

290 Melzer, above n 289, 82.
291 Jean Pictet, Development and Principles of International Humanitarian Law (Martinus Nijhoff, 1985) 75. There is great potential for IHRL to function as a supplementary source of interpretation for IHL. For example, the CESC in its General Comment No 13 on the right to education, stipulates that education in all its forms and at all levels shall exhibit the interrelated features of ‘availability’, ‘accessibility’, ‘acceptability’ and ‘adaptability’: CESC, General Comment No 13, above n 239, [6]. This framework can also be applied in the context of IHL in interpreting the right to education in armed conflict situations. For further elaboration of this framework, see Chapter 7.3.
293 See, eg, Heintze, above n 5, 819; Buis, above n 7; Ben-Naftali and Shany, above n 1; Gioia, above n 7; Doswald-Beck, above n 6; Kälin, above n 280, 441.
individuals caught up in armed conflict. While controversies remain surrounding the involvement of IHRL bodies in applying IHL, it is argued that human rights bodies ‘fill an institutional gap and give international humanitarian law an even more pro-human-rights orientation’. 

In Al-Skeini, for example, the ECtHR examined the right to life in the context of the armed conflict in Iraq. Similarly, the Inter-American Commission and Court of Human Rights and the African Court of Human Rights have dealt with issues arising from armed conflict. However, different approaches have been adopted by such judicial institutions to resolving claims arising out of armed conflict. While the ECtHR has been reluctant to explicitly invoke IHL provisions or to use it as a tool of analysis, a wider approach has been adopted within the Inter-American system. Both the Inter-American Commission and Court have applied not only human rights provisions but also IHL. In Abella v Argentina, commonly known as the La Tablada case, the Inter-American Commission held that in order to resolve claimed violations of the right to life arising out of an armed conflict, in addition to human rights law, the Commission ‘must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations’.

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298 See Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011).

299 See Reidy, above n 295.


The African Commission, however, is explicitly authorised by the *African Charter on Human and Peoples’ Rights* (‘ACHPR’) to ‘draw inspiration from’ and ‘take into consideration’ other international treaties, legal instruments, general principles recognised by African States as well as legal precedents and doctrine to interpret the Charter.\(^{302}\) Accordingly, the African Commission has competence to consider violations of IHL in the fulfilment of its monitoring mandates.\(^{303}\) In so doing, the Commission invoked IHL in the first inter-State case brought before it, between the Democratic Republic of Congo (‘DRC’) and Burundi, Rwanda and Uganda. The DRC alleged grave violations of human and peoples’ rights, including series of rapes, mutilations and mass transfers of individuals, committed by the armed forces of these States during their military activities in, and occupation of, its eastern provinces. The Commission asserted its competence to invoke IHL in considering these violations,\(^{304}\) and held that these series of violations fell within the province of IHL, and were therefore covered by the four *Geneva Conventions* and their *Additional Protocols*.\(^{305}\) As a result, the Committee condemned the three respondent States for violations of specific provisions of IHL in the territory of the DRC,\(^{306}\) in addition to the *ACHPR*.\(^{307}\)

Accordingly the co-application of IHRL potentially increases the available legal forums and accountability measures and thus might bring institutional benefits in terms of the protection of individuals as well as the development of jurisprudence.\(^{308}\)

### 3.5 Conclusion

In Chapter Two, I described the relationship between IHL and IHRL as complementary. Three dominant benefits have been identified in scholarly discussions regarding the application of IHRL alongside IHL in times of armed conflict. First, IHRL fills normative gaps in the scope of protection afforded by IHL. Secondly,

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\(^{302}\) See *ACHPR* arts 60-61.


\(^{304}\) See ibid.

\(^{305}\) See *Democratic Republic of Congo / Burundi, Rwanda, Uganda*, (AComHPR, 33rd sess, Com No 227/99, 29 May 2003) [70]. See also [78].

\(^{306}\) See ibid [79], [82]-[84], [86]-[87], [89].

\(^{307}\) See ibid [88].

IHRL functions as a supplementary source of interpretation to give meaning and content to IHL provisions. Thirdly, IHRL provides specific mechanisms for implementing and monitoring compliance with IHL provisions.

In this Chapter, I compared the provisions of the *ICCPR* and *ICESCR*, with the provisions of the *Geneva Conventions* of 1949 and Additional Protocols I and II to demonstrate more fully that complementarity and to identify in what ways IHRL enhances the protections available to individuals under IHL. First, I identified human rights norms which are common to both IHL and IHRL treaties. Secondly, I identified human rights norms which are exclusive to IHRL.

Norms common to both IHL and IHRL were further classified into three sub-categories:

(a) Comparable normative protection: where human rights are protected under both IHL and IHRL by identical or virtually identical rules. The *lex specialis* maxim is not applied in relation to such norms since no conflict arises between the protections of these norms under the two regimes. In this category, the application of IHRL treaties does not add significantly to the normative content of such rights, although there may be interpretive or institutional advantages.

(b) Enhanced normative protection under IHL: norms expressly dealt with under IHL, which are either merely implied in IHRL treaties or provided in greater detail in IHL as compared to IHRL. Since these rights are already protected in greater detail in IHL, IHRL does not significantly supplement the normative protections, although there may be interpretive and institutional advantages. For this category of rights, IHL will be the *lex specialis*, with IHRL being relevant to provide general guidance to assist in applying the more specific norms of IHL.

(c) Enhanced normative protection under IHRL: where human rights expressly contained in IHRL are either implied in IHL, or provided more comprehensively in IHRL as compared to IHL. In this category, IHRL will be the *lex specialis* with IHL being relevant to provide general guidance to assist in applying the more specific norms of IHRL. The additional application of IHRL treaties in armed conflict situations complements and surpasses the implicit and/or limited protections provided under IHL treaties. In this category, IHRL enhances the protections provided under
IHL in several distinct ways. First, IHRL fills normative gaps in the scope of protection afforded to specific individuals or situations by IHL. IHRL broadens the protections provided to limited categories of individuals under IHL. Additionally, IHL protections differ based on the classification of conflicts. IHRL expands the protection to all types of conflict. Thus, a greater number of individuals are protected under IHRL. Secondly, in relation to some rights, IHRL extends the mere negative obligation under IHL to refrain from interfering with the free enjoyment of the rights to a positive obligation to take steps to ensure the realisation of the rights.

There are also some human rights norms which are exclusive to IHRL and are not manifested in IHL treaties. The applicability of such norms, as they are unique to IHRL treaties and thus absent in IHL, is critically important since it provides an additional set of rights to individuals caught up in armed conflict.

In conclusion, the application of IHRL treaties alongside IHL in times of armed conflict could bring significant advantages, particularly by filling normative gaps in the scope of protection afforded to individuals by IHL. However, the extraterritorial application of IHRL treaties to situations of armed conflict will depend on the exercise of jurisdiction and the establishment of effective control over a given area. In Chapter Four, I consider the extraterritorial application of IHRL treaties in armed conflict, and explore the legal justifications for such application. In Chapter Five, I examine effective control over territory as the test for the activation of human rights treaty obligations of States involved in an armed conflict abroad. In Chapter Six, I develop a framework to identify when each group of rights will apply in an extraterritorial armed conflict situation.
Part Two

Extraterritorial Application of IHRL Treaties in Armed Conflict Situations

This Part considers whether States involved in an armed conflict abroad have extraterritorial human rights treaty obligations (Chapter Four). Assuming that IHRL does apply extraterritorially, I proceed to the question as to when such States have extraterritorial human rights treaty obligations (Chapter Five). The extraterritorial application of human rights treaties in armed conflict situations depends on whether a State conducting military operations abroad can have obligations that extend beyond its territorial borders pursuant to the human rights treaties to which it is a party. In Chapter Four, I examine the text of the treaties, the practice of States and human rights treaty bodies, international and regional jurisprudence and the writings of commentators to determine the theoretical foundations for extraterritorial human rights obligations. I conclude that it is now a well-established principle of international law that human rights treaties apply extraterritorially in armed conflict situations.

The notion of State jurisdiction is central to determining the territorial scope of human rights treaty obligations. Jurisdiction in this sense is the actual power and authority that a State has over territory and people. The extraterritorial application of human rights treaties thus depends on where (spatial notion of jurisdiction) and over whom (personal notion of jurisdiction) the State exercises jurisdiction.

In Chapter Five, I explore the development of the spatial notion of jurisdiction, where ‘effective control over an area’ has become the test for determining when human rights treaty obligations arise for States conducting military operations abroad. I develop a coherent framework identifying factors relevant to determining whether there is effective control over a given area, based on a detailed analysis of relevant jurisprudence. Finally, I conclude that States conducting military operations abroad may exercise different degrees of control, which are relevant to the scope of their human rights obligations.
4 EXTRATERRITORIAL APPLICATION AND JURISDICTION

4.1 Introduction

In Chapter Two, I concluded that IHRL continues to apply alongside IHL in armed conflict. In recent years, increased concerns about military operations conducted outside territorial borders, which dramatically affect the human rights of individuals, have resulted in a debate that questions whether States conducting military operations abroad have human rights obligations that go beyond their national borders. In this Chapter, I examine the extraterritorial applicability of IHRL treaties in armed conflict situations and conclude that a foreign State can have obligations that extend beyond its territorial borders under the human rights treaties to which it is a party.

I first examine the emerging literature on the theoretical foundations for the extraterritorial application of IHRL treaties. I assess the law of treaties, the text of the IHRL treaties including the ICCPR and ICESCR, the practice of States and treaty bodies, relevant jurisprudence and commentary to conclude that the extraterritorial application of IHRL treaties in armed conflict situations has to a great extent been recognised. I demonstrate that both the ICCPR and the ICESCR apply within the

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‘jurisdiction’ of the State Party, meaning that their application is not restricted to the territory of a State Party.

Secondly, I examine the concept of jurisdiction in human rights treaty law. I demonstrate that it is jurisdiction that determines the territorial scope of application of IHRL. In this context, jurisdiction is the actual physical power and authority that a State has over a territory and its people, and is different from that found in general international law.

Having established that IHRL treaties apply extraterritorially, Chapter Five then examines when a human rights instrument applies in a given extraterritorial armed conflict situation by addressing when a State will have ‘jurisdiction’.

4.2 Legal Foundations for the Extraterritorial Application of Human Rights Treaties

The question of the extraterritorial application of human rights treaties concerns whether a State can have obligations that extend beyond its territorial borders pursuant to the human rights treaties to which it is a party. The primary source to examine is the text of the treaties themselves, interpreted in light of the law of treaties.

4.2.1 The Law of Treaties

Article 29 of the Vienna Convention on the Law of Treaties (‘VCLT’) which reads ‘[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’ has been interpreted to create a presumption against extraterritorially. However, the travaux préparatoires of the VCLT indicate that Article 29 was not intended to restrict the extraterritorial

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application of treaties. Accordingly, the plain language of Article 29 ‘merely prescribes a minimum scope of application – the entire territory of the State’. Therefore, Article 29 does not envision a presumption against extraterritorially.

It is impossible to discuss the question of extraterritorial applicability of IHRL treaties outside the specific wording of each treaty. In fact, many of the treaties have specific application clauses which form the basis for any discussion on their reach while others have no application clauses at all. The ICCPR (as an example of the former) and ICESCR (as an example of the latter) will be discussed in further detail with regards to their extraterritorial application.

4.2.2 International Covenant on Civil and Political Rights (ICCPR)

Article 2(1) of the ICCPR provides that ‘each State Party [...] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [...] Covenant’. The Article is open to two interpretations.

One reading of the provision, treating ‘and’ as conjunctive, holds that every State Party is required to ensure the rights in the Covenant only to individuals who are both within its territory and subject to its sovereign authority. Consequently, because of the

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4 Rather, the debate within the ILC on this Article largely focused on the applicability of treaties to territorial units within federal States, and on whether declarations of partial territorial applicability would be viewed as reservations. Following a proposal by some members to clarify the extraterritorial applicability of some treaties, the Special Rapporteur stated that such addition is unnecessary as ‘the [rule on territorial application] hardly seems open to the construction that by implication it excludes the application of a treaty beyond the territories of the parties’: Humphrey Waldock, Special Rapporteur, Sixth Report on the Law of Treaties, UN Doc A/CN.4/186 and Add.1-7 (14 June 1966) 51, 66 [3]. Further, the final report of the ILC provided that ‘to attempt to deal with all the delicate problems of extraterritorial competence in the present article would be inappropriate and inadvisable’: ‘Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly: Draft Articles of the Law of Treaties with Commentaries’ [1966] II Yearbook of the International Law Commission 187, 214 [5]. See also Ben-Naftali and Shany, above n 1, 66-8; Milanovic, Extraterritorial Application of Human Rights Treaties, above n 1, 10.

5 Ben-Naftali and Shany, above n 1, 66.

6 The reference to territory in Article 2(1) of the ICCPR is absent from all other human rights treaties, including the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991). Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) is the only treaty which uses the ICCPR formula, but interestingly with the ‘and’ from Article 2(1) of the ICCPR explicitly turned into an ‘or’. See Marko Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 Human Rights Law Review 411, 413.
‘dual requirement’, the Covenant would not apply extraterritorially.\textsuperscript{7} An alternative interpretation of Article 2(1) treats the ‘and’ as a ‘disjunctive conjunction’, to indicate that a State must guarantee the rights of individuals within its territory and also to individuals under its jurisdiction.\textsuperscript{8}

Nowak argues that an excessively literal and rigid interpretation of the Article would be inconsistent with the ‘object and purpose’ of the Covenant and would lead to ‘absurd results’.\textsuperscript{9} Thus it is necessary, as Nowak suggests ‘to resort to a reasonable systematic and teleological interpretation’, which includes considering the \textit{travaux préparatoires}.\textsuperscript{10}

The term ‘within its territory’ derives from US initiatives and was criticised, above all, by France which successfully insisted in the Commission on Human Rights on replacing these words with the mere reference to ‘jurisdiction’.\textsuperscript{11} Eventually, after prompting by the US delegation, both requirements were laid down together. A final attempt by France and China in the Third Committee to remove the term ‘within its territory’ was defeated by a clear majority.\textsuperscript{12} The discussions reveal, however, that the adoption of the territorial requirement was intended to avoid obliging States Parties to protect individuals who are subject to their jurisdiction but living abroad, against the wrongful acts of the foreign territorial sovereign. It was not intended to mean that a State should not be relieved of its obligations under the Covenant to persons who

\textsuperscript{7} See, eg, Dennis, ‘Application of Human Rights Treaties Extraterritorially’, above n 2; Dennis, ‘Non-Application of Civil and Political Rights Treaties Extraterritoriality’, above n 2. See also Dietrich Schindler, ‘Human Rights and Humanitarian Law: Interrelationship of the Laws’ (1982) 31 \textit{American University Law Review} 935, 939; Sarah Joseph and Melissa Castan, \textit{The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary} (Oxford University Press, 3\textsuperscript{rd} ed, 2013) 96. While Joseph and Castan believe that the text of Article 2(1) seems expressly to exclude liability for a State for acts which occur outside its territory, they argue that the HRC has taken a liberal approach confirming that States do have a level of extraterritorial responsibility.

\textsuperscript{8} See Thomas Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’ in Louis Henkin (ed), \textit{The International Bill of Rights: The Covenant on Civil and Political Rights} (Colombia University Press, 1981) 72, 74. See also Manfred Nowak, \textit{U.N. Covenant on Civil and Political Rights CCPR Commentary} (N.P. Engel Publisher, 2\textsuperscript{nd} revised ed, 2005) 43.

\textsuperscript{9} See Nowak, above n 8.

\textsuperscript{10} Ibid. See also Marco Sassòli, Antonie A Bouvier and Anne Quintin, \textit{How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law} (International Committee of the Red Cross, 3\textsuperscript{rd} ed, 2011) vol I, 451.


\textsuperscript{12} See ibid.
remained within its jurisdiction merely because they were not within its territory.\textsuperscript{13} Thus, ‘the legislative history of Article 2(1) does not support a narrow territorial construction’.\textsuperscript{14}

The HRC has sought to clarify the interpretation of Article 2(1) by reference to the object and purpose of the Covenant so as to offer increased legal protection thereunder. For example, General Comment No 23 refers to Article 2(1) as applying to all individuals ‘within the territory or under the jurisdiction of the State’.\textsuperscript{15} In General Comment No 24, the Committee asserted in broad terms that ‘[t]he intention of the Covenant is that the rights contained therein should be ensured to all those under a State’s party’s jurisdiction’.\textsuperscript{16} The HRC in its more recent General Comment No 31 has interpreted the Article disjunctively and concluded that ‘State Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction’.\textsuperscript{17}

In the case of \textit{Lopéz v Uruguay} concerning the abduction of a citizen of Uruguay in Argentina where he had been granted refugee status,\textsuperscript{18} the HRC stated that Article 2(1) ‘does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it’.\textsuperscript{19} It further emphasised that ‘it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to

\begin{footnotesize}
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\item[\textsuperscript{13}] See Bossuyt, above n 11, 53.
\item[\textsuperscript{14}] Theodor Meron, ‘Extraterritoriality of Human Rights Treaties’ (1995) 89(1) \textit{American Journal of International Law} 78, 79.
\item[\textsuperscript{15}] HRC, \textit{General Comment No 23: The Right of Minorities (Art. 27)}, 50\textsuperscript{th} sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [4] (emphasis added).
\item[\textsuperscript{16}] HRC, \textit{General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant}, 52\textsuperscript{nd} sess, UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994) [12].
\item[\textsuperscript{17}] HRC, \textit{General Comment No 31: Nature of the General Obligations on State Parties to the Covenant}, 80\textsuperscript{th} sess, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [10].
\item[\textsuperscript{18}] While the question before the Committee was whether a State had the same obligations towards its citizens abroad as at home, it is probably reasonable to suggest that the Committee’s view could also be applied to all individuals in other States. See Sigrun I Skogly, ‘Extraterritoriality: Universal Human Rights without Universal Obligations?’ in Sarah Joseph and Adam McBeth (eds), Research Handbook on International Human Rights Law (Edward Elgar, 2010) 71, 83-4.
\item[\textsuperscript{19}] HRC, \textit{Views of the HRC under the Optional Protocol to the ICCPR: Communication No R.12/52}, 36\textsuperscript{th} sess, UN Doc Supp No.40 (A/36/40) at 176 (6 June 1979) (‘Sergio Euben Lopez Burgos v Uruguay’) [12.3].
\end{itemize}
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perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory’. Additionally, in relation to the US reports concerning *inter alia* the conditions at Guantanamo Bay, the HRC noted:

> with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice; [...] The State party should in particular: (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory.

Thus the jurisprudence of the HRC provides clear support for the extraterritorial applicability of the Covenant.

Furthermore, the ICJ has directly addressed the issue of the application of the *ICCPR* in an extraterritorial context. The ICJ concluded expressly in the *Wall Advisory Opinion* that ‘the [*ICCPR*] is applicable in respect of acts done by a State in the exercise of its jurisdiction *outside its own territory’.* In reaching this conclusion the ICJ relied on the practice of the HRC and the preparatory work of the *ICCPR*. Specifically, the Court observed that:

> While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [*ICCPR*], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. [*HRC, Concluding Observations: United States of America, 87th sess, UN Doc CCPR/C/USA/CO/3/Rev.1 (18 December 2006)] [10].

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22 See also HRC, *Concluding Observations: Israel*, 78th sess, UN Doc CCPR/C/ISR/78/Add.5 (6 April 1999) [9]; HRC, *Concluding Observations: United States of America*, 53rd sess, 1413th mtg, UN Doc CCPR/C/79/Add.50 (6 April 1995) [19].


24 Ibid 179 [109]. The Court then referred to *Lopéz v Uruguay* (as discussed above) and *HRC, Views of the HRC under the Optional Protocol to the ICCPR*: Communication No R.13/56, 36th sess, UN Doc Supp No.40 (A/36/40) at 185 (17 July 1979) (‘*Lilian Celiberti de Casariego v Uruguay*’).
The travaux préparatoires of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.\(^{25}\)

The ICJ again addressed the issue of extraterritorial application of human rights law in its 2005 judgment in the *Armed Activities* case. The Court reiterated its prior holding in the *Wall Advisory Opinion* that ‘international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”’,\(^{26}\) with special attention to occupied territories. The Court further found several instruments in the field of IHRL applicable to the case, including the *ICCPR*.\(^{27}\) The Court concluded that the conduct of Ugandan forces on Congolese territory gave rise to violations of Uganda’s obligations under the *ICCPR*.\(^{28}\)

Accordingly, the *ICCPR* applies to everyone within the jurisdiction of the State Party meaning that the Covenant applies beyond territorial borders to cover areas and individuals within its jurisdiction.

**4.2.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)**

The *ICESCR*, unlike the *ICCPR*, does not contain any provision limiting the general scope of application of the treaty to ‘territory’ or ‘jurisdiction’. Article 2(1) of the *ICESCR* outlining the nature of State’s obligations reads as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Some have raised the possibility that ‘absent a jurisdictional clause, human rights treaty obligations may generally be regarded as extending to all acts of state.


\(^{26}\) *Armed Activities (Judgment)* [2005] ICJ Rep 168, 242-3 [216].

\(^{27}\) See ibid 243-4 [217].

\(^{28}\) See ibid 244 [219].
irrespective of where they may be taken as having effect’. Accordingly, the Covenant’s silence on scope has been interpreted to indicate that ‘there is nothing in the ICESCR which would limit the rights recognised [...] to persons within a State’s territory’. Many scholars recognise that the reference to ‘international assistance and co-operation’ provides evidence of some form of extraterritorial obligations. However, the understanding of the content of the extraterritorial obligations stemming from Article 2(1) of the ICESCR has not been significantly developed. Given the non-existence of an individual complaints procedure under the Covenant, until the recent entry into force of the Optional Protocol to the International Covenant on Economic,


30 Rolf Künnemann, above n 2. Künnemann argues that the territorial scope of treaties is qualified in Article 29 of the VCLT, which reads ‘unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’. Article 29, however, Künnemann claims, ‘does not establish that the ICESCR, which is a treaty not explicitly restricted to be binding for each State party only in its territory, would automatically not be binding outside and would need for its extraterritorial obligations a specific statement to this effect’: at 201. See also Elizabeth Mottershaw, ‘Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law’ (2008) 12(3) The International Journal of Human Rights 449, 452.

Social and Cultural Rights, there is no case law yet that could shed light on this question. Nevertheless, the CESCR, the supervisory body for the ICESCR, has repeatedly included explicit and implicit references to ‘international assistance and co-operation’ and ‘international obligations’ in its General Comments and in the questioning of and concluding observations to States’ reports. However, an overall discussion on the issue by the CESCR from a legal perspective has not taken place so far.

‘International assistance and co-operation’ incorporates a shared responsibility of States aimed at contributing to the realisation of economic, social and cultural rights and to the achievement of the right to development, particularly through economic and technical assistance, in a globalised world. On this ground, I agree with academic writers that ‘a certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty’. However, in my view, the extraterritorial obligations of States conducting military operations abroad are different from the

34 See, eg, CESCR, General Comment No 3: The Nature of States Parties Obligations (Art. 2, par 1) 50th sess, UN Doc E/1991/23 (14 December 1990) [13]-[14]; CESCR, General Comment No 12: The Right to Adequate Food (Art. 11), 20th sess, UN Doc E/C.12/1999/5 (12 May 1999) [36]-[37]; CESCR, General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12), 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000) [45]; CESCR, General Comment No 15: The Right to Water (Arts 11 and 12), 26th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003) [37]-[38]; CECSR, General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) [36]-[38]; CESCR, General Comment No 18: The Right to Work (Art. 6), 35th sess, Agenda Item 3, UN Doc E/C.12/GC/18 (6 February 2006) [29]-[30]. For a detailed analysis of the way in which the CESCR has approached this issue, see Magdalena Sepúlveda, ‘Obligations of “International Assistance and Cooperation” in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2006) 24 Netherlands Quarterly of Human Rights 271. Only in General Comment No 19, with respect to the right to social security, does the CESCR explicitly refer to extraterritorial obligations. ‘State Parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where State Parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal and political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law’: CESCR, General Comment No 19: The Right to Social Security (Art 9), 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [54].
international obligation to assist and cooperate incumbent on States, as articulated in Article 2(1). As the CESCR has emphasised in several General Comments, it is the obligation of States ‘to provide international assistance and co-operation, especially economic and technical which enables developing countries to fulfil their core obligations’ under the ICESCR. The extraterritorial obligations of States conducting military operations abroad stems from actions or omissions of those States as a result of military activities undertaken in another State and is different from the ‘international obligation to assist and cooperate’ which often relates to general situations of deprivation that cannot always be linked to the actions or omissions of that State. Accordingly, I argue that the extraterritorial obligation of States conducting military operations abroad cannot be derived from the reference to ‘international assistance and co-operation’ or ‘international obligations’.

Two textual features indicate that the protection of economic, social and cultural rights is not limited to those people resident in the territory of a State Party only. First, the Optional Protocol to the ICESCR expressly establishes competence to receive communications from any individual or group ‘under the jurisdiction of a State party’. This suggests that the State can be found to be in violation of its obligations under the ICESCR for actions taken by it extraterritorially in respect of individuals within its jurisdiction. Second, Article 14 of the ICESCR in relation to the right to education, allows for transitional measures when a State ‘has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education’.

Additionally, the extraterritorial application of the ICESCR is reflected in a number of General Comments of the CESCR. General Comment No 1 on Reporting by State Parties refers to ‘the extent to which the various rights are, or are not, being enjoyed

36 See, eg, CESCR, General Comment No 15, above n 34, [38]. See also CESCR, General Comment No 12, above n 34; CESCR, General Comment No 18, above n 34.
38 Optional Protocol to the ICESCR art 2 (emphasis added).
40 See ICESCR art 14 (emphasis added).
by all individuals *within its territory or under its jurisdiction*. Further, in General Comment No 15 on the right to water the Committee provides that water must be accessible ‘to everyone without discrimination, *within the jurisdiction* of the State party’. The CESC in its Concluding Observations on Israel has also noted that ‘the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction’. This view was reaffirmed in the 2001 Concluding Observations in which the Committee ‘deplores’ Israel’s position that the Covenant does not apply to what Israel describes as ‘areas that are not subject to its sovereign territory and jurisdiction’. Similar concerns were again expressed by the Committee in 2002 and 2003.

The ICJ is also supportive of this view and has made it clear that Israel’s obligations under the *ICESCR* extend beyond territorial borders to cover the occupied territories. The Court took note of the Covenant’s silence on territorial scope and stated:

> The [*ICESCR*] contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.

In support of this, the Court referred to Article 14. The Court also refused to accept Israel’s views and concluded that the construction of the wall and its associated regime impede the exercise by the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) of the rights to work, to health, to education and to an adequate standard of living as proclaimed in the *ICESCR*.

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42 CECSR, *General Comment No 15*, above n 34, [12(c)] (emphasis added).
43 CESCR, *Concluding Observations: Israel*, UN Doc E/C.12/1/Add.27 (4 December 1998) [6].
47 See ibid 191-2 [134]. As previously mentioned, the ICJ in *Armed Activities* stated that ‘international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’: *Armed Activities (Judgment)* [2005] ICJ Rep 168, 242-3 [216].
Consequently, I agree with scholars who argue that the *ICESCR* applies to everyone within the jurisdiction of the State Party, and that the Covenant applies beyond territorial boundaries to cover areas and individuals within its jurisdiction.\(^48\)

Accordingly, IHRL treaties including the *ICCPR* and the *ICESCR* apply extraterritorially. This is in line with the practice of the majority of States,\(^49\) except Israel\(^50\) and the US,\(^51\) who dispute the extraterritorial applicability of human rights


\(^49\) For example, Member States of the Council of Europe have unanimously adopted Resolutions in the Committee of Ministers, the Council’s decision-making body, for the execution of judgments of the ECHR which had applied the Convention extraterritorially in several of its cases, such as *Cyprus v Turkey* (Interim Resolution ResDH (2005)44, concerning the judgment of the European Court of Human Rights of 10 May 2001 in the Case of Cyprus against Turkey (adopted by the Committee of Ministers on 7 June 2005, at the 928th meeting of the Ministers’ Deputies) and *Ilascu v Moldova and Russia* (Interim Resolution ResDH (2006)26, concerning the judgment of the European Court of Human Rights of 8 July 2004 (Grand Chamber) in the Case of Ilascu and others against Moldova and the Russian Federation (adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies). In relation to Italy’s position that the *ICCPR* applies to ‘acts of Italian troops or police officers who are stationed abroad, whether in a context of peace or armed conflict’, see HRC, *Concluding Observations: Italy*, 85th sess, UN Doc CCPR/C/ITA/CO/5 (24 April 2006) [3]. See also, HRC, *Concluding Observations: Poland*, 82nd sess, UN Doc CCPR/CO/82/POL (2 December 2004) [3] in which the HRC welcomed the commitment of the State Party to respect the rights recognised in the Covenant ‘for all individuals subject to its jurisdiction in situations where its troops operate abroad’. See also ‘Written Statement of the League of Arab States’, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2003) ICC Pleadings [10.8]-[10.12] in which the League of Arab States emphasised the extraterritorial reach of IHRL treaties. Extraterritorial application of IHRL treaties has also been supported by written statements of, inter alia, Malaysia and France. See ‘Written Statement of Malaysia’, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2003) ICC Pleadings [121]-[128]; ‘Written Statement of the French Republic’, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2003) ICC Pleadings [22]-[23]. See also the statements made by Greece, Sweden and Cyprus with regards to the declarations and reservations made by Turkey upon ratification of the *ICCPR* in which Turkey declared that it ratifies the *ICCPR* exclusively with regard to the national territory where the Constitution and the legal and administrative order of Turkey are applied (for further elaboration of State pratice supporting the extraterritorial application of human rights, see Cordula Droege, ‘Elective Affinities? Human Rights and Humanitarian Law’ (2008) 90(871) *International Review of the Red Cross* 501, 519; Gondek, above n 2, 286-8.\(^\)

\(^50\) See, eg, *Second Periodic Report of Israel to the Human Rights Committee*, UN Doc CCPR/C/ISR/2001/2 (4 December 2001) 5-6 [8]. Consecutive Israeli governments have objected to the application of various human rights treaties to which they are a party in the Occupied Territories. Israel’s position regarding the applicability of the treaties involves three main arguments: (a) the divergence of IHL and IHRL argument, according to which the application of the former in the Occupied Territories excludes the applicability of the latter. (See, eg, HRC, *Summary Record of the 1677th Meeting: Israel*, 63rd sess, UN Doc CCPR/C/ISR.1677 (27 July 1998) [32]; HRC, *Summary Record of the 1675th Meeting: Israel*, 63rd sess, UN Doc CCPR/C/ISR.1675 (21 July 1998) [23], see Chapter 2.3); (b) the treaty interpretation argument, according to which the jurisdictional clauses of the human rights treaties to which Israel is a party should be interpreted as limited to the sovereign territory
treaties.\textsuperscript{52} The \textit{ICCPR} and \textit{ICESCR} are not restricted to those people resident in the territory of a State Party and can apply extraterritorially if a State’s jurisdiction extends beyond its territory. Accordingly, it is necessary to establish whether a situation falls within the State’s ‘jurisdiction’ before its obligations in the treaties are triggered.

4.3 Jurisdiction

The notion of State jurisdiction is central to determining the scope of application of IHRL treaties. Jurisdiction is a ‘threshold criterion’\textsuperscript{53} and the extraterritorial application of human rights treaties depends on where and over whom the State exercises jurisdiction.\textsuperscript{54} It is essential to distinguish the concept of jurisdiction under IHRL treaties from the concepts of prescriptive and enforcement jurisdiction that regulate a State’s law-making and enforcement powers generally.\textsuperscript{55} Jurisdiction in human rights law ‘is meant to denote the power that a State exercises under international law over persons (both natural and legal) or territory and its
inhabitants’.

It is the actual physical power and authority that a State has over a territory and its people.

Questions as to a State’s extraterritorial human rights obligations are frequently raised before national, regional and international courts. The broad spectrum of cases in relation to the extraterritorial application of human rights treaties, coupled with the fact that these matters are usually of political and legal sensitivity, has led to considerable confusion and ambiguity in the case law. The aim of this section is to demonstrate that the extraterritorial reach of human rights treaty obligations has been recognised in the jurisprudence in relation to overseas military operations. For this purpose, I examine the relevant case law as developed in the ICJ, as well as the European and Inter-American Human Rights bodies.

### 4.3.1 The International Court of Justice

As mentioned earlier, the ICJ has held that human rights instruments apply extraterritorially. This position was confirmed in the *Wall Advisory Opinion* and the *Armed Activities* case. In the latter, the Court found that the human rights treaty obligations of Uganda applied extraterritorially, reiterating that jurisdiction is the key determination of extraterritorial application: ‘international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”’. Consequently the ICJ found a number of human rights law instruments applicable, including the ICCPR, the ACHPR, the CRC and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*.

### 4.3.2 The European Commission and Court of Human Rights

The European Commission and Court of Human Rights have also found that actions by a High Contracting Party beyond its territory may be in breach of that State’s obligations. The Turkish invasion in northern Cyprus in 1974 gave rise to three
inter-State complaints, lodged by Cyprus, dealing with the extraterritorial application of the *ECHR*. The European Commission of Human Rights (‘*ECoHR*’) held that the term ‘within their jurisdiction’ is not ‘equivalent to or limited to the national territory of the High Contracting Party concerned’.

The Commission also held that ‘the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad’. In reaching this determination, the Commission relied on the language and the object of the Convention.

*Loizidou v Turkey* offered the first opportunity for the ECtHR to express its views on extraterritorial application of human rights treaties. The case concerned the prevention of a Greek-Cypriot from accessing her property in Northern Cyprus by Turkish forces after the Turkish occupation of that part of the island. The admissibility of the case was challenged by the Turkish government as it concerned an area outside the territory of Turkey. The ECtHR, however, clearly stated that ‘the concept of “jurisdiction” under Article 1 of the [*ECHR*] is not restricted to the national territory of the Contracting States’.

The Court held that ‘the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory’. *Loizidou* is thus significant in confirming the extraterritorial reach of the Convention to cover situations where jurisdiction is exercised beyond national territory.

In *Banković v Belgium*, sixteen people were killed and another sixteen were seriously injured in the 1999 bombing of the Serbian Radio and Television Station (‘*RTS*’) which was hit by a cruise missile launched from a NATO aircraft against the Federal Republic of Yugoslavia (‘*FRY*’). Five relatives of the deceased and a survivor of the bombing brought a complaint against the NATO member States, in so far as they...
were bound by the *ECH*.*R*. The Court decided that the applicants had not been ‘within the jurisdiction’ of the Seventeen European NATO Member States, for the purposes of the *ECH*.*R*. Although the case was dismissed, the extraterritorial application of human rights norms was reaffirmed, albeit that extraterritorial application was said to be ‘exceptional’\(^\text{65}\) given that ‘jurisdiction … is primarily territorial’.\(^\text{66}\)

In *Ilascu v Moldova and Russia* the question at issue was whether the alleged breaches of the *ECH*.*R* in the Moldovan Republic of Transdniestria (‘MRT’), a secessionist territory in Moldova, which had been set up in 1991 with the support of the Russian Federation, came within the jurisdiction of Russia. The ECtHR recalled that the concept of jurisdiction within the meaning of Article 1 of the Convention is not limited to the national territory of the High Contracting Parties.\(^\text{67}\) Accordingly, the Court concluded that the applicants came within the jurisdiction of Russia and thus Russia’s responsibility was engaged with regard to the acts complained of.\(^\text{68}\) More recently, the ECtHR in *Catan v Moldova and Russia*, which involved the forcible closure of several schools by the MRT authorities, reaffirmed that ‘acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1’.\(^\text{69}\) The Court also recalled that a State can in certain circumstances ‘exercise jurisdiction extraterritorially’.\(^\text{70}\)

Similarly, in *Issa v Turkey* which involved the alleged unlawful arrest, detention, ill-treatment and subsequent killing of a number of Iraqi shepherds in the course of a

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\(^{65}\) See *Banković v Belgium* [2001] XII Eur Court HR 333, 352 [61].

\(^{66}\) See ibid 351 [59]. Extraterritorial jurisdiction is simply a factual test, regardless of whether such a situation is lawful: Wilde, ‘Triggering State Obligations Extraterritorially’, above n 55, 142; Milanovic, *Extraterritorial Application of Human Rights Treaties*, above n 1, 22. For example, the Court in *Loizidou* recognised Turkey’s exercise of jurisdiction for *ECH*.*R* purposes because of the degree of the control exercised, regardless of the legality of the exercise of control. See *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (Ser A) 23–4 [62]; *Loizidou v Turkey (Merits)* [1996] VI Eur Court HR 2216, 2234–5 [52].

\(^{67}\) See *Ilascu v Moldova and Russia* [2004] VII Eur Court HR 179, 263 [314].

\(^{68}\) See ibid 282 [394].

\(^{69}\) *Catan v Moldova and Russia* (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [104].

\(^{70}\) Ibid [114].
military operation conducted by Turkish forces in northern Iraq in April 1995, the extraterritorial application of human rights norms was reaffirmed.71

A recent case that merits discussion is Al-Skeini v United Kingdom, recognised as ‘the leading Strasbourg authority on the extraterritorial application of the ECHR’.72 The proceedings arose from the killing of six Iraqi civilians by British armed forces in Basra, Iraq, at a time when the UK was recognised as an occupying power in Basra city. Five of the deceased Iraqi civilians were allegedly killed by British troops on patrol, while the other had been arrested by military forces and died whilst in British custody. The relatives of the deceased applied to UK Courts for an order of judicial review against the Secretary of State for Defence, seeking to challenge his refusal to order an independent enquiry into the circumstances of the deaths, and his refusal to afford the claimants redress for causing them.73

The UK House of Lords examined the jurisprudence of the ECtHR, finding that the case law does ‘not speak with one voice’,74 but that the ECtHR had recognised the extraterritorial application of the ECHR. The ECtHR has sometimes adopted a restrictive approach to extraterritorial jurisdiction (as in Bankovic)75 and in other cases has tended to adopt a broader view of extraterritorial application (as in Issa).76 The House of Lords eventually affirmed the decisions of the Queen’s Bench Divisional Court and Court of Appeal and dismissed the cases of the five applicants killed on patrol on preliminary grounds of lack of UK jurisdiction, and consequent lack of extraterritorial application of the ECHR.77 However, the case of Baha Mousa, who was killed by British troops when held as a prisoner in a British military detention

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71 See Issa v Turkey (European Court of Human Rights, Chamber, Application No 31821/96, 16 November 2004) [68]-[69].
75 See ibid 215 [131] (Lord Brown).
76 See ibid 214 [127] (Lord Brown).
77 See ibid 202-3 [81]-[83] (Lord Rodger), 204 [90]-[92] (Baroness Hale), 206 [97] (Lord Carswell), 215-6 [132] (Lord Brown). See also R (Al-Skeini) v Defence Secretary [2007] QB 140, 225-6 [287]-[288], 244 [344] (Queen’s Bench Divisional Court); R (Al-Skeini) v Defence Secretary [2007] QB 140, 287 [138], 288 [142] (Brooke LJ) (EWCA Civ). For Sedley LJ, however, UK’s jurisdiction extended ‘beyond the walls of the British military prison and include[d] the streets patrolled by British troops’: R (Al-Skeini) v Defence Secretary [2007] QB 140, 303 [205] (Sedley LJ). In other words, Sedley LJ recognised the cases of the five applicants killed on patrol to be within the jurisdiction of UK. However, his Honour raised doubt rather than dissented, because in his view ‘such a conclusion would probably not be compatible with the central reasoning of Bankovic’s case’: at [206].
unit, was found to be within the jurisdiction of the UK. Consequently, the UK Courts found that the *ECHR* applies extraterritorially. However, jurisdiction was not established on the particular facts of the case in relation to the five applicants killed on patrol. After their case was rejected by the House of Lords, all six applicants appealed to the ECtHR. In its judgment, the Grand Chamber ‘recognised the exercise of extraterritorial jurisdiction’ by Contracting States. For the purposes of this Chapter, both the UK Courts (including the Divisional Court, the Court of Appeal and the House of Lords) and the ECtHR recognised and established the extraterritorial reach of the *ECHR*.

Thus, the extraterritorial application of the *European Convention* has been verified on numerous occasions in the jurisprudence of the European Commission and Court of Human Rights. However, views vary as to when jurisdiction is established and subsequently the extent of the extraterritorial reach of the *ECHR*; issues which will be examined in the following Chapters.

### 4.3.3 The Inter-American System of Human Rights

The IACoHR has determined that the *American Declaration of the Rights and Duties of Man* applies outside the territory of State Parties. The Commission stated in *Saldaño v Argentina* that the term ‘jurisdiction’ in Article 1(1) is not limited to, or

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78 See *R (Al-Skeini) v Defence Secretary* [2007] QB 140, 225-6 [287]-[288] (Queen’s Bench Divisional Court); *R (Al-Skeini) v Defence Secretary* [2007] QB 140, 278-9 [108], 288 [143] (Brooke LJ), 297 [182] (Sedley LJ) (EWCA Civ); *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, 204 [90]-[92] (Baroness Hale), 206 [97] (Lord Carswell), 215-6 [132] (Lord Brown).

79 *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011).

80 The Inter-American system of human rights includes every independent country in the hemisphere. The *Statute of the Inter-American Commission on Human Rights* provides that the Commission is an organ of the Organisation of American States, created to promote the observance of human rights. ‘Human rights are understood to be the rights set forth in the *American Convention on Human Rights*, in relation to the States Parties thereto, [and those] set forth in the *American Declaration on the Rights and Duties of Man*, in relation to the other member States’ that have not yet ratified or acceded to the Convention. *Statute of the Inter-American Commission on Human Rights*, adopted by the OAS General Assembly Res No 447, 9th Regular Session, La Paz, Bolivia, October 1979 art 1. The IACoHR was created in 1959, not by treaty but by a political resolution. Since the Commission’s mandate was to promote and protect human rights in the hemisphere, the only existing human rights instrument, at the regional level, was the *American Declaration*. See Christina M Cerna, ‘Extraterritorial Application of the Human Rights Instruments of the Inter-American System’ in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 141.

81 Most cases of extraterritorial application by the Commission involve the *American Declaration*, which unlike the *American Convention* contains no limiting jurisdictional clause. See Douglass Cassel, ‘Extraterritorial Application of Inter-American Human Rights Instruments’ in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 175, 178.
merely co-extensive with, national territory.\textsuperscript{82} It found that ‘a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory’.\textsuperscript{83} The Commission cited the European Commission and Court of Human Rights in \textit{Cyprus v Turkey} as authority for expanding the reach of human rights beyond the State’s national territory.\textsuperscript{84}

Following the invasion of Grenada by the US in October 1983, a number of individuals were arrested and detained by US forces. Seventeen Grenadian claimants, including Bernard Coard, filed a petition before the Commission in July 1991. Although the US did not challenge the extraterritorial application of the \textit{American Declaration} in \textit{Coard v United States}, the Commission chose to address this issue. The Commission held that:

\begin{quote}
Each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus.\textsuperscript{85}
\end{quote}

The Commission reiterated its conclusion that jurisdiction could be exercised beyond the State’s territory in \textit{Armando Alejandro Jr v Cuba}. The case concerned the shooting down of two unarmed civilian light airplanes belonging to the ‘Brothers to the Rescue’ anti-Castro organisation by a Cuban military aircraft in international airspace.\textsuperscript{86} The fact that the events took place outside the national territory of the Cuban State, in the Commission’s view, did not limit the competence and reach of the \textit{American Declaration}. Consequently, the Commission applied ‘the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace’.\textsuperscript{87}

In sum, the extraterritorial application of the \textit{American Declaration} has been confirmed by the Inter-American Commission on of Human Rights.

\textsuperscript{83} Ibid [17]. The case involved a petition against Argentina by an Argentine national who had been sentenced to death in the US.
\textsuperscript{84} See ibid [18]-[19].
\textsuperscript{87} Ibid [25]. See Cerna, above n 80, 159.
4.4 Conclusion

The subject of the extraterritorial application of IHRL treaties in armed conflicts has received renewed attention as a result of increased concerns about military operations conducted outside territorial borders following September 11, 2001. In this Chapter, I first established that the textual interpretation of the ICCPR and ICESCR, the practice of States and relevant treaty bodies, jurisprudence and the majority of current scholarship support the extraterritorial application of these treaties in armed conflict situations.

Secondly, I examined the concept of State ‘jurisdiction’ which is central to determining the scope of application of human rights treaties. I concluded that jurisdiction in this sense, is the actual physical power, authority and control that a State has over a territory and its people. Jurisdiction is a ‘threshold criterion’ which must be established to give rise to human rights treaty obligations.

In the next Chapter, I will examine when a human rights treaty applies in a given extraterritorial armed conflict situation by addressing when a State will have ‘jurisdiction’. I will examine ‘effective control over an area’ as a test developed within the jurisprudence in order to determine a State’s jurisdiction over territory.
5 EFFECTIVE CONTROL OVER TERRITORY

5.1 Introduction

The previous Chapter concluded that States will sometimes have human rights treaty obligations when conducting military operations abroad. In order for a State’s treaty obligations to be triggered, it is necessary to establish a nexus to the State, by showing that the situation falls within the State’s jurisdiction. In this sense, jurisdiction is a ‘threshold criterion’\(^1\) which must be met for treaty obligations to arise.\(^2\)

This Chapter examines when a human rights instrument applies in a given extraterritorial armed conflict situation by addressing when a State will have ‘jurisdiction’. The next two Chapters put forward a proposal of how substantive obligations that follow from the existence of effective control could be realistically applied in practice.

In order for a State involved in an armed conflict abroad to be bound by its human rights treaty obligations, it must either exercise the requisite level of control over the territory, bringing all individuals in that territory within its jurisdiction, or over specific individuals, thus bringing only those individuals within its jurisdiction.\(^3\)

Consequently, the extraterritorial application of human rights treaties is limited to situations where the State authorities have ‘effective control over territory’ (the spatial

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\(^1\) See Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [130]; Catan v Moldova and Russia (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [103].


notion of jurisdiction) or ‘authority and control over a person’ (the personal notion of jurisdiction), so they can practically and effectively ensure respect for human rights. This requirement ensures that States are not held accountable for violations over which they have no control.

This Chapter focuses on the spatial notion of jurisdiction. First, I explore the development of the spatial notion of jurisdiction and the concept of ‘effective control over territory’ as a test for the extraterritorial application of human rights norms in times of armed conflict. Jurisdiction may be established by effective control exercised either directly through a State’s forces or indirectly through a subordinate local

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4 See Cordula Droge, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40(2) Israel Law Review 310, 330. See also Manisuli Ssenyonjo, above n 2; Christoph Heyns, Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions, 68th sess, Agenda Item 69(b), UN Doc A/68/382 (13 September 2013) [46]. The personal notion of jurisdiction may arise for instance, when the State is running a detention facility outside its borders. In such circumstances, agents of the state conducting operations abroad exercise de facto control over persons and property outside their territory ‘in a more or less limited, incidental, ad hoc fashion’ in the territory of another State: Lawson, above n 3. Thus, the decisive factor in such cases is the ‘exercise of authority over persons or property’. See Cyprus v Turkey (1975) 2 Eur Comm HR 125, 136. ‘A person is in the control of a party when the latter determines the condition in which the individual finds himself and whether he is free to leave that control’: Françoise Hampson, ‘Fundamental Guarantees’ in Elizabeth Wilmshurst and Susan Breau (eds), Perspectives on the ICRC Study on Customary International Humanitarian Law (Cambridge University Press, 2007) 282, 283. Obvious examples of this instance are arrest, abduction, detention and internment where the individual is within custody or physical control of the intervening State. There is overwhelming juridical support for such cases to fall within the jurisdiction of the foreign state to trigger human rights obligations. As Christopher Greenwood QC, counsel for the UK in Banković noted: ‘a prisoner is the archetypal example of someone who comes within the jurisdiction of the detaining state which exercises the most extreme type of control over him’; Verbatim Record of the hearing held in Banković (24 October 2001) 10, cited in Michael O’Boyle, ‘The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on Life after Banković’ in Fons Coomans and Menno T Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004) 125, 138. In relation to the ECtHR see, eg, Öcalan v Turkey [2005] IV Eur Court HR 131, 164 [91]; Issa v Turkey (European Court of Human Rights, Chamber, Application No 31821/96, 16 November 2004)[71]; Banković v Belgium [2001] XII Eur Court HR 333, 346-7 [36]-[37]. In relation to the Inter-American system see, eg, Coard et al v United States (1999) IACOMHR, Case No 10.951, Report No 109/99, OEA/Ser.L/V/II.106 [17], [37]; Armando Alejandro Jr et al v Cuba (1999) IACOMHR, Case No 11.589, Report No 86/99, OEA/Ser.L/V/II.106 [23], [25]; Rafael Ferrer-Mazorra et al v United States (2001) IACOMHR, Case No 9903, Report No 51/01, OEA/Ser./L/V/II.111; Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba (2002) IACOMHR 41 ILM 532.

5 See, eg, R (Al-Skeini) v Secretary of State for Defence [2008] 1 AC 153, 215 [129] (Lord Brown) where his Honour stated: ‘except where a state really does have effective control of territory, it cannot hope to secure Convention [ECHR] rights within that territory’. Assuming that the Covenant rights (ICCPR) are meant to be effective and realistic they should not be interpreted to extend to individuals except when the State is in a position to give effect to the rights, that is, it has some degree of governmental powers over those individuals. See Dominic McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ in Fons Coomans and Menno T Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004) 41, 46.

6 See Chapter 1.1.
The notion of effective control over territory is not found in treaty law; it is a concept developed in the jurisprudence and legal discourse to describe one of the circumstances in which human rights treaty obligations apply extraterritorially. Therefore, in this examination I consider the work of human rights supervisory bodies, relevant jurisprudence of international, regional and national courts and State practice. The main focus will be on the ECtHR because its jurisprudence on this issue is the most developed.

I demonstrate that while the effective control test has been widely accepted, it is still unclear what in fact constitutes effective control. Hence, the main aim of this Chapter is to clarify what amounts to effective control. The concept of effective control over territory for the purposes of human rights law is a fact-sensitive inquiry. By examining the jurisprudence of international, regional and national courts, I identify various elements and factors which are relevant to the determination of effective control. I argue that these factors, none of which is determinative, meet the conditions for the extraterritorial application of human rights norms in armed conflict. Finally, I conclude that based on an overall assessment of the relevant factors, States conducting military operations abroad may exercise different degrees of effective control over an area. In this sense, effective control is a ‘sliding scale’ concept.

Against this background, in the following two Chapters, I argue that to the extent that a State conducting military operations abroad exercises varying levels of effective control, it may be subject to different ranges and levels of human rights obligations.

### 5.2 Spatial Notion of Jurisdiction: The Test of ‘Effective Control Over Territory’

It is well-established in international law that States may be liable for acts committed by them in a territory over which they exercise control, even if they have no sovereign

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7 See Loizidou v Turkey (Preliminary Objections) (1995) 310 Eur Court HR (Ser A) 23-4 [62].
8 The Inter-American system has examined the personal notion of extraterritorial jurisdiction in numerous cases but unlike the ECtHR, it has not addressed the spatial notion. For example, in a case involving the US invasion of Panama, the Commission did not query whether alleged killings and property damage by the US military took place before or after the US gained effective control of the territory, or in locations inside or outside territory then controlled by the US: Salas et al v United States (1993) IAComHR, Case No 10.573, Report No 31/93. See also Douglass Cassel, ‘Extraterritorial Application of Inter-American Human Rights Instruments’ in Fons Coomans and Menno T Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004) 83, 103.
rights to the territory in question. The ICJ in its *Namibia Advisory Opinion* enunciated this principle in 1971, stating that:

The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. *Physical control of a territory*, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.  

Exercising jurisdiction extraterritorially amounts to asserting control over a foreign territorial space, which activates the human rights treaty obligations of the controlling State. Accordingly, jurisdiction in the extraterritorial context is understood in terms of a nexus between the State and the territory in which the relevant acts took place.

The 1996 case of *Loizidou v Turkey*, described by Milanovic as the gold standard for the spatial model of jurisdiction, was the first occasion where the ECtHR expressed its views on the extraterritorial application of human rights in armed conflict in the spatial context. Following the Turkish intervention in northern Cyprus, the complainant, Ms Loizidou, who claimed to be the owner of plots of land in northern Cyprus, fled to the south. She brought a complaint against Turkey, stating that Turkish forces prevented her from returning to her property. While rejecting all responsibility for the situation, Turkey argued that the mere presence of Turkish armed forces in northern Cyprus did not mean that it had exercised jurisdiction over life and property in northern Cyprus. It further argued that any complaints should be directed against the Turkish Republic of Northern Cyprus (‘TRNC’) which was established in 1983. The Court rejected this argument:

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9 See Wilde, ‘Legal “Black Hole”?’, above n 3, 798.  
11 Similarly, a State must be in control of its territory to have human rights obligations. In this regard the HRC has equated jurisdiction with the exercising of control. In its Concluding Observations on Cyprus in 1998 the HRC noted that, “the State party, as a consequence of events that occurred in 1974 and resulted in the occupation of part of the territory of Cyprus, is still not in a position to exercise control over all of its territory and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction”: HRC, *Concluding Observations: Cyprus*, 62nd sess, UN Doc CCPR/C/79/Add.88 (6 August 1998) [3]. It is clear that a State needs to be in a position to exercise control to ensure the application of the ICCPR: McGoldrick, above n 5, 50.  
13 Turkey argued that it had not ‘exercised effective control and jurisdiction over the applicant since at the critical date of 22 January 1990 the authorities of the Turkish Cypriot community, constitutionally
The responsibility of a Contracting Party may [...] arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.

The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

In the view of the Court, territory over which a foreign military exercises effective control comes within the ambit of the human rights obligations of the State.

Other human rights treaty bodies have likewise recognised the spatial model of jurisdiction. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which purport ‘to provide an authoritative “gloss” on the ICESCR for the benefit of the [CESCR]’, recognise that ‘[u]nder circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question’.

Organised within the “TRNC” and in no way exercising jurisdiction on behalf of Turkey, were in control of the property rights of the applicant: Loizidou v Turkey (Merits) [1996] VI Eur Court HR 2216, 2233-4 [51].

Accordingly, the applicability of human rights treaties, similar to the applicability of the law of occupation and the jus in bello, is not dependant on the lawfulness of the use of force as a matter of the jus ad bellum. See, eg, Milanovic, Extraterritorial Application of Human Rights Treaties, above n 3, 135. See also Robert D Sloane, ‘The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War’ (2009) 34 Yale Journal of International Law 47.

While the facts of Loizidou satisfy the test of effective control of an area since Turkey had occupied a third of the island of Cyprus, problems arise as the area in question spatially diminishes. Milanovic queries whether a city, a mere village, any building such as a military camp, a prison, or even an apartment within that building, is considered an ‘area’ that can be subjected to State jurisdiction? He concludes that ‘if we conceive of state jurisdiction in human rights treaties in spatial terms, we can observe that space or area to which it refers on a continuum from something that we would broadly call a “territory,” such as Northern Cyprus, to what we would generally call a “place,” such as a UK-run prison in Iraq’. The question is whether that continuum extends even further, to smaller areas or places. As Milanovic argues there is a degree of artificiality to this approach in that the spatial concept of State jurisdiction, as control over an area, tends to collapse into the personal model of jurisdiction, as control over individuals. How then can an ‘area’ be defined in a principled way he asks? The only possible definition in his view is a functional one: only something over which a State can exercise a sufficient degree of control can count as an area: Milanovic, Extraterritorial Application of Human Rights Treaties, above n 3, 129-35. Accordingly, the question Milanovic raises runs into the concept of personal jurisdiction and the relationship of it to territorial jurisdiction, which as previously mentioned is not within the scope of my thesis. See also Al-Saadoon and Mufdhi v United Kingdom (European Court of Human Rights, Chamber, Application No 61498/08, 2 March 2010) [87]-[88].

Loizidou v Turkey (Preliminary Objections) (1995) 310 Eur Court HR (Ser A) 23-4 [62] (emphasis added).


The CESCR also reaffirms the view that a State Party’s obligations under the ICESCR ‘apply to all territories and populations under its effective control’. The HRC similarly found the ICCPR applicable to Occupied Palestinian Territories in those areas ‘where Israel exercises effective control’. Furthermore, the HRC in its General Comment No 31 endorses the effective control test in relation to the ICCPR:

[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [...] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained [...].

Moreover, the ICJ in the Wall Advisory Opinion expressly endorsed the CESCR’s view that ‘the State Party’s obligations under the Covenant [ICESCR] apply to all territories and populations under its effective control’. The Court concluded that, because of the powers available to Israel on the basis of its territorial jurisdiction as the occupying power, it is bound by the provisions of the ICESCR.

were developed in 1997 by a group of distinguished experts in international law aiming to elaborate on the nature and scope of the violations on economic, social and cultural rights and appropriate responses and remedies. As with all other authoritative interpretative tools in international law, the Guidelines lack binding force on States and are considered a subsidiary means of determining the rules of international law.

19 See, eg, CESCR, Concluding Observations: Israel, UN Doc E/C.12/1/Add.27 (4 December 1998) [8]. The CESCR reaffirmed its view in: CESCR, Concluding Observations: Israel, 30th sess, UN Doc E/C.12/1/Add.90 (23 May 2003) [31].
20 HRC, Concluding Observations: Israel, 63rd sess, UN Doc CCPR/C/79/Add.93 (18 August 1998) [10]. The Committee against Torture did the same with regard to the CAT in Iraq and Afghanistan. ‘The Committee expresses its concern at: (b) the State party’s limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that “those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq”; the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the de facto effective control of the State party’s authorities’: Committee against Torture, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, 33rd sess, UN Doc CAT/C/CR/33/3 (10 December 2004) [4(b)] (emphasis added). Futhermore, the Committee against Torture in its General Comment No 2 has interpreted ‘any territory under its jurisdiction’ to mean ‘all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law’: Committee against Torture, General Comment No 2: Implementation of Article 2 by States Parties, UN Doc CAT/C/GC/2 (24 January 2008) [16] (emphasis added).
21 HRC, General Comment No 31: Nature of the General Obligations on State Parties to the Covenant, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [10].
23 See Wall (Advisory Opinion) [2004] ICJ Rep 136, 180 [112].
The ICJ later in the Armed Activities case found Uganda as an occupying power of parts of the territory of the Congo liable for violating the ICCPR, the CRC, and the ACHPR due to its actions in those parts. The Court in assessing the facts of the case considered whether Uganda had effective control of the territory.

A comparative analysis of the extraterritorial application of human rights treaties conducted by the Maastricht Centre for Human Rights in 2003 concluded that ‘there is general agreement between the supervisory bodies that if a State exercises effective control over foreign territory, the human rights treaties to which it is a party are applicable to its conduct in that foreign territory’. The effective control test has also been recognised within the European system. For example, Resolution 1386, adopted by the Parliamentary Assembly of the Council of Europe in 2004, called upon those member States ‘that are engaged in the [multinational force] to accept the full applicability of the European Convention on Human Rights to the activities of their forces in Iraq, in so far as those forces exercised effective control over the areas in which they operated’. The effective control test has been further endorsed in a number of cases before the ECtHR.

The ECtHR in Cyprus v Turkey reiterated its prior holding in Loizidou and held:

Having effective overall control over northern Cyprus, [...] [it] follows that, in terms of Article 1 of the Convention, Turkey’s

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24 See Armed Activities (Judgment) [2005] ICJ Rep 168, 243-4 [217].
25 See ibid 213-14 [109], 228 [168], 230-1 [177].
28 See, eg, Loizidou v Turkey (Preliminary Objections) (1995) 310 Eur Court HR (Ser A) 23-4 [62]; Cyprus v Turkey [2001] IV Eur Court HR 1, 25 [77]; Banković v Belgium [2001] XII Eur Court HR 333, 355 [71].
29 The Court speaks of ‘effective control of an area’ in its preliminary objections in Loizidou, and of ‘effective overall control’ of an area in its merits judgment: ‘It is not necessary to determine whether, [...] Turkey actually exercises detailed control over the policies and actions of the authorities of the “TRNC”. It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the “TRNC”. Those affected by such policies or actions therefore come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus’: Loizidou v Turkey (Merits) [1996] VI Eur Court HR 2216, 2235-6 [56] (internal citations omitted). Terminological and conceptual inconsistencies have resulted in great confusion about whether the
“jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified, and that violations of those rights are imputable to Turkey.30

Loizidou ‘effective overall control’ test is a test of State jurisdiction for human rights purposes or a test of attribution. The Appeals Chamber of the ICTY, added to this confusion when it relied on Loizidou in support of its ‘overall control’ test of attribution in Tadic Case, which it used to determine whether the conflict in Bosnia was international or non-international in character: Prosecutor v Dusko Tadic (International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995). Tadic has been criticised by scholars and its overall control test was rejected by the International Law Commission. See, eg, Marko Milanovic, ‘State Responsibility for Genocide’ (2006) 17(3) European Journal of International Law 533, 576-81; Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Elizabeth Wilmshurst (ed), International Law and the Classification of Conflicts (Oxford University Press, 2012) 32, 58-9; Report of the International Law Commission on the Work of its Fifty-Third Session (23 April-1 June and 2 July-10 August 2001), UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10, 105-7 [4]-[5]. It is important to recall that the notion of State jurisdiction in human rights treaties is conceptually distinct from attribution in the context of State responsibility. The former refers to State control over territory for the purpose of establishing whether the State has jurisdiction over the territory, the latter to State control over actors and their specific acts for the purpose of attributing these acts to the State. It is also vital to note the difference between the obligation to respect and the obligation to protect, which I will turn to in Chapter Seven. While the former is the obligation of the State not to have its organs, agents, or other persons whose acts are attributable to it to commit human rights violations, the latter is the obligation of the State to prevent human rights violations committed by third States, private individuals, or non-state groups generally against other private individuals. In light of this distinction Loizidou becomes clearer. The Court did not find that all of the acts of the TRNC were attributable to Turkey. Rather, it established that Turkey, by virtue of its effective overall control over northern Cyprus, had the positive obligation to prevent human rights violations, regardless of by whom they were committed. Accordingly the Court stated that Turkey’s obligation ‘derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration’: Loizidou v Turkey (Preliminary Objections) (1995) 310 Eur Court HR (Ser A) 23-4 [62]. Thus, the ‘effective overall control’ test in Loizidou is a threshold test to establish jurisdiction and not a test of attribution. As stated by Milanovic, the ‘overall’ aspect of the Loizidou test serves an important purpose: applicants do not need to show that the State controlling a territory exercised detailed control over the politics and actions of the (possibly non-state) actor whose conduct directly violated their rights: Milanovic, Extraterritorial Application of Human Rights Treaties, above n 3, 136-7. The Court stated in Cyprus v Turkey, ‘[h]aving effective overall control over northern Cyprus, [Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survived by virtue of Turkish military and other support’: Cyprus v Turkey [2001] IV Eur Court HR 1, 25 [77]. Several judges have also examined the distinction between jurisdiction and attribution. See, eg. the opinions of Judges Loucaides and Kovler in Ilascu v Moldova and Russia [2004] VII Eur Court HR 179, 329-31 (Loucaides J) and 339-46 (Kovler J) and the joint dissenting opinion of Judges Golcuklu and Pettiti in Loizidou v Turkey (Preliminary Objections) (1995) 310 Eur Court HR (Ser A) 30-2; See also Louise Doswald-Beck, Human Rights in Times of Conflict and Terrorism (Oxford University Press, 2011) 25-8. More recently, the Grand Chamber of the ECtHR, explicitly provided that ‘the test for establishing the existence of “jurisdiction” under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under international law’: Catan v Moldova and Russia (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [115]. See also Turkey’s statement in Loizidou that the question of jurisdiction is not identical with the question of State responsibility under international law: Loizidou v Turkey (Merits) [1996] VI Eur Court HR 2216, 2233-4 [51].

30 Cyprus v Turkey [2001] IV Eur Court HR 1, 25 [77].
The extraterritorial application of the ECHR and the effective control test was again examined in Banković. Although the case was dismissed by the Court, the extraterritorial application of human rights norms was reaffirmed ‘through the effective control of the relevant territory’. The Court emphasised that the jurisdictional competence of a State was primarily territorial but could apply extraterritorially in exceptional cases. It stated the exceptional circumstances in which extraterritorial jurisdiction may be recognised as:

[W]hen the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

This is a clear endorsement of the effective control test.

The effective control test was again applied in Issa v Turkey where six Iraqi nationals complained of the alleged unlawful arrest, detention, ill-treatment and subsequent killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995. While the case primarily concerned the personal notion of jurisdiction, because it was in relation to arrest and detention, the Court also considered the issue of effective control of territory. The applicants claimed that on 2 April 1995, they left the village with the deceased to take their flocks of sheep to the hills in Azadi village in the Spna area. They were met by Turkish soldiers who told the women to return to the village and took the men away. The applicants claimed that they subsequently heard gunfire and saw a military helicopter land. The bodies of five of the seven shepherds were found the next day. Turkey confirmed that a Turkish military operation took place in northern Iraq.

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31 The Court decided that the applicants had not been ‘within the jurisdiction’ of the seventeen European NATO Member States, for the purposes of the ECHR. It also argued that ‘the Convention is a multilateral treaty operating [...] in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States’. It continued that the FRY did not fall within this legal space: Banković v Belgium [2001] XII Eur Court HR 333, 358-9 [80].
32 Banković v Belgium [2001] XII Eur Court HR 333, 355 [71].
33 See ibid. The Court distinguished Banković from Loizidou and Cyprus v Turkey where it had recognised extraterritorial acts as constituting an exercise of jurisdiction: at 358-9 [80].
34 Banković v Belgium [2001] XII Eur Court HR 333, 355 [71].
35 See Issa v Turkey (European Court of Human Rights, Chamber, Application No 31821/96, 16 November 2004).
between 19 March and 16 April 1995, however, it rejected the presence of any Turkish soldiers in the area indicated by the applicants and denied responsibility.\(^\text{36}\)

The Court endorsed the effective control test as the appropriate test for the spatial notion of jurisdiction. Accordingly, the Court had to ‘ascertain whether the applicants’ relatives were under the effective control, and therefore within the jurisdiction, of the respondent State as a result of the latter’s extraterritorial acts’.\(^\text{37}\) In examining the facts of the case, the Court referred to the documentary evidence and concluded that the cross-border operation conducted in northern Iraq over a six-week period was extensive and aimed at pursuing and eliminating terrorists who were seeking shelter in northern Iraq. The Court did not:

\[\text{E}xclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey […]\]\(^\text{38}\)

The Court, however, concluded that: ‘notwithstanding the large number of troops involved in the [...] military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq’.\(^\text{39}\) The essential question to be examined then was whether at the relevant time Turkish troops conducted operations in the area where the killings took place.\(^\text{40}\) While news reports and official records confirmed the conduct of cross-border operations and the presence of the Turkish army in northern Iraq at the material time, these materials did not make it possible for the Court to conclude with any degree of certainty that Turkish troops went as far as the Azadi village in the Spna area.\(^\text{41}\) Thus, it had not been established to the required standard of proof that the Turkish armed forces conducted operations in the area in question, and, more precisely, in the hills above the village of Azadi where, according to the applicants’ statements, the victims were at that time.\(^\text{42}\) The

\[^{36}\]See ibid [58].

\[^{37}\]Ibid [72].

\[^{38}\]Ibid [74].

\[^{39}\]Ibid [75]. The Court distinguished the case from that of northern Cyprus in Loizidou and Cyprus v Turkey. I will return to this issue in the following sections.

\[^{40}\]See ibid [76].

\[^{41}\]See ibid [79].

\[^{42}\]See ibid [81].
Court therefore held unanimously that the applicants’ relatives did not come within the jurisdiction of Turkey on the ground of the spatial notion of jurisdiction.\textsuperscript{43}

Subsequently, in \textit{Al-Skeini v United Kingdom}, the Grand Chamber of the ECtHR once again endorsed the effective control test. \textit{Al-Skeini} dealt with the claims of the relatives of six deceased Iraqi civilians who had been killed by British soldiers at a time when the UK was recognised as an occupying power in Basrah city.\textsuperscript{44} In the first five cases the deceased had been shot in separate armed incidents involving British troops. In the sixth case, the deceased had been arrested by British forces and died in a military prison in British custody. The applicants alleged that at the relevant time their relatives fell within UK jurisdiction and that ‘there had been no effective investigation into the deaths, in breach of Article 2 of the \textit{ECHR}’.\textsuperscript{45}

In its judgment, the ECtHR acknowledged that ‘the exercise of jurisdiction is a necessary condition for a […] State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention’.\textsuperscript{46} The Court, while referring to the territorial nature of jurisdiction, recognised exceptional circumstances capable of giving rise to the exercise of jurisdiction by a State outside its own territorial boundaries. The Court then summarised the two main strands of the case law in relation to extraterritorial jurisdiction, one based on a personal and the other on a spatial notion of jurisdiction. When examining the spatial notion of jurisdiction, it reiterated its prior holding in \textit{Loizidou}.\textsuperscript{47} Accordingly, the exercise of effective control over an area outside a national’s territory was again recognised in \textit{Al-Skeini} as a basis for human rights obligations to arise in an extraterritorial context.

While the Grand Chamber in \textit{Al-Skeini} endorsed the effective control test for the spatial notion of jurisdiction, it did not address the factual question of whether the UK

\textsuperscript{43} See ibid \[82\].
\textsuperscript{44} The UK was an occupying power under the relevant provisions of the 1907 \textit{Hague Regulations} and the 1949 \textit{Geneva Convention IV} in those areas of southern Iraq, and particularly Basrah city, where British troops exercised sufficient authority for this purpose. The period of occupation started on 1 May 2003 and ended on 28 June 2004, when the Iraqi Interim Government assumed full responsibility and authority for governing Iraq. See \textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 151 \[11\].
\textsuperscript{45} \textit{Al-Skeini v United Kingdom} (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) \[3\].
\textsuperscript{46} Ibid \[130\].
\textsuperscript{47} See ibid \[138\].
had effective control over Basrah. Accordingly, the Court’s holding that ‘the applicants’ deceased relatives fell within the jurisdiction of the [UK]’, was based on the personal notion of jurisdiction.48

However, when the case had been before the UK Courts, the spatial notion of jurisdiction had been applied. For instance, the Queen’s Bench Divisional Court reiterated the holding in Banković that Article 1 of the ECHR reflected a territorial concept of jurisdiction and other bases of jurisdiction were exceptional.49 One such exception was recognised where a State through effective control of another territory exercised powers normally exercised by the government of that territory.50

In deciding the first five complaints, the UK Court of Appeal posed the question whether British troops could be said to have been in effective control of Basrah city at the relevant time (August 2003 - November 2003).51 Throughout the relevant period, the Coalition Provisional Authority (‘CPA’), a ‘civilian administration’52 created by the occupying States, had temporarily assumed the powers of government as a ‘caretaker administration’ until an Iraqi government could be established.53 The coalition’s goal from the outset was ‘to transfer responsibility for administration to representative Iraqi authorities as early as possible’.54 Accordingly, the CPA was responsible for the temporary governance of Iraq and was ‘vested with all executive, legislative and judicial authority necessary to achieve its objectives’.55

48 Ibid [4].
49 See R (Al-Skeini) v Defence Secretary [2007] QB 140, 171 [109], 173-4 [119], 175 [123], 214 [245]-246]. The Court, while recognising exceptions to the basic principle of territoriality, emphasised that there is complete disagreement as to the width, nature, rationale and applicability of the exceptions: at 171 [109].
50 Ibid 175 [123], 215 [248].
51 See ibid 279 [112] (Brooke LJ).
52 Ibid 152 [14]. During the relevant period the Coalition forces consisted of six divisions that were under the overall command of US generals. Four were US divisions and two were multinational. Each division was given responsibility for a particular geographical area in Iraq. The UK was given command of the multinational division (south east), which comprised the provinces of Al Basrah, Maysan, Thi Qar and Al Muthanna and is an area approximately twice the size of Wales with a total population of about 4.6m: at 157 [41].
53 See Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [12].
While the Court of Appeal recognised that the UK was an occupying power in those areas of southern Iraq, and particularly Basrah city, it distinguished between the position required to amount to occupation under the 1907 Hague Regulations and the question of effective control of Basrah city for the purposes of human rights obligations. The Court moved on to differentiate the situation in Iraq in August - November 2003 from the situations of northern Cyprus and the MRT as featured in

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56 Article 42 of the 1907 Hague Regulations provides that ‘territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised’. This standard has been generally interpreted in the literature as being one of ‘effective control’. See, eg, Yoram Dinstein, The International Law of Belligerent Occupation (Cambridge University Press, 2009) 40-2; Akande, above n 29, 44; Milanovic, Extraterritorial Application of Human Rights Treaties, above n 3, 53, 141-7; Tristan Ferraro, Occupation and Other Forms of Administration of Foreign Territory (March 2012) International Committee of the Red Cross. 96 <http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>.

57 One question is whether this ‘effective control’ has any relevance, to the ‘effective control’ test for the activation of human rights obligations in an extraterritorial armed conflict situation. Two of the elements of effective control over foreign territory which underpin the definition of occupation set out in Article 42 of the 1907 Hague Regulations, are also common to the notion of ‘effective control’ in human rights law, which I will turn to shortly: (a) the presence of foreign forces; and (b) the exercise of authority over the territory. See Ferraro at 96. However, a further element recognised for the ‘effective control’ test in relation to belligerent occupation, is ‘the non-consensual nature of belligerent occupation’. See, eg, Dinstein at 35-7; Ferraro at 10-17, 20-3; Milanovic at 150.

Consent, however, is irrelevant to the activation of human rights law in extraterritorial armed conflict situations. See Banković v Belgium [2001] XII Eur Court HR 333, 355 [71]. Therefore, while consent generally terminates belligerent occupation, the human rights obligations of States conducting military operations abroad will continue pursuant to their exercise of effective control, regardless of the consent of the local government. Furthermore, as will be discussed later in this Chapter, the intensity of insurgency can affect the level of effective control for the purposes of human rights obligations but is not relevant in the assessment of occupation. Another point of distinction is that while in occupation, the authority of the occupant should substitute the local government. (Armed Activities (Judgment) [2005] ICJ Rep 168, 230 [173]) substitution of authority is not required for jurisdiction, and thus human rights obligations to arise. Accordingly, while there is some overlap between the concept of effective control as a threshold for occupation, and the effective control test for the purposes of human rights law, these are not identical tests. However, since this thesis does not focus on occupation, it is not within the scope of my thesis to examine this question further. For the view that the two thresholds should be the same, see Milanovic at 147. See also Wilde, ‘Triggering State Obligations Extraterritorially’, above n 3, 510-11. On the relationship between occupation and jurisdiction, see Doswald-Beck, above n 29, 28.

58 The question at issue was whether the alleged breaches of the ECHR in MRT came within the jurisdiction of Russia. Ilascu v Moldova and Russia [2004] VII Eur Court HR 179. Russia’s jurisdiction was recognised by the ECtHR in relation to the arrest and detention of the applicants: at [384]. The Court considered Russia’s responsibility based on the military and political support it gave to the MRT to help them set up the separatist regime and the participation of its military personnel in the fighting. The Court also noted that ‘even after the ceasefire agreement of 21 July 1992 [Russia] continued to provide military, political and economic support to the separatist regime [...], thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova’: at 280 [382], 282 [394]. Although Ilascu deals with ‘effective control over territory’ to establish jurisdiction, the case has been criticised because the Court’s methodological approach is generally hard to decipher. Ilascu is criticised for the lack of clarity in the Court’s formulation that the responsibility of Russia was ‘engaged’ and not clarifying whether the conduct of Transdnistrian authorities were attributable to Russia: Milanovic, Extraterritorial Application of Human Rights Treaties, above n 3, 49-50, 138-41. In relation to the relationship between attribution and jurisdiction see above n 29.
the earlier cases before the ECtHR. The Court clearly stated its differentiation on the basis of (a) the ‘every intention’ of the foreign powers in the latter examples to exercise their control on a long-term basis. It further acknowledged that (b) the civilian administration of those territories was under the control of the foreign State; and (c) the foreign State had deployed sufficient troops to ensure that its control of the area was effective. Based on these factors, the Court was of the opinion that the number of British troops and other available resources were not sufficient to enable the UK to exercise effective control of Basrah city.

For Lord Justice Brooke, writing in the majority in the UK Court of Appeal, it was:

[Quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basra City for the purposes of ECHR jurisprudence at the material time ... The UK possessed no executive, legislative or judicial authority in Basra City, other than the limited authority given to its military forces, and as an occupying power it was bound to respect the laws in force in Iraq unless absolutely prevented [...]. It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways [...].52]

In other words, for the Court of Appeal, the limited authority given to the British military forces to maintain security and to support the civil administration in Iraq, could not be equated with a civil power adequate for effective control.

The majority of the House of Lords also reiterated the exceptional nature of effective control over territory for jurisdiction to arise. They subsequently held that the obligation to secure the Convention rights would arise only where a Contracting State had such effective control over an area as to enable it to provide the full package of rights and freedoms guaranteed in the Convention to everyone in that area.64

58 See R (Al-Skeini) v Defence Secretary [2007] QB 140, 281 [120] (Brooke LJ).
59 See ibid.
60 'Unlike the Turkish army in northern Cyprus, the British military forces had no control over the civil administration of Iraq': ibid 282 [123] (Brooke LJ). Brigadier Moore describes the situation in these terms: ‘I was not responsible for civil administration per se but the brigade had to become loosely involved in supporting it, owing to a lack of help from elsewhere. [...] We assisted civil administration by paying public workers, rebuilding facilities and getting infrastructure working’: Reprinted in R (Al-Skeini) v Defence Secretary [2007] QB 140, 282 [123] (Brooke LJ).
61 See ibid 281 [120] (Brooke LJ).
64 See, eg, ibid 202-3 [79], [81]-[83] (Lord Rodger).
the UK Courts did not find effective control on the facts, they endorsed the effective
control test for extraterritorial jurisdiction to arise.

5.2.1 Conclusion: Spatial Notion of Jurisdiction: The Test of ‘Effective Control Over Territory’

The above analysis indicates that ‘effective control over territory’ is the accepted test
within international, regional and national courts for the extraterritorial application of
human rights norms in military operations beyond territorial borders. Accordingly,
human rights obligations take effect when effective control has been established over
a given foreign territory. What constitutes effective control depends on ‘a detailed
factual analysis of the level of control’ asserted by foreign forces. The factors that
appear to be relevant from an examination of available materials to determining the
question whether a State exercises effective control over an area outside its own
territory will now be examined.

5.3 Various Elements Constituting ‘Effective Control’

While the effective control test has been widely accepted, it is still unclear what in
fact constitutes effective control and there is considerable disagreement on the
required amount of control for the extraterritorial extension of human rights norms.
The main difficulty, as Arai-Takahashi explains, ‘lies precisely in the factual
evaluation of the threshold of effectiveness in control’. Accordingly, a detailed
factual analysis of the level of control asserted by foreign forces is required in each
given situation in order to establish jurisdiction.

Whereas establishing effective control is a fact-sensitive inquiry, to move from the
abstract to the concrete various elements and factors constituting such control can be
identified through the jurisprudence of international, regional and national courts. By
identifying relevant factors in the assessment of effective control, I demonstrate that
ductive control is a ‘sliding scale’ concept, meaning that there are various degrees of

65 See Ralph Wilde, ‘Legal “Black Hole”?’; above n 3, 801; Milanovic, Extraterritorial Application of
Human Rights Treaties; above n 3, 136.
Humanitarian Law, and its Interaction with International Human Rights Law (Martinus Nijhoff, 2009)
433.
effective control based on an overall assessment of the relevant elements. In this section, I set out the various elements constituting effective control.

### 5.3.1 Strength of the State’s Military Presence in the Area

In determining whether a State exercises effective control over an area outside its own territory, as stated by the ECtHR in *Catan v Moldova and Russia*, primarily the ‘strength of the State’s military presence in the area’ has to be assessed. It is by virtue of the military presence in a given area that a foreign force is militarily capable of exercising its control over the territory. While military presence is vital, technological developments have made it possible for military control to be asserted over significant portions of territory without necessarily requiring permanent ground presence or ‘boots on the ground’. In other words, effective control over territory is ‘a concept that is intimately linked with, but not entirely dependent upon, military ground presence in the territory’. Thus, it is important to keep in mind that military presence in modern warfare is less likely to necessitate permanent ground presence.

Factors that have been identified in the case law as relevant to assessing the strength of the military presence are now examined.

#### 5.3.1.1 Number of Troops

One factor to be weighed when assessing whether effective control is enjoyed is the number of troops deployed. The ECtHR stated in *Loizidou* that: ‘It is obvious from the large number of troops engaged in active duties in northern Cyprus’ that Turkey exercises effective control over that part of the island. More than 30,000 Turkish

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67 *Catan v Moldova and Russia* (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [107]; See also *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [139].

68 See Ferraro, above n.56, 19.


70 Bashi and Mann, above n 69.

71 In this connection, the ICJ in the *Nuclear Weapons Advisory Opinion*, affirmed that the principles of humanitarian law must apply to new methods of exercising force, made possible by advancements in military technology: *Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 253 [63]-[64].

72 *Loizidou v Turkey (Merits)* [1996] VI Eur Court HR 2216, 2235 [56] (emphasis added).
personnel were stationed throughout the whole of the occupied area of northern Cyprus.\(^73\)

The Court’s decision in Issa illustrates that the number of troops is not a single determinative factor amounting to effective control.\(^74\) There the ECtHR concluded that ‘notwithstanding the large number of troops involved in the […] military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq’.\(^75\) Therefore, other key factors have to be assessed alongside the number of troops to establish effective control.

For example, as the US Army Field Manual provides, the number of troops necessary to maintain effective control must be considered in the context of the number and density of the population in the area.\(^76\) Similarly, the UK relied on the insufficient number of troops in arguing that, although an occupying power, it did not exercise effective control over Basrah and Maysan provinces, the main theater of operations of UK forces in Iraq. Approximately 8,119 British troops were deployed in the area. The total population of the relevant area was about 2,760,000 giving a troops to population ratio of about 1:340.\(^77\) The UK compared this to the ratio of 1:7 Turkish troops to population in northern Cyprus, where the ECtHR recognised Turkey having effective control. Consequently, the UK argued that a ratio of 1:340 was not sufficient to support a finding that it had effective control.\(^78\) The UK Court of Appeal in Al-Skeini also affirmed that the UK was not provided with ‘nearly enough troops and resources to enable’ it to exercise effective control of Basrah city.\(^79\)

This case law clearly indicates that the number of troops is a relevant factor in the assessment of control. However, technology has increasingly changed the nature of warfare and the way military operations are conducted, so the number of troops and particularly the number of ‘boots on the ground’ may not be as important as it used to be in exercising control in a given area. After all, the legal test is essentially the fact

\(^73\) See ibid 2223 [16].
\(^74\) See Issa v Turkey (European Court of Human Rights, Chamber, Application No 31821/96, 16 November 2004) [75].
\(^75\) Ibid [75] (emphasis added).
\(^77\) See R (Al-Skeini) v Defence Secretary [2007] QB 140, 157 [42] (Queen’s Bench Divisional Court).
\(^78\) See ibid 157 [41]-[42] (Queen’s Bench Divisional Court).
\(^79\) See R (Al-Skeini) v Defence Secretary [2007] QB 140, 281-2 [121] (Brooke LJ).
of control, not the means by which it is exercised. Accordingly, the number of troops is merely one of a number of evidentiary indicators of whether the military power is in a position to carry out its obligations.

5.3.1.2 Size of Arsenal

Alongside the number of troops, the size and number of weapons and stocks is a relevant factor in the determination of the strength of the military presence and effective control. Despite the small number of Russian troops stationed in Transdniestria (around 2,000 soldiers),\(^80\) the ECtHR referred to the size of Russia’s weapons stocks and arsenal in Transdniestria, amongst other factors, in determining that Russia exercised effective control over the given area.\(^81\)

5.3.2 Distribution of Troops

The strength of the military presence as a component of the effective control test cannot be established solely by the number of troops deployed by foreign forces or the size of the arsenal. In order for the forces to exercise control which is effective, the way in which they are distributed within a given territory is also important. This factor is particularly evident in Issa, where the ECtHR compared the situation of Turkish troops in northern Iraq with their presence in northern Cyprus. Contrasting Loizidou,\(^82\) the point of distinction for the Court in Issa was not the number of troops engaged in northern Iraq, which was ‘in excess of 35,000 ground troops, backed up by tanks, helicopters and F-16 fighter aircraft’.\(^83\) Rather, one point of difference for the Court was that the troops were stationed throughout the whole of the territory of northern Cyprus and that the area was constantly patrolled and had check points on all main lines of communication between the northern and southern parts of the island.\(^84\)

How troops are distributed within a territory must be considered in the context of the topographical features of that territory. Clearly, a greater number of troops are needed

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\(^80\) Russia relied on the small number of its troops and compared its 2,000 soldiers to the 30,000 Turkish forces in northern Cyprus in arguing that it did not exercise jurisdiction over Transdniestria. See Ilascu v Moldova and Russia [2004] VII Eur Court HR 179 [335].

\(^81\) See ibid [387].

\(^82\) See Issa v Turkey (European Court of Human Rights, Chamber, Application No 31821/96, 16 November 2004) [75].

\(^83\) Ibid [63].

\(^84\) See ibid [75].
in strategic places. Accordingly, the required amount of troops would vary according to the circumstances, in particular the topographical features of the territory, the degree of resistance of the local population encountered on the ground and, as discussed, the density of the population.85

5.3.3 Period of Time of the Presence of Troops

Courts and States have also recognised the period of time of the presence of troops as a relevant factor in the determination of effective control. For the Turkish Government in Issa, ‘the mere presence of Turkish armed forces for a limited time and for a limited purpose in northern Iraq was not synonymous with “jurisdiction”’ and subsequently Turkey denied the exercise of effective control of any part of Iraq.87 The ECtHR accepted the ‘limited time’ argument was relevant and, despite the large number of troops involved, concluded that Turkey did not appear to exercise effective control of the entire area of northern Iraq.88 The Court contrasted the situation with Loizidou and Cyprus v Turkey. The point of distinction for the Court was (amongst other things) the much longer period of time that the Turkish troops were in northern Cyprus than in northern Iraq.89

Further, the HRC in its Concluding Observations on Israel expressed its deep concern that Israel continued to deny its responsibility to fully apply the ICCPR in the occupied territories and pointed to the ‘long-standing presence of Israel in these territories’, amongst other factors, as a basis for holding Israel responsible for the full application of the Covenant.90

In some situations, the intended length of stay may be the relevant question instead of the actual time of presence of troops. In Al-Skeini, Brooke LJ writing for the UK

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85 See Ferraro, above n 56, 17.
86 Issa v Turkey (European Court of Human Rights, Chamber. Application No 31821/96, 16 November 2004) [58] (emphasis added). The Turkish security forces carried out fourteen major cross-border operations between January 1994 and November 1998. The largest operation, called “Çelik (steel) operation” lasted almost six weeks between 19 March and 2 May 1995: at [45]. It was during this operation that the applicants claimed that their relatives had been killed.
87 See ibid [58].
88 See ibid [75].
89 See ibid.
90 HRC, Concluding Observations: Israel, (18 August 1998), above n 20, [10].
91 The HRC also pointed to ‘Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein’ in recognising Israel’s responsibility to apply the ICCPR: ibid [10].
Court of Appeal contrasted the situation in question where British troops were intended to be in southern Iraq for a limited time only with the situations in northern Cyprus\(^\text{92}\) and in the MRT,\(^\text{93}\) where part of the territory of a State was under the control of another State which had ‘every intention of exercising its control on a long term basis.’\(^\text{94}\) For Brooke LJ in Al-Skeini, what was determinative of effective control was not merely the actual time of presence of troops, but also the intention of the State power(s) to continue to exercise their control on a long term basis.

Thus, analysis of the relevant jurisprudence reveals that the actual period of time of presence of troops and the intended length of stay can both be relevant factors in determining the strength of the military presence and ultimately, the degree of effective control.

### 5.3.4 Intensity of Patrols, Checkpoints and Other means of Control

Control of a territory’s borders, land crossings and main lines of communication including airspace and sea areas by foreign troops through *inter alia*, patrols, checkpoints and incursions gives the ability to foreign military forces to restrict the entrance, exit and movement of persons and goods. Moreover, foreign forces may also control a territory’s airspace and territorial waters, observing activity and restricting movement to a greater extent.

The fact that northern Cyprus was ‘constantly patrolled’\(^\text{95}\) by Turkish troops and ‘had check points on all main lines of communication between the northern and southern parts of the island,’\(^\text{96}\) in conjunction with other relevant factors, compelled the ECtHR to hold that Turkey exercised effective control over northern Cyprus in *Issa*.\(^\text{97}\)

\(^\text{92}\) See, eg, *Loizidou v Turkey (Merits)* [1996] VI Eur Court HR 2216; *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (Ser A); *Cyprus v Turkey* [2001] IV Eur Court HR 1.

\(^\text{93}\) See, eg, *Ilascu v Moldova and Russia* [2004] VII Eur Court HR 179; *Catan v Moldova and Russia* (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012).

\(^\text{94}\) *R (Al-Skeini) v Defence Secretary* [2007] QB 140, 281 [120] (Brooke LJ) (emphasis added).

\(^\text{95}\) *Issa v Turkey* (European Court of Human Rights, Chamber, Application No 31821/96, 16 November 2004) [75].

\(^\text{96}\) Ibid [75].

\(^\text{97}\) See ibid.
5.3.5 Intensity of Insurgency and Local Resistance

Another significant factor in the exercise of effective control by foreign troops is the possible local resistance and hostilities encountered on the ground which can result in a highly volatile situation. The US Army Field Manual in enumerating various considerations which are relevant to the necessary number of troops to maintain effective control, includes ‘the disposition of the inhabitants’. Thus, foreign troops might face local resistance which can affect their exercise of effective control. With the cessation of hostilities, the control of foreign forces over an area increases and order and security advance. However, renewed hostilities might flare up and thus reduce the degree of effective control. Accordingly, fluctuations of hostilities and the intensity of the insurgency will affect the degree of effective control exercised by the foreign troops.

5.3.6 Exercise of Some Public Powers by Foreign Forces

Another key element in relation to effective control is the exercise of authority or some public powers by foreign forces. In Banković, extraterritorial jurisdiction was said to exist when a State conducting military operations abroad ‘exercises all or some of the public powers normally to be exercised by that Government’. Later in Al-

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98 See US Department of the Army, Field Manual: The Law of Land Warfare, above n 76, 139 [356]. See also R (Al-Skeini) v Defence Secretary [2007] QB 140, 300 [197] (Sedley LJ) in which his Honour stated that the low ratio of troops to civilians, the widespread availability of weapons and the prevalence of insurgency would fall to be evaluated for the effective control test.

99 This requirement of the exercise of public powers is analogous to the requirement of the exercise of authority for occupation under IHL. Article 42 of the 1907 Hague Regulations provides that ‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised’. In occupation the nature of authority to be exercised by the occupying power refers to the notion of governmental functions. See Ferraro, above n 56, 19. This was confirmed in the Armed Activities case: ‘In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying power” […] the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question’: Armed Activities (Judgment) [2005] ICJ Rep 168, 230 [173]. Furthermore, ‘in the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also they had substituted their own authority for that of the Congolese Government’: at 230 [173]. Accordingly, occupation required the exercise of actual authority by the foreign forces, meaning that foreign troops should substantiate their authority in order to qualify as an occupying power. See, eg, Wilde, ‘Triggering State Obligations Extraterritorially’, above n 3, 516-23; Milanovic, Extraterritorial Application of Human Rights Treaties, above n 3, 137-41. See also R (Al-Skeini) v Defence Secretary [2007] QB 140, 299 [193] (Sedley LJ) where his Honour emphasised the exercise of ‘some’ public powers.

100 Banković v Belgium [2001] XII Eur Court HR 333, 355 [71]. The Court in Banković, unlike its previous decisions, explicitly emphasised the exercise of ‘all or some of the public powers normally to
Skeini, the ECtHR interpreted ‘some public powers’ to mean executive or judicial functions.101

The maintenance of security is considered as an exercise of executive power. Following the removal from power of the Ba’ath regime and until the accession of the interim Government, the Grand Chamber in Al-Skeini recognised that the UK maintained in Iraq some of the public powers normally exercised by a sovereign government. The Grand Chamber referred in particular to the UK’s ‘assumed authority and responsibility for the maintenance of security in South East Iraq’102 as an exercise of such public powers. The Court then found a jurisdictional link between the deceased and the UK, arising from such security operations.103 Moreover, the UK Court of Appeal in Al-Skeini, in considering the facts of the case to determine whether British troops had effective control over Iraq, referred to the maintenance of security in the South East area of Iraq, amongst the two main functions carried out by the forces in Iraq. The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Amongst the other tasks, were ‘patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations’.104 Similarly, in the context of the occupied territories the HRC has relied on ‘the exercise of effective jurisdiction by Israeli security forces’105 in the occupied territories, as one of the grounds for holding Israel responsible for the full application the ICCPR.

101 See Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [135]. The mere reference to executive or judicial functions does not mean that the Court disregarded legislative powers as part of public powers. It seems that the Court just referred to the first two as examples of the exercise of some public powers.

102 Ibid [149].

103 See ibid. Albeit that the exercise of public powers was assessed in the context of the personal notion of jurisdiction.

104 R (Al-Skeini) v Defence Secretary [2007] QB 140, 157 [43] (Queen’s Bench Divisional Court).

105 HRC, Concluding Observations: Israel, (18 August 1998), above n 20, [10].
Control of the civil administration or even assisting the civil administration can also be seen as the foreign State exercising executive functions.\textsuperscript{106} The Queen’s Bench Divisional Court in \textit{Al-Skeini} regarded as relevant that British troops in Iraq had been engaged in ‘the support of the civil administration in Iraq in a variety of ways, from liaison with the CPA and [Iraqi Governing Council] and local government, to assisting with the rebuilding of the infrastructure’.\textsuperscript{107} The wide range of measures adopted by the CPA for the temporary governance of Iraq give an indication of the general breadth of the subject of administration. The Queen’s Bench Divisional Court noted that the CPA dealt with such matters as, \textit{inter alia},

‘taxation, banking, foreign investment, regulation of oil distribution, new Iraqi banknotes, company law, trading agencies, media and communications, public broadcasting, status of Coalition personnel, confiscation of the proceeds of crime, public sector employment, disqualification from public office, local government powers, weapons control, trade liberalisation, management and use of public property and freedom of assembly.’\textsuperscript{108}

The CPA additionally set up a wide range of government agencies, including a development fund, a governing council, a strategic review board, a ministry of science and technology, a department of border enforcement, a ministry of municipalities and public works, a ministry of environment, a ministry of displacement and migration and a communications and media commission.\textsuperscript{109} It also dealt with other matters such as establishing Iraqi criminal law procedures and the creation of a central criminal court, a ministry of justice, an Iraqi special tribunal (to try Iraqis for war crimes) and a ministry of human rights. Provision was also made for enhanced sentences, notification of criminal offences, management of prisons, review of the justice system and an Iraqi judiciary.\textsuperscript{110}

Commentators have observed that civil administration can involve other factors such as management of a significant portion of the income and finances of the territory.

\textsuperscript{106} The Court in answering whether British troops were in effective control of Basrah city, contrasted the situation in August - November 2003 with the situations in northern Cyprus and the Russian-occupied part of Moldova. In each of those cases, amongst other factors of departure, ‘[t]he civilian administration of those territories was under the control of the occupying state’: \textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 281 [120] (Brooke LJ).

\textsuperscript{107} \textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 157 [44].

\textsuperscript{108} \textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 154 [26] (Queen’s Bench Divisional Court) (internal citations omitted).

\textsuperscript{109} See ibid 154 [25] (Queen’s Bench Divisional Court).

\textsuperscript{110} See ibid 154 [24] (Queen’s Bench Divisional Court).
national budgeting, the maintenance of civil and commercial registers, control over the functioning of governmental institutions, border and customs control, policing the airspace and territorial waters of the territory which in effect places imports and exports in control of the foreign State, issuing of ID cards and travel documents, registration of plates and stamps and management of currency.\textsuperscript{111}

In conclusion, it is a question of fact whether a State conducting military operations abroad exercises effective control over an area. Various interrelated factors are relevant in assessing effective control. An overall evaluation of the strength of the military presence in the area consisting of the number of military troops and strength of arsenals, the distribution of the forces in the territory concerned, the ratio of the number of troops to the population of the territory, the period of time of presence of troops and/or the intended length of stay, the intensity of patrols, checkpoints and other controls, the intensity of insurgency and local resistance and the exercise of some public powers are all relevant to the assessment of whether a foreign State’s military is in effective control.

Based on the overall assessment of the relevant factors, States conducting military operations abroad may exercise different degrees of effective control over an area.\textsuperscript{112} At the outbreak of hostilities and during ‘active hostilities’,\textsuperscript{113} the level of control exercised by foreign forces and their respective State is usually extremely limited. The control of foreign forces over an area increases as hostilities decrease and order and security advance. However, there might be considerable movement in the theatre of hostilities. For example, renewed hostilities may reduce the degree of effective control exercised by the foreign power over some sections of the territory. Thus, control may fluctuate. As the foreign State increases its power and authority over the area, it is able to gradually exercise more governmental functions and achieve greater

\textsuperscript{111} See Bashi and Mann, above n 69; Ferraro, above n 56.
\textsuperscript{112} See, eg, Wilde, ‘Triggering State Obligations Extraterritorially’, above n 3, 524.
effective control. In this sense, effective control is a ‘sliding scale’ concept, one which is realistic and adaptable to the infinite variety of real armed conflict situations.\textsuperscript{114}

\textbf{5.4 Conclusion}

In this Chapter I demonstrated that effective control over territory is the accepted test for the spatial notion of jurisdiction, which gives rise to human rights treaty obligations. By analysing the relevant jurisprudence of international, regional and domestic courts, I developed a coherent framework to assess the spatial notion of jurisdiction, identifying factors relevant to determining whether there is effective control over territory.

An overall evaluation of the strength of the military presence in the area consisting of the number of military troops and arsenals, the distribution of the forces in the territory concerned, the ratio of the number of troops to the population of the territory, the period of time of presence of troops and/or the intended length of stay, the intensity of patrols, checkpoints and other controls, the intensity of insurgency and local resistance and the exercise of some public powers were found to be relevant to the assessment of whether a foreign State’s military is in effective control.

I subsequently argued that there is a spectrum of effective control and States involved in armed conflicts abroad might exercise different degrees of effective control over an area. At the outbreak of hostilities and during active hostilities, the level of control exercised by foreign States is extremely limited. As hostilities decrease, the foreign forces gain increased power and authority over the area and are able to gradually exercise more governmental functions and therefore exercise greater effective control.

Identifying the factors relevant to the effective control test is important as it addresses the current problem of indeterminacy by assisting to identify in a practical sense when human rights treaty obligations apply extraterritorially in armed conflict. However, this is just the starting point. How human rights treaty obligations apply in a given extraterritorial armed conflict situation is the next issue. In the next two Chapters, I argue that \textit{to the extent} that a State conducting military operations abroad exercises

\textsuperscript{114} See Sassòli, above n 69; Marco Sassòli, ‘Sliding Scales or Clear-Cut Regimes of International Law for Armed Conflicts and Other Situations of Violence’ (Speech delivered at the Canadian Council of International Law, 5 November 2011).
control,\textsuperscript{115} it may be subject to different \textit{ranges} and \textit{levels} of human rights obligations resulting in a direct relationship between the amount of effective control and the extent of a State’s extraterritorial human rights obligations.\textsuperscript{116}


Part Three

A Leaner Approach to the Extraterritorial Application of IHRL Treaties in Armed Conflict Situations

In situations of extraterritorial conduct, the degree of control is not usually the same as exercised by a State within its own territory, and the ability of governments to control areas situated outside their sovereign territory is generally limited when compared to their ability to control their own land. Accordingly, in defining the extraterritorial obligations of States conducting military operations abroad considerations of reasonableness and practicality must be addressed in such a way as not to ‘impose an impossible or disproportioanate burden’ on States.

This Part argues that the scope of human rights treaty obligations of a State conducting military operations abroad should be co-extensive with the degree of effective control it exercises. As the foreign forces exercise greater effective control over the territory, the range and level of their human rights obligations broadens. Conversely, with lower degrees of effective control, a more limited range and level of human rights obligations will be applicable. This means that human rights treaty obligations when applied in situations of extraterritorial armed conflict might not be applied in full and may entail a more limited range and lower levels of obligations.

Chapter Six examines the range and Chapter Seven examines the level of applicable human rights obligations in an extraterritorial armed conflict situation. Chapter Seven concludes with a four-stage framework for the gradual application of the range and level of human rights obligations of States involved in armed conflicts abroad.

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2 Ilascu and Others v Moldova and Russia [2004] VII Eur Court HR 179, 266 [332]; Özgür Gündem v Turkey [2000] III Eur Court HR 1, 21 [43].
6 RANGE OF HUMAN RIGHTS OBLIGATIONS

6.1 Introduction

In the previous Chapter I examined the development of effective control over territory as the test for the spatial notion of jurisdiction, which gives rise to the extraterritorial application of human rights treaty obligations. I further argued that States conducting military operations abroad may exercise different degrees of control over a territory. In the next two Chapters, I argue that the range and level of human rights obligations of a State conducting military operations abroad should be proportionate to the degree of effective control it exercises.¹

The main aim of this Chapter is to provide a framework for determining the applicable range of rights in any given situation according to the various levels of effective control exercised by States conducting military operations abroad. I propose that the range of applicable rights in an extraterritorial armed conflict context will be limited by the extent of the control exercised by that State. As the foreign forces exercise greater effective control over the territory, the range of their human rights obligations broadens. Conversely, with lower degrees of effective control, a more limited range of human rights obligations will be applicable. Some rights might remain relevant even with the least amount of effective control.

In setting out my proposal, I first examine the possibility of the divisibility of rights in an extraterritorial armed conflict situation. I examine the relevant jurisprudence and commentary to locate support for my argument that human rights may be divided and tailored in armed conflict situations. Having established the possibility that the range of applicable rights may be limited by the extent of the foreign State’s effective control in the circumstances, I address the question as to which rights would then apply in any given situation.

In undertaking this task, I employ the typology developed in Chapter Three. I suggest that the full range of a State’s human rights obligations in an extraterritorial armed conflict situation will apply progressively in three distinct phases, depending on the amount of effective control it exercises.

Having established the progressive activation of the three different phases of human rights obligations based on the degree of effective control exercised, I turn in Chapter Seven to examine the level of human rights obligations, which I argue should also be co-extensive with the degree of control exercised by foreign States.

6.2 Range of Applicable Rights in Extraterritorial Armed Conflict Situations

As demonstrated in Chapter Two, although the traditional view of a clear and unquestioned separation between IHL and IHRL no longer enjoys majority support and that IHRL is not automatically displaced by IHL at the outbreak of hostilities, IHL and IHRL were historically two separate regimes designed to govern distinct situations. Modern IHRL, although developed from the ashes of Second World War, was primarily designed to apply to ordinary situations of peace. This is supported by Resolution XXIII, ‘Human Rights in Armed Conflicts’ adopted by the International Conference on Human Rights in 1968 where it was acknowledged that ‘peace is the underlying condition for the full observance of human rights and war is their negation’.2

Additionally, ‘fears that applying human rights guarantees extraterritorially would prove to be wholly impracticable permeate’3 much of the existing case law and literature in relation to extraterritoriality. For example, in Al-Skeini both the UK Court of Appeal and House of Lords explicitly declared that it would be ‘utterly unreal’4 and ‘manifestly absurd’5 to expect the UK to secure all ECHR rights in occupied Iraq.

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5 R (Al-Skeini) v Secretary of State for Defence [2008] 1 AC 153, 201-02 [78] (Lord Rodger).
‘As human rights law is generally predicated on a State’s authority and presumed capacity to control individuals and territories,’ it seems reasonable that the human rights obligations of a State acting abroad may not be as extensive as when it acts within its own borders. Holding such States responsible for the full range of rights without considering the amount of control they exercise would be imposing ‘an impossible or disproportionate burden’ on these States. This is especially the case, when extraterritoriality is associated with hostilities and armed conflict. Indeed, States are unlikely to adopt the obligation to apply human rights norms extraterritorially in armed conflict without some degree of modification and limitation of their human rights obligations in such circumstances.

Consequently, to extend human rights obligations to situations of armed conflict, without considering the limits and constraints of the States conducting military operations abroad, would be overburdening these States, ultimately resulting in non-compliance. Since a strict application of human rights norms extraterritorially to armed conflict situations would be both unsuitable and unachievable, a leaner approach towards the extraterritorial application of human rights norms in the context of armed conflict appears to be a workable compromise rather than an ‘all or nothing’ approach.

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7 See Ilaşcu and Others v Moldova and Russia [2004] VII Eur Court HR 179, 266 [332]; Özgür Gündem v Turkey [2000] III Eur Court HR 1, 21 [43].

8 See, eg, Orna Ben-Naftali and Yuval Shany, ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (2003) 37(1) Israel Law Review 17, 37. This situation is comparable to cases where a State does not exercise control over parts of its territory. In the Ilaşcu case, for example, the Court found that Moldova’s ‘jurisdiction’ had a more limited scope by virtue of the fact that it did not have effective control over Transdniestria. Thus, the Court expressly tied the scope of Moldova’s jurisdiction to the level of Moldova’s control over the situation. Where a State is prevented from exercising its control over the whole of its territory ‘by a constraining de facto situation’, the Court held that such a factual situation reduces the scope of that jurisdiction...’. However, the State must ‘endeavour, with all the legal and diplomatic means available to it [...] to continue to guarantee the enjoyment of the rights and freedoms’ in the Convention: Ilaşcu and Others v Moldova and Russia [2004] VII Eur Court HR 179, 266-7 [333].


10 See, eg, Ben-Naftali and Shany, above n 8; Dominic McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ in Fons Coomans and Menno T Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004) 41, 46; Milanovic, Extraterritorial Application of Human Rights Treaties, above n 3, 111.
A key issue in relation to the extraterritorial application of IHRL in times of armed conflict is the range of rights that apply in such situations. Within a State’s territory, normally the full scope of rights will apply. However, given the generally limited control exercised by a State conducting military operations abroad it is unlikely that the full scope of rights set forth in each treaty to which the State is a party will apply. Instead, the range of its human rights obligations will be commensurate with the extent of effective control it exercises. While the argument for a limited range of rights in an extraterritorial context of armed conflict seems persuasive, it has been opposed by a number of scholars and judicial bodies. This section explains the relationship between the ideal of the indivisibility of human rights and the practical realities of the extraterritorial application of human rights in situations of armed conflict.

The argument for a limited range of rights might provoke the concern that any flexibility in the substantive application of human rights norms undermines their protection and implementation and threatens to diminish the hard-fought gains of past decades in terms of human rights norms and rights discourse.11 Such an approach might be said to go against the dominant trend in IHRL and scholarship that insists that human rights are ‘indivisible’ and ‘interrelated’ and cannot be segmented or prioritised.12 The concept of the indivisibility of human rights has powerful support in IHRL. Within a State’s territory, the full range of rights will normally be applicable and human rights may not be selected or prioritised to apply by the State. In other words, they may not be divided and tailored. However, the argument as to the indivisibility of human rights has also been claimed to operate in the extraterritorial armed conflict context. According to that argument, as human rights are indivisible,


once a State is considered to have extraterritorial jurisdiction, then that State is bound to enforce all its human rights treaty obligations. \(13\)

In my view the concerns as to the potential drawbacks to the divisibility of human rights are overstated, since ‘flexibility and contextualisation are integral components of the very meaning of the [human rights] obligations themselves, via the operation of limitation clauses, […] derogation provisions’ \(14\) and reservations. \(15\) Considering ‘particular contextual situations’ is an essential part of understanding what the obligations amount to when they are applied. \(16\) In the words of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ‘[w]hile the standards of human rights law remain the same even in situations approaching armed conflict, they have to be applied in ways that are realistic in the context’. \(17\)

The Grand Chamber of the ECtHR in Banković was in favour of indivisibility. \(18\) The applicants’ claims, arising from NATO air strikes against the FRY, were that the ECHR applied ‘in a manner proportionate to the level of control exercised in any given extraterritorial situation’. \(19\) For the applicants, ‘when the respondent States strike a target outside their territory, they are not obliged to do the impossible (secure the full range of Convention rights) but rather are held accountable for those Convention rights within their control in the situation in question’. \(20\) On the facts, the applicants argued that the limited scope of the control over airspace only circumscribed the scope of the respondent State’s positive obligation to protect the

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\(13\) This issue of the indivisibility of human rights is raised in Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) (Judge Bonello).

\(14\) Ralph Wilde, ‘Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms’ (2009) 42(1) Israel Law Review 80, 93. For such derogation provisions, see eg, ICCPR art 4(1): ‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’. By Article 4(2) ‘no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision’.

\(15\) See Wilde, above n 14.

\(16\) See ibid.

\(17\) Christof Heyns, Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions, 68th sess, Agenda Item 69(b), UN Doc A/68/382 (13 September 2013) [36].

\(18\) See Banković v Belgium [2001] XII Eur Court HR 333, 357 [76].

\(19\) Ibid 356-7 [75]. The applicants considered that ‘this approach to jurisdiction in Article 1 would provide manageable criteria by which the Court could deal with future complaints arising out of comparable circumstances’: at 348-9 [46].

\(20\) Ibid 349 [47].
applicants and did not exclude it.\textsuperscript{21} The Grand Chamber rejected the applicants’ claim and dismissed the possibility of a lesser obligation arising:

The wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure “the rights and freedoms defined in section 1 of this Convention” can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question...\textsuperscript{22}

Both the UK Court of Appeal and the House of Lords in \textit{Al-Skeini} regarded themselves as bound to follow Banković, and thus held that the ECHR ‘is applicable either in full, [...] or not at all’.\textsuperscript{23} As Lord Rodger of the House of Lords explained:

[T]he whole package of rights applies and must be secured where a contracting state has jurisdiction. This merely reflects the normal understanding that a contracting state cannot pick and choose among the rights in the Convention: it must secure them all to everyone within its jurisdiction.\textsuperscript{24}

If that is so, Lord Rodger continued,

then it suggests that the obligation [to secure the Convention rights] can arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory \textit{all} the rights and freedoms [...] of the Convention.\textsuperscript{25}

The House of Lords held that the UK’s presence in Iraq fell far short of such control and the five applicants killed on patrol were not within the jurisdiction of the UK.\textsuperscript{26}

\textsuperscript{21}See ibid 348-9 [46]-[47], 356-7 [75].
\textsuperscript{22}Ibid 357 [76]. For a narrower reading of the dictum in Banković that rights cannot be divided and tailored, see Wilde, above n 14.
\textsuperscript{23}\textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 298-9 [190] (Sedley LJ), 282 [124] (Brooke LJ); \textit{R (Al-Skeini) v Secretary of State for Defence} [2008] 1 AC 153, 202 [79] (Lord Rodger). See also \textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 175 [124], 223 [278] (Queen’s Bench Divisional Court).
\textsuperscript{24}\textit{R (Al-Skeini) v Secretary of State for Defence} [2008] 1 AC 153, 202 [79] (Lord Rodger).
\textsuperscript{25}Ibid (emphasis added).
\textsuperscript{26}See ibid 202-3 [81]-[83] (Lord Rodger), 204 [90]-[92] (Baroness Hale), 206 [97] (Lord Carswell), 215-16 [132] (Lord Brown). See also \textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 225-6 [287]-[288], 244 [344] (Queen’s Bench Divisional Court); \textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 287 [138], 288 [142] (Brooke LJ) (EWCA Civ). It was further argued by the UK Courts that the effective control test as developed in \textit{Loizidou} could not apply to Iraqi territory, as this ground for jurisdiction as confirmed in Banković v Belgium [2001] XII Eur Court HR 333, 358 [80], could only extend to territories that were part of the ECHR’s \textit{espace juridique}, and were already covered by the Convention. Essentially, the UK Courts found that the European human rights system was designed within and for a particular region and was not intended to make Council of Europe States responsible for securing the rights of individuals throughout the world. The jurisprudence of the ECHR is, however, inconsistent with respect to this issue. Accordingly, the ECtHR in \textit{Al-Skeini} clearly confirmed that extraterritorial jurisdiction can be applied outside the \textit{espace juridique} of the Council of Europe: \textit{Al-Skeini v United Kingdom} (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [142].
The position of the ECtHR in *Banković*, however, has been the subject of harsh criticism.\(^{27}\) In the UK Court of Appeal, Sedley LJ wrote that:

I do not see why the presence or absence of adequate [...] effective control in international law should be tested by asking whether there is sufficient control to enforce the full range of Convention rights.\(^{28}\)

In other words, for Sedley LJ, ‘the applicability of Convention rights depended not on their enforceability as a whole’.\(^{29}\) Describing the ‘all or nothing’ approach as ‘absurd’,\(^{30}\) his Lordship argued persuasively that ‘it is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing.’\(^{31}\)

The Grand Chamber of the ECtHR in *Al-Skeini* departed from its prior holding in *Banković* and the ‘all or nothing’ approach and recognised that rights can be divided and tailored. In the context of the personal model of jurisdiction the Court held:

> whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored”.\(^{32}\)

This point was made even more explicitly in Judge Bonello’s concurring opinion, in that a State acting extraterritorially, is obliged to ensure the observance of all those human rights which *it is in a position to ensure*. It is quite possible to envisage situations in which a Contracting State, in its role as an occupying power, has well within its authority the power not to commit torture or extrajudicial killings, to punish those who commit them and to compensate the victims – but at the same time that Contracting State does not have the extent of authority and control required to ensure to all persons the right to education or the right to free and fair elections: those fundamental rights it can enforce would fall squarely within its jurisdiction, those it cannot, on the wrong side of the bright line.\(^{33}\)


\(^{28}\) *R (Al-Skeini) v Defence Secretary* [2007] QB 140, 300 [195] (Sedley LJ).

\(^{29}\) Ibid 301 [198] (Sedley LJ).

\(^{30}\) Ibid 300 [196] (Sedley LJ).

\(^{31}\) Ibid 300 [197] (Sedley LJ).

\(^{32}\) *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) 59 [137].

\(^{33}\) Ibid 84 [32] (Judge Bonello).
Accordingly, Justice Bonello rejected the argument of the UK ‘that their inability to secure respect for all fundamental rights in Basrah, gave them the right not to respect any at all’. 34

Thus, the European jurisprudence, at least after Al-Skeini, has evolved from initial attempts to maintain indivisibility to now accept the possibility and necessity of dividing and tailoring a State’s human rights obligations in an extraterritorial armed conflict situation.

The indivisibility of human rights law is not workable if we accept the idea of the extraterritorial application of IHRL in armed conflict situations. 35 The solution is not one of ‘all or nothing’. 36 The answer lies in finding the proper balance between the various considerations, including the degree of effective control exercised by the State conducting military operations abroad based on the relevant factors identified in Chapter Five.

While the ECtHR has now adopted a more nuanced position, accepting that human rights obligations can be divided and tailored, it has yet to systematically consider how such rights are tailored in their application to extraterritorial armed conflict situations. 37 Likewise, scholars to date have not examined this issue in any detail. One exception is Cerone, who has undertaken a limited analysis of the question of the range of applicable rights and argues that the ICJ in the Wall Advisory Opinion appeared to suggest different thresholds for the activation of the ICCPR and ICESCR. 38 He suggests that the Court might have appeared to limit more narrowly the

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34 Ibid 84 [33] (Judge Bonello). Furthermore, to require a State to exert such control as to enable it to enforce the whole package of rights within that territory, as the applicants reasoned in Al-Skeini (ECHR) ‘would lead to the perverse position whereby facts disclosing a violation of the Convention would, instead of entitling the victim to a remedy, form the evidential basis for a finding that the State did not exercise jurisdiction’: at 55 [126].
35 See Modirzadeh, above n 9.
36 See Public Committee against Torture v Government [2006] Israel Law Reports (14 December 2006) Israel Supreme Court sitting as the High Court of Justice HCJ 769/02, 459, 483.
37 There are some general and vague references as to which sort of rights are to be applied. For example, the ECtHR in Al-Skeini held that the State is under an obligation to secure to the individual the rights and freedoms ‘that are relevant to the situation of that individual’: Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) 59 [137]. Judge Bonello in his separate concurring opinion expressed the view that those fundamental rights that the State can enforce would fall within its jurisdiction: at 84 [32] (Judge Bonello).
circumstances in which the *ICESCR* would apply extraterritorially, indicating that there is a higher threshold for the activation of economic, social and cultural rights.\(^{39}\) Cerone cautiously argues that ‘it may be that this approach is linked to the nature of economic and social rights’, in that ‘these rights are thought to require an expansive and more highly defined conception of the State’.\(^{40}\) However, as he points out in *DRC v Uganda*, ‘the [ICJ] seemed to indicate a single standard for the extraterritorial application of human rights treaties generally’.\(^{41}\) He goes no further with his analysis but suggests that another approach to a more limited scope of extraterritorial human rights obligations would be to focus the inquiry not on the range of rights, but instead on the level of human rights obligations upon States.\(^{42}\) Therefore, there is a clear need for a closer examination of the range of applicable rights in extraterritorial armed conflict situations.

### 6.3 Which Human Rights?

If it is accepted that the range of applicable human rights may be limited by the scope of the State’s control in the circumstances, the question arises as to which rights will apply in any given situation. To answer this question, I return to my typology as presented in Chapter Three.

I propose that the full range of a State’s human rights obligations will apply gradually in extraterritorial armed conflict situations in three distinct phases as its level of


\(^{42}\) Cerone, ‘Human Dignity in the Line of Fire’, above n 6, 1498; Cerone, ‘Jurisdiction and Power’, above n 39, 440. Sassòli also proposes the ‘functional approach’, ‘distinguishing the degree of control necessary according to the right to be protected’. He argues that ‘[t]his functional approach would for example mean that international forces have to respect the right to life of a person simply by omitting to attack that person as soon as those forces could affect that right by their attack. On the other hand, it is only while they physically detain a person that they would have to respect the procedural guarantees inherent in the right to personal freedom, but not if they hand an arrested person over to the custody of another state’: Sassòli, ‘The Role of Human Rights and International Humanitarian Law’, above n 1, 65-6. In my view, Sassòli’s examples demonstrate that his approach is limited to specific rights and does resolve how other rights such as the right to education or the right to work would apply.
effective control increases. This approach is consistent with the view of Judge Bonello in *Al-Skeini* (ECtHR), where his Honour recognised the prohibition of torture (first phase right) as being within the authority of the occupying power, but enumerated the rights to education (second phase right) and free and fair elections (third phase right) as rights which may not be within the authority and control of the occupying State on the facts of the case.\(^{43}\) As Judge Bonello explained, the obligation of the State extends to ‘those rights which it is in a position to ensure’, adding that only ‘*rights it can enforce* would fall […] within its jurisdiction’.\(^{44}\)

In accordance with a justification based on pragmatism for tailoring human rights in an extraterritorial context the range of obligations which a State is bound to protect will increase as its ability to protect those rights increases, and that ability will itself depend on the level of effective control exercised by the State. In this way, the test of effective control will determine which rights apply in any given situation. It is here that my typology of rights presented in Chapter 3 can be used to identify distinct phases in which human rights norms will become applicable as effective control increases.

The issue of control becomes relevant only when IHRL adds to the normative content of IHL. Accordingly, the activation of some human rights (first phase rights) is not dependent on the amount of control exercised by States conducting military operations abroad. In the case of first phase rights, States are already under comparable obligations under IHL, and thus there is no pragmatic justification for deferring the application of these rights under IHRL. Conversely, the degree of effective control is relevant to the activation of other rights, namely those where IHRL adds to the protections available under IHL. These include: (a) rights that confer enhanced protection under IHRL over and above that of IHL (second phase rights); and (b) rights which are exclusive to IHRL (third phase rights).

In the case of human rights norms that add to the protections available under IHL, these rights would be triggered by a lower degree of effective control than in the case of third phase rights. The explanation for this differentiation between these phases lies

\(^{43}\) See *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) 84 [32] (Judge Bonello).

\(^{44}\) Ibid (emphasis added).
in the fact that second phase rights are already protected to an extent under IHL and compliance with the additional requirements of IHRL would not place an unreasonable burden on States. In the case of third phase rights, however, which have no equivalent in IHL, their realisation in most cases would require complex and advanced administrative apparatus and would place a significantly higher burden on States. Accordingly, a higher degree of effective control would be required for the activation of third phase rights.

Adopting this framework, I propose a model to address a hitherto neglected issue by employing the effective control test to identify the progressive application of IHRL norms in extraterritorial armed conflict situations.

6.3.1 First Phase

First phase rights that are binding on States conducting military operations abroad regardless of the amount of effective control exercised, include non-derogable rights, jus cogens norms and norms where IHL provides comparable normative protection or enhanced normative protection compared to IHRL.

6.3.1.1 Non-derogable Rights

Some international human rights treaties contain a so-called derogation clause or emergency clause that permits States under certain conditions\(^{45}\) to derogate temporarily from some of their human rights obligations, subject to international supervision.\(^{46}\) However, a limited number of obligations, considered to be particularly

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\(^{46}\) See, eg, *ICCPR* art 4; *ECHR* art 15; *ACHR* art 27(1). Although the *ICCPR* does not provide explicitly for derogation in times of armed conflict, as Nowak writes, armed conflict, particularly an international armed conflict usually represents the typical example of a public emergency that threatens the life of the nation: Nowak, *UN Covenant on Civil and Political Rights*, above n 45, 89. This was repeatedly emphasised during the drafting of Article 4. While the *ICCPR* only mentions public emergency, Article 15 of the *ECHR* and Article 27 of the *ACHR* provide explicitly for derogation in
fundamental, may not be the subject of any derogation, even in a time of public emergency. The ICCPR recognises as non-derogable rights: the right to life; the prohibition of torture, cruel, inhuman or degrading treatment or punishment, or of medical or scientific experimentation without consent; the prohibition of slavery, slave trade and servitude; freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation; the prohibition of retroactive application of criminal law; the right to recognition as a person before the law; and the right to freedom of thought, conscience and religion. Given that non-derogable rights are ipso facto incapable of suspension during times of public emergency, including armed

wartime. Specific mention of wartime in the public emergency proviso which appeared in a draft of the ICCPR was deleted in 1952 in order to prevent giving the impression that the United Nations accepted war. See, eg, Economic and Social Council, Commission on Human Rights, Drafting Committee, International Bill of Human Rights, UN Doc E/CN.4/AC.1/1/4 (5 June 1947) annex I, art 4(1); Economic and Social Council, Commission on Human Rights, Report of the Drafting Committee on an International Bill of Human Rights, 1st sess, UN Doc E/CN.4/21/1 (1 July 1947) art 4(1); Nowak at 89. However, as the HRC has stated, not every armed conflict qualifies as a state of emergency. In that respect, the Committee has indicated that ‘[t]he [ICCPR] requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation’: HRC, General Comment No 29: States of Emergency (Article 4), 1950th mtg, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [3]. For more information on the existence of a state of emergency see, Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 41st sess, Agenda Item 18, UN Doc E/CN.4/1985/4 (28 September 1984) [39]. ‘The process of derogation is a formal one, usually set out in the treaty, and failure to follow it may make the derogation ineffective in international law’: Francisco Forrest Martin et al, International Human Rights and Humanitarian Law: Treaties, Cases and Analysis (Cambridge University Press, 2006) 25.

47 ICCPR art 4(2). Article 15(2) of the ECHR confines the non-derogable rights to four, these are: the right to life except in respect of deaths resulting from lawful acts of war (art 2); prohibition of torture or inhuman or degrading treatment or punishment (art 3); prohibition of slavery or servitude (art 4(1); and prohibition of retroactive application of criminal law (art 7). Under Article 27(2) of the ACHR, eleven rights are enumerated as non-derogable: the right to juridical personality (art 3); right to life (art 4); right to humane treatment (art 5); freedom from slavery (art 6); freedom from post facto laws (art 9); freedom of conscience and religion (art 12); rights of the family (art 17); right to a name (art 18); rights of the child (art 19); right to nationality (art 20); right to participate in government (art 23); and judicial guarantees essential for the protection of such rights. Due process guarantees are embodied in arts 7 (right to personal liberty) and 8 (right to a fair trial). Given the scope of this thesis is primarily limited to the provisions of the ICCPR and the ICESCR, the non-derogable rights as enumerated in the ECHR and ACHR are not dealt with.

48 ICCPR art 6.
49 Ibid art 7.
50 Ibid art 8(1) and (2).
51 Ibid art 11. In Chapter Three, I categorised this norm as a norm which is exclusively a matter of IHRL.
52 Ibid art 15.
53 Ibid art 16.
54 Ibid art 18. The HRC in its General Comment No 29 expanded the list of non-derogable rights beyond that expressly provided in the ICCPR to cover rights such as the freedom from arbitrary deprivation of liberty and the right to a fair trial (which includes the presumption of innocence) as peremptory norms of international law as well as the principles of IHL such as the prohibition of taking hostages and the interdiction of collective punishments. HRC, General Comment No 29, above n 46, [11], [13].
conflict situations, they apply at all times. Therefore, these human rights obligations apply to States involved in extraterritorial armed conflict irrespective of the amount of effective control exercised.\textsuperscript{55}

\textbf{6.3.1.2 Jus Cogens Norms}

\textit{Jus cogens} or peremptory norms provide a set of common values and interests of the international community and apply equally to all States irrespective of specific treaty obligations.\textsuperscript{56} In accordance with Article 53 of the \textit{VCLT} a peremptory norm of general international law is one which is ‘accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.\textsuperscript{57}

Despite some uncertainty over which norms enjoy the status of \textit{jus cogens}, it is now widely accepted that some human rights obligations have this status.\textsuperscript{58} Although, as the ILC Report on the Fragmentation of International Law points out, there is no single authoritative list of \textit{jus cogens} norms,\textsuperscript{59} there are several pronouncements today

\begin{itemize}
\item \textsuperscript{55} See Modirzadeh, above n 9.
\item \textsuperscript{56} See, eg, Malcolm N Shaw, \textit{International Law} (Cambridge University Press, 6\textsuperscript{th} ed, 2008) 123-7; Stephen Hall, \textit{Principles of International Law} (Lexis Nexis, 3\textsuperscript{rd} ed, 2011) 119-21.
\item \textsuperscript{57} Article 4 of the \textit{VCLT} sets out that the Convention applies only prospectively. Accordingly the \textit{IC CPR} and \textit{ICESCR} both entered into force in 1976, before the entry into force of the \textit{VCLT} in 1980. However, since many of its provisions are thought to reflect customary international law, so they are considered applicable even in relation to treaties which entered into force prior to it. See, eg, US Department of State, \textit{Vienna Convention on the Law of Treaties} [http://www.state.gov/s/l/treaty/faqs/70139.htm]; Karen da Costa, \textit{The Extraterritorial Application of Selected Human Rights Treaties} (Martinus Nijhoff, 2013) 15.
\item \textsuperscript{58} Over the years, the initial controversy over the notion of \textit{jus cogens} norms has dissipated. As the ILC remarked in its Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ‘[t]he concept of peremptory norms of general international law is recognised in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine’: \textit{Report of the International Law Commission on the Work of its Fifty-Third Session (23 April-1 June and 2 July-10 August 2001)}, UN GAOR, 56\textsuperscript{th} sess, Supp No 10, UN Doc A/56/10, 282. However, as Aust has expressed: ‘the concept was once controversial, now it is more its scope and applicability that is unclear’: Anthony Aust, \textit{Handbook of International Law} (Cambridge University Press, 2005) 11.
\item \textsuperscript{59} See Martti Koskenniemi, \textit{Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law}, Report of the Study Group of the International Law Commission, 58\textsuperscript{th} sess, UN Doc A/CN.4/L.682 (13 April 2006) [375]. Previously, in its final draft of the law of treaties the ILC deliberately avoided listing concrete examples of \textit{jus cogens} norms. It did so because, ‘there is no simple criterion by which to identify a general rule of international law as having the character of \textit{jus cogens}’: ‘Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly: Treaties Conflicting with a Peremptory Norm of General International Law (\textit{Jus Cogens})’ [1966] II \textit{Yearbook of the International Law Commission} 247, 247-8.
\end{itemize}
from various judicial and diplomatic organs that give an idea of which human rights norms might have *jus cogens* status. These include the prohibition of slavery and slave trade, racial discrimination and apartheid, torture, basic rules of IHL applicable in armed conflict, such as the prohibition of hostilities directed at the civilian population, and the right to self-determination.60

In light of the higher status of such norms which involve, as explained by Bassiouni, the universal application of such obligations whether in time of peace or war and their non-derogation in states of emergency,61 it can be concluded that the extraterritorial applicability of such norms in armed conflict situations is not dependent on the level of control exercised by States conducting military operations abroad. This means that, as in the case of non-derogable rights, such norms apply to States conducting military operations abroad regardless of the amount of control exercised.

### 6.3.1.3 Comparable Normative Protection

In Chapter Three I demonstrated that some rights are protected under both IHL and IHRL by identical or virtually identical rules. Given that this category of rights is already safeguarded under IHL, and IHRL adds nothing to their normative content beyond the possibility of providing a supplementary source of interpretation and

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60 In its Commentary to the Draft Articles on State Responsibility in 2001 the ILC provides as examples of *jus cogens* norms the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture, basic rules of international humanitarian law applicable in armed conflict, and the obligation to respect the right to self-determination. *Report of the International Law Commission on the Work of its Fifty-Third Session*, above n 58, 283-4. The ILC in its 2006 Report on Fragmentation of International Law listed the prohibition of aggressive use of force; the right to self-defence; the prohibition of slavery and slave trade; the prohibition of piracy; the prohibition of racial discrimination and apartheid; and the prohibition of hostilities directed at civilian population as ‘the most frequently cited candidates for the status of *jus cogens*’: Koskenniemi, above n 59, [374]. See also M Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’ (1996) 59(4) *Law and Contemporary Problems* 63, 67; Kenneth Randall, ‘Universal Jurisdiction under International Law’ (1988) 66 *Texas Law Review* 785, 830; Michael Byers, ‘Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules’ (1997) 66 *Nordic Journal of International Law* 211, 219. Furthermore, the ICJ has quoted with approval the statement by the ILC that ‘the Law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*…’: *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment, Merits) [1986] ICJ Rep 14 [190]. See also ‘Documents of the Second Part of the Seventeenth Session: and of the Eighteenth Session including the Reports of the Commission to the General Assembly: Treaties Conflicting with a Peremptory Norm’, above n 59, 247.

access to complaint mechanisms, there seems to be a strong argument for the activation of these human rights norms regardless of the amount of effective control exercised by the State in question. This category of rights was argued to include: (a) the prohibition of adverse distinction and discrimination; (b) the prohibition of torture and cruel, inhuman or degrading treatment; (c) the right to a fair trial; (d) the principle of legality (prohibition of retrospective criminal laws); (e) respect for religious convictions and practices (right to freedom of religion); and (f) respect for family life. Many of these rights, including the prohibition of torture, cruel, inhuman or degrading treatment, the prohibition of retrospective criminal laws and respect for convictions and religious practices are already listed above either in the category of non-derogable rights or *jus cogens* norms.

### 6.3.1.4 Enhanced Normative Protection under IHL

Certain human rights are either expressly protected under IHL (whereas merely implied in IHRL) or their content is more detailed in the former regime. Given that this category of rights is protected in greater detail under IHL, the additional application of human rights treaties will not in reality add to their normative content. As the application of IHL is not dependent on the level of control exercised by States conducting military operations abroad, the issue of effective control is not relevant to the activation of such rights and they are triggered regardless of the amount of control exercised. Nevertheless, as discussed in Chapter Three, there are other advantages to the application of human rights treaties in relation to such norms.

These norms include: (a) the prohibition of human shields; (b) the prohibition of hostage-taking; (c) humane treatment; (d) the principal of individual criminal responsibility; (e) the prohibition of collective punishments; (f) the prohibition of rape and other forms of sexual violence; (g) the prohibition of mutilation; (h) the prohibition of medical or scientific experiments; and (i) the prohibition of corporal punishments.

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62 See Chapter 3.2.1 and 3.4.
63 See Chapter 3.2.1.
64 See Chapter 3.2.2 and 3.4.
6.3.1.5 Conclusion: First Phase

In this section I have identified those rights activated independently of the amount of effective control exercised by States conducting military operations abroad. These include non-derogable rights, *jus cogens* norms and norms where IHL provides comparable normative protection or enhanced normative protection compared to IHRL.

In sum, first phase rights therefore comprise: (a) the prohibition of torture, cruel, inhuman or degrading treatment or punishment; (b) the prohibition of slavery, slave trade and servitude;\(^65\) (c) freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation; (d) the prohibition of retroactive application of criminal law; (e) the right to recognition as a person before the law; (f) the right to freedom of thought, conscience and religion; (g) the prohibition of racial discrimination and apartheid;\(^66\) (h) basic rules of IHL applicable in armed conflict; (i) the right to self-determination; (j) the prohibition of adverse distinction and discrimination; (k) the right to a fair trial; (l) respect for family life; (m) the prohibition of the use of human shields; (n) the prohibition of hostage-taking;\(^67\) (o) humane treatment; (p) the principle of individual criminal responsibility; (q) the prohibition of collective punishments; (r) the prohibition of rape and other forms of sexual violence; (s) the prohibition of mutilation; (t) the prohibition of medical or scientific experiments; and (u) the prohibition of corporal punishments.

6.3.2 Second Phase

The issue of control becomes relevant when IHRL adds to the normative content of IHL. In the case of second phase rights IHRL enriches the normative content of the protections provided under IHL, for example by broadening the restricted protections provided to limited categories of people under that regime, and the activation of this category of rights requires an increased level of control, as compared to first phase.

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\(^{65}\) In Chapter 3.2.3, I placed the prohibition on slavery and slave trade in the category of enhanced protection under IHRL, as it is explicitly prohibited under IHRL rather than impliedly prohibited within IHL treaties. Nonetheless, since it is a *jus cogens* norm, for the purposes of this Chapter, it is a first phase right.

\(^{66}\) Racial discrimination is part of the more general prohibition of adverse distinction and discrimination as enumerated in the category of comparable normative protection. See Chapter 3.2.1.1.

\(^{67}\) Randall lists hostage taking as a *jus cogens* norm: Randall, above n 60, 830. However, hostage taking is not recognised as a *jus cogens* norm by other scholars named in n 59.
rights. However, as they are already reflected within IHL treaties, their activation requires a lower amount of control in comparison to those rights which are exclusive to IHL. These rights identified in Chapter Three are: (a) prohibition of forced or compulsory labour and the right to work; (b) right to an adequate standard of living which comprises of (i) right to food and (ii) right to housing and prohibition of forced evictions; (c) right to health; (d) right to freedom of expression; (e) freedom of movement; (f) prohibition on arbitrary or unlawful interference with correspondence; (g) rights of women; (h) rights of children; and (i) right to education.68

An analysis of the facts of Catan,69 in which the jurisdiction of Russia was recognised by the ECtHR for violations of the right to education of Moldovan nationals, a second phase right, can assist in determining the required level of effective control for the activation of second phase rights.70 Despite the small number of Russian troops stationed in Transdniestria (around 2,000 soldiers),71 in view of Russia’s weapons stocks and arsenal in Transdniestria, its military importance in the region and its dissuasive influence, the Court recognised Russia as exercising effective control.72 Further, the intention of Russia in exercising its control on a long term basis accompanied by the fact that the civilian administration of the MRT was under Russia’s control, were recognised as relevant factors in establishing that Russia had effective control over part of Moldova’s territory.73

Furthermore, in Cyprus v Turkey several factors were recognised as being relevant in establishing Turkish effective control over northern Cyprus, in which Turkey was held responsible for the denial of educational rights by the ECtHR.74 These factors, as discussed in Loizidou v Turkey were: the number of Turkish troops (30,000) stationed throughout the whole of the territory of northern Cyprus making a ratio of 1:7 to the

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68 See Chapter 3.2.3.
69 For an elaboration of the facts of the case, see Chapters 4.3.2 and 7.4.2.
70 Since the circumstances of Catan were similar to Ilascu, the Court referred to its previous judgment in Ilascu where the facts were set out in detail. Catan v Moldova and Russia (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [12].
71 Russia, in arguing that it did not exercise jurisdiction over Transdniestria, relied on the small number of its troops and compared its 2,000 soldiers to the 30,000 Turkish forces in northern Cyprus. See Ilascu v Moldova and Russia [2004] VII Eur Court HR 179 [355].
72 See ibid [387].
73 The UK Court of Appeal in comparing the case of Transdniestria with British presence in Iraq relied on such facts. R (Al-Skeini) v Defence Secretary [2007] QB 140, 281 [120] (Brooke LJ).
74 Cyprus v Turkey [2001] IV Eur Court HR 1, 17 [44], 72-73 [275], [277]-[278], [280], 77-8 [300].
population;\textsuperscript{75} the longer period of time of presence of troops in northern Cyprus, in comparison to other cases;\textsuperscript{76} the intention of Turkey to exercise its control on a long term basis;\textsuperscript{77} the fact that the territory of northern Cyprus was constantly patrolled and had check points on all main lines of communication;\textsuperscript{78} and finally that the civil administration of northern Cyprus was under the control of Turkey.\textsuperscript{79}

These cases are consistent with my argument that for the activation of a second phase right, such as the right to education, a level of effective control is required as compared to the activation of first phase rights.

### 6.3.3 Third Phase

As discussed in Chapter Three a number of human rights norms are not reflected in IHL treaties.\textsuperscript{80} Consequently, the only source for the application of such norms is human rights law. Since these third phase rights are more complex and require advanced administrative apparatus in place for their implementation, they can only become relevant at later stages when hostilities have decreased, order and security has advanced and the power, authority and control of the State conducting military operations abroad has increased so that it can gradually exercise more governmental and administration functions. Therefore, the activation of third phase rights requires a relatively high degree of control over and above that in the case of second phase rights.

Third phase rights include: (a) the prohibition of arbitrary or unlawful interference with privacy, family or home\textsuperscript{81} and unlawful attacks on his honour and reputation; (b) the right to peaceful assembly; (c) freedom of association with others and the right to form trade unions; (d) recognition of the right to marry (no marriage without free consent of spouses); (e) the right to be registered immediately after birth and the right to have a name; (f) the right to acquire nationality; (g) the right to take part in public

\textsuperscript{75} See Loizidou v Turkey (Merits) [1996] VI Eur Court HR 2216, 2223 [16].
\textsuperscript{76} See Issa v Turkey (European Court of Human Rights, Chamber, Application No 31821/96, 16 November 2004) [75].
\textsuperscript{77} See R (Al-Skeini) v Defence Secretary [2007] QB 140, 281 [120] (Brooke LJ).
\textsuperscript{78} See Loizidou v Turkey (Merits) [1996] VI Eur Court HR 2216, 2223 [16].
\textsuperscript{79} This issue was discussed as a comparison to the case of British troops in Iraq in R (Al-Skeini) v Defence Secretary [2007] QB 140, 281 [120] (Brooke LJ).
\textsuperscript{80} See Chapter 3.3.
\textsuperscript{81} Article 17 ICCPR also includes prohibition of arbitrary or unlawful interference with correspondence which I have categorised in phase two under enhanced normative protection under IHRL.
affairs; (h) the right of minorities; (i) the right to social security, including social insurance; (j) the right to take part in cultural life; (k) the right to enjoy the benefits of scientific progress and its applications; and (l) the right to benefit from the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author.\footnote{Three of the norms classified into this category in Chapter Three, namely the right to recognition as a person before the law, freedom to hold opinions without interference, and the prohibition on imprisonment based on inability to fulfil a contractual obligation, are enumerated as non-derogable rights under the ICCPR. Accordingly, these are first phase norms in this Chapter.}

Interestingly, for Sedley LJ in the UK Court of Appeal in \textit{Al-Skeini}, it was ‘absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry’,\footnote{\textit{R (Al-Skeini) v Defence Secretary} [2007] QB 140, 300 [196] (Sedley LJ).} a third phase right.

\section*{6.4 Conclusion}

In this Chapter I argued that the range of human rights obligations of a State conducting military operations abroad should be limited by the extent of the control exercised by that State. With lower degrees of effective control, a more limited range of human rights obligations will be applicable. As the foreign State exercises greater effective control over the territory, the range of its human rights obligations expand.

In doing so, I analysed the relevant jurisprudence and the work of scholars to make the argument that human rights may be divided and tailored in extraterritorial armed conflict situations. However, to date how this tailoring of rights might take place in practice has not been explored.

Therefore, I proposed a model in which the applicable human rights are tailored and progressively applied in an extraterritorial armed conflict situation. I employed my typology developed in Chapter Three in relation to the comparative analysis of rights and protections in IHL and IHRL treaties. I argued that the full range of a State’s human rights obligations in an extraterritorial armed conflict situation will apply gradually in three distinct phases. The first phase of rights which is triggered regardless of the amount of effective control exercised, consists of non-derogable rights, \textit{jus cogens} norms and norms where IHL provides comparable normative protection or enhanced normative protection compared to IHRL. The range of human
rights obligations would increase as the foreign State asserted more effective control, with the second phase of rights the next to be activated. These are norms where IHRL provides enhanced normative protection compared to IHL. Finally, a higher level of effective control is required for third phase rights to be activated. These rights consist of human rights norms not reflected in IHL treaties.

In the next Chapter, I will argue that the level of human rights obligations of a State conducting military operations abroad is also proportionate to the degree of effective control it exercises. Accordingly, to the extent that such a State exercises control, its obligations increase from one entailing the duty to respect, to one encompassing the duties to protect and to fulfil.
7 LEVEL OF HUMAN RIGHTS OBLIGATIONS

7.1 Introduction

In the previous Chapter, I argued that considerations of reasonableness and practicability require that a State’s human rights obligations while acting abroad will be limited by the extent of effective control exercised by that State and will not usually be as extensive as when it acts within its own borders. Without some degree of modification of such obligations, States would be unlikely to accept the extraterritorial application of human rights norms in armed conflict. Accordingly, a leaner approach to the extraterritorial application of human rights obligations in the context of armed conflict was suggested in order to better reflect the realities of armed conflict situations. I argued that modifications could be applied in relation to the range of applicable rights as well as to the level of human rights obligations. In Chapter Six, I addressed the range of applicable rights in extraterritorial armed conflict situations. In this Chapter, I concentrate on the applicable level of human rights obligations based on the amount of effective control exercised over the territory.

Current literature supporting the view that the level of human rights obligations of a State conducting military operations abroad should be tied to the scope of that State’s effective control over the territory in which it is operating is abstract and theoretically focused. It neither addresses the practical question of how to determine the applicability of the various levels of human rights obligations in any given situation, nor does it attempt to develop a coherent and comprehensive understanding of the application of various levels based on a thorough examination of the jurisprudence. For example, Milanovic also proposes a model based on the distinction between positive and negative obligations. He suggests that the ‘jurisdiction’ threshold ‘would apply only to the State’s obligation to secure or ensure human rights [obligations to protect and to fulfill] but not to its obligation to respect human rights, which would be territorially unbound’.1 However, while he examines the textual interpretation of human rights treaties to find support for his approach, he neither explains how this

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approach would work in practice nor at what level of effective control the obligations to protect and fulfil would be activated. For Milanovic, this model ‘provides the best balance between universality and effectiveness’. Cerone also observes that there may be an identifiable trend toward recognising varying levels of obligation. He suggests that ‘it may be that negative obligations apply whenever a State acts extraterritorially […] but that the degree of positive obligations will be dependent upon the type and degree of control (or power or authority) exercised by the State’. This approach he believes ‘would preserve the integrity of the respective treaties and would vindicate the universal nature of human rights’. At the same time, he continues, it would not place unreasonable burdens on State Parties. My study goes further in that I first examine how the tertiary model of human rights obligations in relation to the specific case of the right to education could be implemented in an extraterritorial armed conflict situation. Secondly, I identify the required level of effective control which appears to be sufficient for the activation of positive obligations. My conclusions, although not directly supported by case law, are consistent with the relevant jurisprudence and the practice of international bodies.

In this manner I employ the right to education as a second phase right in order to demonstrate how my proposed approach might work in practice. Education is not only a human right in itself but also ‘an indispensable means of realizing other human rights’. As expressed by UNICEF, ‘education is the single most vital element in combating poverty, empowering women[,] promoting human rights and democracy’ and preventing armed conflict.

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2 Milanovic, Extraterritorial Application of Human Rights Treaties, above n 1, 228.
In this Chapter, I first provide a historical background to the origins of the tertiary model of human rights obligations. As I will demonstrate, human rights treaties are understood to involve three different levels of obligations on States in relation to any given right, namely: the obligations ‘to respect’; ‘to protect’; and ‘to fulfil’.

Secondly, I explain what each obligation entails using the right to education to analyse the concept of the spectrum of obligations in a traditional non-extraterritorial context. As one moves from the predominantly cost free and passive obligation to respect, to the gradually more active and costly obligations to protect and fulfil, the degree of State involvement as well as the resources necessary to ensure enjoyment of a specific right are increased.

Thirdly, I examine how the tertiary model of human rights obligations in relation to the right to education could be implemented in extraterritorial armed conflict situations. In such situations, as the extent of a foreign State’s effective control increases, according to the tertiary model of human rights obligations its obligations increase from the duty to respect, to the duty to protect and finally the obligation to fulfil.7

Given that the obligation to respect only requires the State and its agents to refrain from interference with the rights enjoyed by the population, States conducting military operations aboard will be required to comply with this obligation regardless of the amount of control they exercise. On the other hand, the application of the positive obligations to protect and fulfil, which are more onerous, will depend on the degree of effective control exercised by the foreign State. I demonstrate that case law recognises the extraterritorial obligation upon States conducting military operations abroad to protect the right to education. I identify the relevant effective control factors, which are deemed sufficient in the view of the ECtHR, to enliven the obligation to protect in extraterritorial armed conflict situations. I argue that it is more than likely that the level of effective control required for the extraterritorial fulfilment of the right to education in situations of armed conflict would only occur in a prolonged and stable occupation.

Finally, I draw together the analysis from this Chapter and the previous one to propose a four-stage framework for the gradual application of the range and level of human rights obligations of States involved in armed conflicts abroad.

7.2 The Tertiary Model of Human Rights Obligations

The typology of States’ obligations under human rights treaties according to the so-called tertiary model, a useful analytical framework, has been created, defined and developed by scholars and UN experts and further adopted by human rights treaty bodies. The interpretations provided by such treaty bodies are regarded as highly persuasive. According to this approach, human rights treaties are said to entail three different types of obligations in relation to any given right: the obligation ‘to respect’ at the primary level; the obligation ‘to protect’ at the secondary level; and at the tertiary level, the obligation ‘to fulfil’.

The tertiary model traces its origins to Shue and Eide in the early 1980s. In 1980 Shue suggested that for every basic right there are three types of ‘correlative duties’: ‘to avoid depriving’; ‘to protect from deprivation’; and ‘to aid the deprived’. The proposal of what he called ‘a very simple tripartite typology of duties’, was later developed by Eide into the three levels of obligations: ‘to respect’; ‘to protect’; and ‘to fulfil’.

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10 For a brief history of the development of the tripartite typology, see Sepúlveda, above n 8, 157.

11 Shue, above n 8, 52.

12 Ibid.

13 Eide’s approach to typologies was first presented in: Eide, ‘The International Human Rights System’, above n 8, 154. Eide as the Special Rapporteur on the right to food also used this typology in his report.
In 1999, for the first time, the CESCR relied explicitly upon the tertiary model of human rights obligations in General Comment No 12 in relation to the right to adequate food. The Committee subsequently incorporated the tripartite typology in eight of its General Comments. Additionally, the Outline for Drafting General Comments on Specific Rights of the ICESCR adopted by the CESCR in 1999, suggests dividing the texts of General Comments into six sections, one being ‘State Party’s

See Asbjørn Eide, Special Rapporteur, Report on the Right to Adequate Food as a Human Right, Commission on Human Rights, 39th sess, UN Doc E/CN.4/Sub.2/1987/23 (7 July 1987) [112]-[114]. The first version of Eide’s typology refers to three levels of obligations. However, in later studies Eide modified his approach and added a fourth level: to respect; to protect; to facilitate; and to fulfil. The obligation to facilitate or assist requires the State to ‘facilitate opportunities by which the rights [...] can be enjoyed’: Asbjørn Eide, The Realisation of Economic, Social and Cultural Rights: The Right to Adequate Food and to be Free From Hunger, Commission on Human Rights, Sub-Commission on Prevention of Discrimination of Minorities, 51st sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/1999/12 (28 June 1999) [52]. Over the years Eide has further developed his approach in numerous documents, inter alia, Asbjørn Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), Economic, Social and Cultural Rights: A Textbook (Martinus Nijhoff, 1995) 21, 37; Asbjørn Eide, ‘Realisation of Social and Economic Rights and the Minimum Threshold Approach’ (1989) 10 Human Rights Law Journal 35; Asbjørn Eide, ‘Economic and Social Rights’ in Janusz Symonides (ed), Human Rights: Concept and Standards (UNESCO, 2000) 109, 127; Asbjørn Eide, ‘Universalisation of Human Rights versus Globalisation of Economic Power’ in Fons Coomans et al (eds), Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo Van Boven (Kluwer, 2000) 99, 110-20. Some other scholars have also developed typologies containing more than three levels. For example, Hoof proposed a typology containing four levels of duties, namely: the obligations to respect; to protect; to ensure; and to promote: Hoof, above n 8, 106. Steiner, Alston and Goodman have also developed a scheme of five types of human rights obligations building on the work of other writers, particularly Shue and Hoof. These five duties are: (a) respect [the] rights of others; (b) create institutional machinery essential to [the] realisation of rights; (c) protect rights/prevent violations; (d) provide goods and services to satisfy rights; and (e) promote rights. Steiner, Alston and Goodman, above n 8, 187-9. For an evaluation of the different typologies see Sepüveda, above n 8, 165. 


Obligations’; which includes the obligations to respect, to protect and to fulfil.\textsuperscript{16} Furthermore, the duty to respect, protect and fulfil human rights is articulated in the \textit{Maastricht Guidelines on Violations of Economic, Social and Cultural Rights}.\textsuperscript{17}

The tertiary framework, although initially developed in the context of economic, social and cultural rights, is nowadays accepted as applicable to the whole range of human rights law, including civil and political rights.\textsuperscript{18} In fact the \textit{Maastricht Guidelines} explicitly introduce the tertiary framework with the comment that ‘like civil and political rights, economic, social and cultural rights impose three different types of obligations on States’.\textsuperscript{19} Moreover, this graduated approach is supported by the African Commission on Human and Peoples’ Rights (‘AComHPR’). The Commission in describing the ‘respect, protect and fulfil’ methodology, stated that ‘internationally accepted ideas of the various obligations engendered by human rights’ adhere to this typology, whether they are civil and political rights or economic, social and cultural rights.\textsuperscript{20} More importantly, the text of the \textit{ICCPR} implicitly supports the typology. Article 2(1) of the \textit{ICCPR} obliges States Parties to ‘respect’ and to ‘ensure’ all Covenant rights. Nowak asserts that ‘the obligation to ensure consists of the obligation to \textit{protect} individuals against interference by third parties [...] and the

\textsuperscript{16} See CESCR, \textit{Outline for Drafting General Comments on Specific Rights of the International Covenant on Economic, Social and Cultural Rights}, 21\textsuperscript{st} sess, 37\textsuperscript{th} mtg (19 November 1999) annex IX reprinted in CESCR, \textit{Report on the Twentieth and Twenty-First Sessions} (26 April-14 May 1999, 15 November-3 December 1999) Supp No 2, UN Doc E/C.12/1999/11, 135. The Outline, in addition to the obligations to respect, to protect and to fulfil, also includes the obligation to promote.

\textsuperscript{17} See \textit{The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights} [6]. For the legal status of the Guidelines, see Chapter 5.2.

\textsuperscript{18} See Maria Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’ (2001) 23 \textit{Human Rights Quarterly} 1062, 1071; Sepúlveda, above n 8, 171; Eide, ‘Economic and Social Rights’, above n 13; Matthew C.R. Craven, \textit{The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development} (Clarendon Press, 1995) 110; Manfred Nowak, ‘Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective’ in Mark Gibney and Sigrun Skogly (eds), \textit{Universal Human Rights and Extraterritorial Obligations} (University of Pennsylvania Press, 2010) 11, 11; Ida Elisabeth Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’ (2005) 5(1) \textit{Human Rights Law Review} 81, 87; Gondek, above n 4, 60. In spite of the fact that the tripartite typology is also applicable to civil and political rights, the HRC has not adopted the terminology. For the purposes of my thesis, the tertiary model of human rights obligations will be applied to both sets of rights. Doswald-Beck, however, questions the applicability of the terms of the tertiary framework to civil and political rights: Louise Doswald-Beck, \textit{Human Rights in Times of Conflict and Terrorism} (Oxford University Press, 2011) 47.

\textsuperscript{19} \textit{The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights} [6].

\textsuperscript{20} \textit{Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria} (AComHPR, 30\textsuperscript{th} sess, Com No 155/96, 27 October 2001) [44], [46].
obligation to *fulfil*.\(^{21}\) In the following sections, I examine what each obligation entails in greater detail.

### 7.2.1 The Obligation to Respect

The obligation to respect requires the State and all its organs and agents, to refrain directly or indirectly from interfering with or impairing the enjoyment of human rights.\(^{22}\) Thus, it requires the State to have control over the conduct of its own agents.\(^{23}\) The duty to respect has been described as a ‘negative obligation’ in the sense of being a ‘hands-off duty’.\(^{24}\) The failure to respect human rights occurs where a State official takes, or has taken, a positive step that ‘violates the integrity of the individual or infringes on his or her freedom beyond what is permitted in the human rights system’.\(^{25}\)

The obligation to respect is the lowest of the three levels and requires only that a State refrain from interference with the enjoyment of rights. Accordingly, the obligation to respect as a negative obligation is usually regarded as a low-cost obligation that does not demand a great deal of State expenditure, management and allocation of resources compared to the more onerous obligations to protect and fulfil.\(^{26}\)

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\(^{21}\) See Manfred Nowak, *U.N. Convention on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2\(^{nd}\) ed, 2005) 37-8. The obligation to ensure ‘includes the obligation to protect the individual’s enjoyment of civil and political rights against private interference’ and ‘indicates the duty of States Parties to guarantee by all means of positive action to all human beings the actual enjoyment of their civil and political rights and the opportunity to exercise them’: Manfred Nowak, ‘Civil and Political Rights’ in Janusz Symonides (ed), *Human Rights Concept and Standards* (UNESCO, 2000) 69, 73-4. Article 1 of the ACHR similarly refers to both the need to respect and ensure rights while Article 3(1) of the ACHR only refers to ensure. The ACHPR does not use the word ensure, but in effect requires this by specifying measures that need to be undertaken in Article 1. The ECHR under the heading of ‘obligation to respect human rights’ obliges Contracting Parties to ‘secure’ the rights and freedoms (Article 1). The obligation to secure in fact requires States to take positive actions in order to implement the rights of the individuals. See also Nowak, ‘Obligations of States to Prevent and Prohibit Torture’, above n 18, 12; Doswald-Beck, above n 18, 30; Cerone, ‘Human Dignity in the Line of Fire’, above n 3, 1466. The formulation of the ICESCR differs from that of the ICCPR, in that it requires States ‘to take steps [...] with a view to achieving progressively the full realisation of the rights’: *ICESCR* art 2(1). The ICESCR unlike the ICCPR does not contain concrete obligations. To rectify this, numerous scholars and the CESCR have ‘worked to achieve a more precise understanding’ of the obligations under the ICESCR: See Doswald-Beck, above n 18, 43; Koch, above n 18, 81. This might explain why the framework of typologies was created initially in relation to economic, social and cultural rights and later applied to civil and political rights.


\(^{24}\) See Steiner, Alston and Goodman, above n 8, 186. See also Doswald-Beck, above n 18, 32.


\(^{26}\) See Sepúlveda, above n 8, 155, 158.
7.2.2 The Obligation to Protect

The obligation to protect requires the State ‘to take the necessary measures to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of individuals’. It refers to what is typically called ‘due diligence’. To meet this requirement a State must take all measures reasonably within its power in order to prevent violations of human rights. Thus, the obligation to protect ‘encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights’. The failure to protect human rights includes instances where the State does not take action to prevent or punish the denial of human rights by third parties.

The obligation to protect, therefore, goes beyond the obligation to refrain from interference with the enjoyment of rights by requiring the adoption and enforcement of appropriate measures, particularly legislative, to regulate the activities of third parties so as to protect against violations of human rights. In this way, the obligation to protect as compared to the obligation to respect requires positive steps that will involve the allocation and management of funds and resources and ultimately greater State interference.

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28 See Doswald-Beck, above n 18, 37. The obligation to protect was clearly expressed by the IACtHR in Velasquez Rodriguez v Honduras, where the Court was considering a case of a disappearance possibly caused by paramilitary forces. The Court held the responsibility of a State may arise ‘not because of the act itself, but because of the lack of due diligence [by the State] to prevent the violations or to respond to it as required by the Convention’: Velasquez Rodriguez v Honduras (Judgment) (1989) IACtHR (Ser C) No 4 [172]. The Court continued that ‘[t]he State is obligated to investigate every situation involving a violation of rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised in the Convention’: at [176]. See also Ergi v Turkey [1998] IV Eur Court HR 1751, 1776-9 [79]-[82], [85]-[86] where the ECtHR held the failure of the State’s security forces to protect civilians during internal armed conflict and the inadequacy of subsequent investigations by the State, amounted to a breach by the State of its obligation under the ECHR. See also HRC, General Comment No 31: Nature of the General Obligations on State Parties to the Covenant, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [8].
30 See González et al v Mexico (Judgment) (2009) IACtHR (Ser C) No 205 [252].
31 See HRC, General Comment No 31, above n 28; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights [18]; Velasquez Rodriguez v Honduras (Judgment) (1989) IACtHR (Ser C) No 4 [172]; González et al v Mexico (Judgment) (2009) IACtHR (Ser C) No 205 [252].
32 See Skogly, above n 8, 69.
7.2.3 The Obligation to Fulfil

The obligation to fulfil requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in the human rights instruments, which cannot be secured by personal efforts.\(^{33}\) It requires the State to work actively to establish legislative, administrative, budgetary, judicial and other measures necessary for the full realisation of such rights so that all members of the population have access to the guaranteed rights.\(^{34}\) At this third level, the State is required to ensure the achievement of minimum standards of human rights for everyone within its jurisdiction. It involves a focus on the enjoyment of rights, by facilitating opportunities by which the rights can be enjoyed,\(^{35}\) not merely a restraint on intervention.

The obligation to fulfil encompasses the obligations to facilitate, to provide and to promote.\(^{36}\) The obligation to facilitate requires the State to take positive measures aimed at enabling, assisting and strengthening people’s access to and utilisation of resources and means to ensure their rights.\(^{37}\) The State is further obliged to provide a specific right directly when individuals or groups are unable, on grounds reasonably beyond their control, to realise that right themselves by the means at their disposal.\(^{38}\) Accordingly, the provider function of the State is activated only when people have failed to satisfy their own needs due to circumstances beyond their control.\(^{39}\) Finally, the State is obligated to promote human rights by taking actions that create, maintain and restore the realisation of rights by (for instance) appropriate education, training,


\(^{35}\) See Eide, ‘Economic and Social Rights’, above n 13, 128.

\(^{36}\) According to General Comments Nos 12 and 13, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. However, from General Comment No 14 onwards, the obligation to fulfil also incorporates an obligation to promote. See CESCRR, General Comment No 12, above n 14; CESCRR, General Comment No 13, above n 5, [46]; CESCRR, General Comment No 14, above n 15. The obligations to facilitate, to provide and to promote unlike the obligations to respect, to protect and to fulfil are not sequential.

\(^{37}\) See CESCRR, General Comment No 12, above n 14; CESCRR, General Comment No 14, above n 15, [37]; Eide, ‘Economic and Social Rights’, above n 13, 128; Lorenzo Cuotula and Margaret Vidar, ‘The Right to Adequate Food in Emergencies’ (Legislative Study No 77, Food and Agriculture Organisation of the United Nations (FAO), 2002) 32-4.

\(^{38}\) See CESCRR, General Comment No 12, above n 14; CESCRR, General Comment No 14, above n 15, [37]; Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties (Oxford University Press, 2008) 77.

\(^{39}\) See Sepúlveda, above n 8, 242.
dissemination of information and public awareness concerning access to specific rights.\textsuperscript{40}

The obligation to fulfil, as the final level of the tripartite typology of human rights obligations, goes beyond the obligations to respect and to protect and is aimed at the full realisation of human rights. It involves all appropriate means and requires executive action and a great deal of State involvement, management and expenditure as compared to the first two levels of obligation.

The full realisation of human rights, therefore, is understood as involving three levels of ‘multi-layered State obligations,’\textsuperscript{41} entailing a spectrum of legal obligations,\textsuperscript{42} or perhaps more accurately a sequence of different ‘levels of obligations’.\textsuperscript{43} At the primary level, States are bound to respect human rights; at the secondary level, States have an obligation to protect human rights; and, at the tertiary or final level is the obligation to fulfil human rights. Obligations range ‘from the predominantly cost free and passive obligation to respect, to the gradually more active and costly obligations to protect and fulfil’.\textsuperscript{44} Similarly, the typology ‘moves […] from negative to more positive obligations,’\textsuperscript{45} each obligation requiring different levels of State interference.

\textsuperscript{40} See CESCR, General Comment No 14, above n 15, [37]. See also Ssenyonjo, Economic, Social and Cultural Rights, above n 5, 25; Sepúlveda, above 8, 199-201.


\textsuperscript{43} See Sepúlveda, above n 8, 137.

\textsuperscript{44} See Koch, above n 18, 85.

\textsuperscript{45} See ibid 86. See also Heike Krieger, ‘A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study’ (2006) 11(2) Journal of Conflict and Security Law 265, 282. The discussion in relation to negative and positive obligations has also been expressed through a division between civil and political rights, on one side, and economic, social and cultural rights on the other. The traditional assumption that civil and political rights only require State abstention (negative obligations) and that economic, social and cultural rights require States to take action (positive obligations), does not have much credibility today. It is now well established that the alleged difference in the nature of the two sets of rights cannot be made out and thus a positive-negative distinction between on one hand, civil and political rights and on the other hand, economic, social and cultural rights no longer exists. Accordingly, it is beyond doubt that civil and political rights, although drafted basically in terms of obligations not to interfere in the exercise of individuals’ rights, also impose ‘positive obligations’ on the part of States and conversely, economic, social and cultural rights while being interpreted as containing elements that mainly require the State to take affirmative action, also encompasses ‘negative obligations’. See Sepúlveda, above n 8, 123-6; Skogly, above n 8, 59.
and different resources.\textsuperscript{46} Moving through the obligations to respect, protect and fulfil, the degree of State involvement as well as the resources necessary to comply with the duties emanating from a specific right are increased.\textsuperscript{47}

### 7.3 The Concept of a ‘Spectrum of State Obligations’\textsuperscript{48} in the Context of the Right to Education

The operation of the ‘spectrum of obligations’ is best illustrated by reference to a specific example. In this section, I analyse the right to education within a traditional non-extraterritorial context, for the purpose of demonstrating the operation of the spectrum of State obligations. In the following section, I extend this analysis to extraterritorial armed conflict situations. The duties imposed on States across the spectrum range from the negative obligation to refrain from direct interference with an individual’s education (under the obligation to respect) to the onerous positive duty to take measures towards the full realisation of the right to education (under the obligation to fulfil). All of the duties within the spectrum are essential components for the realisation of the right to education, but require very different levels of State control and resources to secure.

A number of international and regional instruments address the right of every person, without discrimination, to enjoy access to education.\textsuperscript{49} The \textit{ICESCR} provides ‘the most wide-ranging and comprehensive article on the right to education in international human rights law’.\textsuperscript{50} Article 13 of the \textit{ICESCR}, the longest and most detailed article in the Covenant, in addition to specifying the aims and objectives of education, stipulates the right to different levels of education including primary, secondary and higher education as well as fundamental\textsuperscript{51} and technical and vocational education. Each level of education involves different obligations. Primary education is

\textsuperscript{46} For example the ECtHR has said on a number of occasions that positive obligations require an effective independent judicial system. See \textit{Vo v France} [2004] VIII Eur Court HR 67, 110 [90]. See also Krieger, above n 45.

\textsuperscript{47} See Sepúlveda, above n 8, 137.

\textsuperscript{48} The expression has been used in Künemann, ‘A Coherent Approach’, above n 42, 327-31 and Sepúlveda, above n 8, 137.

\textsuperscript{49} See, eg, \textit{ICESCR} arts 13-14; \textit{CRC} arts 28-29; \textit{CEDAW} art 10; \textit{ECHR}, Protocol 1 art 2; \textit{ACHPR} art 17(1).

\textsuperscript{50} \textit{ICESCR}, \textit{General Comment No 13}, above n 5, [2].

\textsuperscript{51} By virtue of Article 13(2)(d), individuals ‘who have not received or completed the whole period of their primary education’ have a right to fundamental education. The enjoyment of such a right is not limited by age or gender.
to be ‘compulsory’ and ‘available free to all’. Article 14, provides in greater detail the responsibility of States, which have not been able to secure in their metropolitan territory or other territories under their jurisdiction compulsory primary education, free of charge, to undertake within two years to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, of the principle of compulsory education free of charge for all. Secondary education ‘shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education,’ while higher education is to be available ‘on the basis of capacity’. Article 13 also provides for the liberty of parents to choose their children’s schools to ensure that the religious and moral education of their children conforms with their own convictions. Additionally, it prohibits the State from interfering with the liberty of individuals and bodies to establish and direct educational institutions, subject to the observance of certain principles and standards.

The CESCR in its General Comment No 13 on the right to education, stipulates that education in all its forms and at all levels shall exhibit the interrelated and essential features of ‘availability’, ‘accessibility’, ‘acceptability’ and ‘adaptability’, commonly known as the ‘four As’ framework. First, educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State. All institutions and programmes in order to function properly require, as a minimum, buildings or other protection from the elements, sanitation facilities for

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52 See ICESCR art 13(2)(a).
53 See ibid 13(2)(b). This means that while States must prioritise the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. See CESCR, General Comment No 13, above n 5, [14].
54 See ICESCR art 13(2)(c).
55 See ibid art 13(3).
56 See ibid art 13(4).
57 See CESCR, General Comment No 13, above n 5, [6].
58 This framework was developed by the Commission on Human Rights. See Katarina Tomasevski, Progress Report of the Special Rapporteur on the Right to Education, UN ESCOR, 56th sess, Agenda Item 10, UN Doc E/CN.4/2000/6 (1 February 2000) [32]-[65]; Katarina Tomasevski, Annual Report of the Special Rapporteur on the Right to Education, UN ESCOR, 57th sess, Agenda Item 10, UN Doc E/CN.4/2001/52 (11 January 2001) [64]-[77]; Katarina Tomasevski, Annual Report of the Special Rapporteur on the Right to Education, UN ESCOR, 58th sess, Agenda Item 10, UN Doc E/CN.4/2002/60 (7 January 2002) [22]-[45]. While this framework is not universally accepted, it has become a standard that is often used by the CESCR, the Office of the High Commissioner for Human Rights and economic, social and cultural rights advocates in general. See Kristin Hausler, Nicole Urban and Robert McCorquodale, Protecting Education in Insecurity and Armed Conflict (British Institute of International and Comparative Law, 2012) 73.
both sexes, safe drinking water, trained salaried teachers, teaching materials, and so on.\textsuperscript{59} Secondly, ‘educational institutions and programmes have to be \textit{accessible} to everyone, without discrimination, within the jurisdiction of the State Party.\textsuperscript{60} Accessibility has three overlapping dimensions: non-discrimination, physical accessibility and economic accessibility.\textsuperscript{61} The requirement of non-discrimination is self-evident; physical accessibility requires education to be within safe physical reach; and economic accessibility incorporates the requirement that education has to be affordable to all.\textsuperscript{62} The economic dimension of accessibility is subject to the differential wording of Article 13(2) in relation to primary, secondary and higher education.\textsuperscript{63} Thirdly, the content and form of education, including curricula and teaching methods, have to be \textit{acceptable} to students and, in appropriate cases, parents.\textsuperscript{64} This requires education to be relevant, culturally appropriate and of good quality.\textsuperscript{65} Lastly, \textit{adaptability} requires education to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.\textsuperscript{66}

The right to education, like all human rights, imposes three levels of obligations on States Parties.\textsuperscript{67} I will now examine in detail the obligations imposed at each level.

\subsection*{7.3.1 Obligation to Respect the Right to Education}

The obligation to respect the right to education requires the State to refrain from all measures that directly or indirectly interfere with, impair, hinder or prevent the enjoyment of the right to education for all those within its jurisdiction.\textsuperscript{68} This is a minimum that entails that the State cannot directly or indirectly impede an individual’s education. For example, States have a duty not to deny or limit equal

\textsuperscript{59} See CESCR, \textit{General Comment No 13}, above n 5, [6(a)].
\textsuperscript{60} See ibid [6(b)].
\textsuperscript{61} See ibid.
\textsuperscript{62} See ibid [6(b)(ii) and (iii)].
\textsuperscript{63} See Hausler, Urban and McCorquodale, above n 58, 74.
\textsuperscript{64} See CESCR, \textit{General Comment No 13}, above n 5, [6(c)].
\textsuperscript{65} See ibid.
\textsuperscript{66} See ibid [6(d)].
\textsuperscript{68} See Nowak, ‘The Right to Education’, above n 67. See also CESCR, \textit{General Comment No 13}, above n 5, [47]; Sepúlveda, above n 8, 202.
access for all individuals and groups to all levels of education. Accordingly, States are to refrain from acts such as closure of schools. Nevertheless, this is not an absolute prohibition, since there are some circumstances when interference with education may be justified. By way of illustration, in emergency situations the State may temporarily order the closure of schools for security reasons and to avoid unnecessary harm. A further hypothetical example could be that the right to education may be hampered due to valid security reasons.

States are also obliged to refrain from prohibiting, impeding or closing private educational institutions that conform to 'minimum educational standards' established by the State. A State must equally refrain from acts such as limiting access to education services as a punitive measure and censoring or withholding education-related information.

In summary States are required to respect the right to education by refraining from unjustified interference with the enjoyment of educational rights of those within their jurisdiction. This merely requires the State to have control over the conduct of its own agents so as to ensure they do not interfere with the enjoyment of the right to education.

### 7.3.2 Obligation to Protect the Right to Education

States not only have to themselves refrain from interference with the right to education of individuals, but must also take appropriate steps to safeguard the right to education of those within their jurisdiction from third party interference. The obligation to protect the right to education generally entails the creation and maintenance of an atmosphere or framework through an effective interplay of regulatory measures so that individuals and groups will be able freely to realise their educational rights. This requires, for example, the adoption and enforcement of

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70 See CESCR, General Comment No 13, above n 5, [59].
71 For example in 1989, the Israeli Ministry of Justice announced that ‘the Israeli government has temporarily closed schools which have ceased to act as centres for education’: Israeli Ministry of Justice, Jerusalem, Children as Participants in the Intifada (26 November 1989) reprinted in Ilene Cohn and Guy S Goodwin-Gill, Child Soldiers: The Role of Children in Armed Conflict (Oxford University Press, 1994) 113.
72 See CESCR, General Comment No 13, above n 5, [54]. See also [50].
legislation or other necessary measures by the State to ensure equal access to education provided by third parties by monitoring to ensure that private educational institutions do not apply discriminatory admissions practices. Likewise, the State must ensure that third parties, including parents, husbands and employers, do not prevent girls, specifically pregnant girls, women or other disadvantaged or marginalised groups from having access to education. Further, States have an obligation to ensure that early marriage amongst families does not interfere with a child’s right to education. Similarly, States also have an obligation to ensure that communities and families are not dependant on child labour that interferes with the educational rights of those children.

Security in schools, including not only physical, psychological and emotional safety but also an uninterrupted education, forms part of the right to education. This means that States have the responsibility to devise effective methods of protection and punish perpetrators of violence against the enjoyment of the right to education. Accordingly, protection might also entail the obligation to investigate and prosecute interference with, and crimes committed against, the right to education. It also demands that States establish ‘minimum educational standards’ to which all educational institutions, including private institutions, are required to conform. Likewise, a State must ensure that privatisation of the education sector does not constitute a threat to standards of education and to ensure that teachers and other education professionals meet appropriate standards of education, skill and ethical codes of conduct.

In summary the obligation to protect the right to education requires the State to take positive measures to protect the educational rights of individuals against third party

74 Ibid 390.
75 Ibid. See also CESCR, General Comment No 13, above n 5, [50].
76 See Ssenyonjo, Economic, Social and Cultural Rights, above n 5, 390. See also CEDAW/C, General Recommendation No 21: Equality in Marriage and Family Relations, 13th sess (12 April 1994) [21], [36].
79 See Muñoz, Special Rapporteur, Right to Education in Emergency Situations, above n 67, [21]; Muñoz Villalobos, above n 78.
80 See Doswald-Beck, above n 18, 35.
82 See ibid.
interference. Thus, it involves greater State interference and recourses, as compared to the obligation to respect.

7.3.3 Obligation to Fulfil the Right to Education

At the highest level, the obligation to fulfil the right to education requires the State to take positive measures to satisfy the basic needs required for the enjoyment of the right to education. The State must adopt necessary measures, including legislative, administrative, budgetary, judicial, promotional and other measures, towards the full realisation of the right to education.\footnote{See, eg, Nowak, ‘The Right to Education’, above n 67, 422.}

The obligation to facilitate requires the State ‘to take positive measures that enable and assist individuals and communities to enjoy the right to education’.\footnote{See CESCR, General Comment No 13, above n 5, [47].} These measures which are aimed at improving the realisation of the right to education include for example, the construction and equipping of schools and universities, investment in the capacity building of education personnel to ensure that teachers and other education professionals are available in sufficient quantity and securing an adequate long-term budget for education.\footnote{See Ssenyonjo, Economic, Social and Cultural Rights, above n 5, 391.} The State is also obligated to provide the right to education when an individual or group is unable, for reasons beyond their control, to realise the right to education themselves by the means at their disposal.\footnote{See CESCR, General Comment No 13, above n 5, [47]. See also Article 11(3)(e) of the African Charter on the Rights and Welfare of the Child which obliges States to ‘take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community’: African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999).}

Among such situations are cases of persons under detention and mentally ill persons in State institutions, low-income groups and victims of natural disasters.\footnote{See CESCR, General Comment No 12, above n 14; Sepúlveda, above n 8, 241.} States may provide the right to education by supporting, for example, through a system of scholarships, those who cannot afford fees charged for education.\footnote{See Hausler, Urban and McCorquodale, above n 58, 74.} Finally, the State is obligated to promote the right to education by raising awareness amongst different sectors of the society of their right to education and what it incorporates.\footnote{See Ssenyonjo, Economic, Social and Cultural Rights, above n 5, 243-6.} Certainly all these measures involve the diversion of State resources and significant State
involvement. The obligation to fulfil, involves a focus on the enjoyment of the right to education by facilitating opportunities by which individuals can enjoy their educational rights, not merely a restraint from interference.

In sum, the respect, protect and fulfil framework entails increasing levels of obligations, which as I demonstrate in the following section when examining the extraterritorial application of the right to education, may be related to the levels of effective control exercised by the State in question.

7.4 Extraterritorial Obligations to Respect, Protect and Fulfil by a State Conducting Military Operations Abroad

There is often a tension between the terms of treaties and the interpretation placed on them by relevant treaty bodies on the one hand, and the pragmatic manner in which States interpret and apply them on the other. Ultimately, the practice of States will determine, in part, the application of the treaties. States are unlikely to apply human rights treaties in extraterritorial armed conflict situations in a manner they perceive as overly onerous, unreasonable or unrealistic. Therefore, in defining the obligations of States conducting military operations abroad, there should be a delicate balance involving considerations of reasonableness and practicability between the terms and purpose of the treaties and the constraints and limits that States face in complying with their treaty obligations.

90 See ibid 391.
91 For the application of the tertiary model to extraterritorial situations see, Maastricht Principles on Extraterritorial Obligations of States in the Areas of Economic, Social and Cultural Rights (28 September 2011) which provide that ‘[a]ll States have obligations to respect, protect and fulfil human rights, [...] both within their territory and extraterritorially’: General Principles 3, 4, 18. The Maastricht Principles were adopted by a group of experts in international law and human rights at a gathering convened by Maastricht University and the International Commission of Jurists. See also Ssenyonjo, Economic, Social and Cultural Rights, above n 5, 72-6; Gondek, above n 4, 354-63; Rolf Künnemann, ‘Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno T Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004) 201, 212-27.
92 See Marco Sassòli, ‘Sliding Scales or Clear-Cut Regimes of International Law for Armed Conflicts and Other Situations of Violence’ (Speech delivered at the Canadian Council of International Law, 5 November 2011).
93 See VCLT art 31(3).
As we have seen, the human rights obligations of a State within its territory will normally consist of all three different levels in relation to any given right. However, this might not be the case when the State is conducting military operations abroad. In situations of extraterritorial conduct, the degree of control is not usually the same as exercised by a State within its own territory. The human rights regime is based on the idea that to ensure and guarantee the defined rights of persons in a territory, a State must wield the necessary amount of effective control. Given that ‘human rights law is generally predicated on a State’s authority and presumed capacity to control individuals and territories,’ it seems reasonable that the human rights obligations of a State acting abroad may not be as extensive as when it acts within its own borders. Transferring human rights obligations to situations of extraterritorial armed conflict, without considering the limits and constraints of the States conducting military operations abroad, would be overburdening these States and could result in non-compliance. Accordingly, just as the range of applicable rights in an extraterritorial armed conflict context may be limited by the extent of the control exercised by that State, so may be the level of its human rights obligations. The level of obligations of States conducting military operations abroad should be tied to the scope of a State’s effective control: as the control of the State conducting military operations abroad increases, the level of its human rights obligations should also increase.

94 It is recalled that in Ilascu, despite the fact that Transdniestria was part of Moldovan territory, the ECtHR held that Moldova’s jurisdiction had a more limited scope by virtue of the fact that it did not have effective control over that part of its territory. Where a State ‘is prevented from exercising its authority over the whole of its territory’, the Court held that ‘such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in light of the Contracting State’s positive obligations towards persons within its territory’: Ilascu v Moldova and Russia [2004] VII Eur Court HR 179, 266-7 [333]. Similarly this reasoning can be applied to an extraterritorial context.
96 See Droege, above n 7.
98 Ibid.
99 Modirzadeh argues that ‘[i]ndeed, the argument for parallel application would be incredibly difficult to make to States (and their militaries) without some degree of limitation on the entire scope of rights provided in the relevant treaties (particularly when advocates of extraterritorial application argue that rights would increase with the level of control, suggesting that some minimal rights would apply with minimal control or during active hostilities):’ Naz K Modirzadeh, ‘The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict’ (2010) 86 International Law Studies Series: U.S. Naval War College 349, 378.
In order to comply with the obligation to respect, States must refrain from interference with the rights enjoyed by the population. For the most part, it requires States generally, ‘to leave a man alone’.\(^{100}\) Thus, it requires the State ‘to have nothing more than control over the conduct of its own agents.’\(^{101}\) Given that ‘the State by definition has control over its own agents’,\(^{102}\) the State’s ability to comply with its negative obligation to respect human rights does not depend on its control over territory. Therefore, it is submitted that negative obligations apply whenever a State acts extraterritorially, regardless of the amount of effective control it exercises.\(^{103}\) This means that in the case of, for example, aerial bombardment or drone attacks, the foreign State is obliged to respect human rights even in the absence of effective control over the territory.\(^{104}\) This is confirmed in the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions:

> In principle, while control of territory means that a State has obligations, guaranteed by international law, not only to respect but also to ensure and to fulfil the human rights of those on the territory, the exercise of authority with regard to an individual by State agents

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\(^{101}\) See Milanovic, Extraterritorial Application of Human Rights Treaties, above n 1, 210. This is in line with the assessment of Sedley LJ in the UK Court of Appeal in Al-Skeini that despite UK’s assumption of power as an occupying force, the UK forces lacked any real control of what happened from hour to hour in the Basra region. For Sedley LJ ‘the one thing British troops did have control over, even in the labile situation […], was their own use of lethal force’: \(R\) (Al-Skeini) v Defence Secretary [2007] QB 140, 300 [197] (Sedley LJ).

\(^{102}\) See Milanovic, Extraterritorial Application of Human Rights Treaties, above n 1, 141.


\(^{104}\) There is limited jurisprudence on this matter. In \(\text{Alejandre, the IAComHR concluded that the shooting down of two unarmed civilian airplanes by a Cuban military aircraft in international airspace violated the right to life of the passengers: Armando Alejandre Jr et al v Cuba (1999) IAComHR, Case No 11.589, Report No 86/99, OEA/Ser.L/V/II.106 [23]-[25]. However, in Banković, the ECHR held that persons killed during aerial bombing by NATO forces did not fall within the jurisdiction of the participating States for the purposes of establishing whether they had violated the right to life: Banković v Belgium [2001] XII Eur Court HR 333, 359 [82]. The application of this decision has, however, increasingly been narrowed in subsequent cases of the ECHR and it is not clear that the position can be sustained. See, eg, Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) 47-72 [106]-[177]. Further, the political context in which the case was decided and the political implications of a possible finding that the Convention is applicable to extraterritorial acts of State Parties a few months after the 9/11 attacks, certainly played a role in the final ruling. See Gondek, above n 4, 178; Rick Lawson, ‘Life After Bankovic: On the Extraterritorial Application of the European Convention of Human Rights’ in Fons Coomans and Menno T Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004) 83, 116.}
in the absence of territorial control at a minimum triggers the State’s obligation to respect the rights of those individuals.\textsuperscript{105} However, the obligation to respect acknowledges that if IHL is applicable to the situation in question it will be \textit{lex specialis} and as a consequence will impose limits on human rights. For example, respect for the right to life in armed conflict situations is subject to the provisions of IHL which permit the targeting of combatants and those taking a direct part in hostilities, provided they are not \textit{hors de combat}.\textsuperscript{106}

By way of contrast, the activation of the positive obligations to protect and fulfil, being more onerous, depend on the degree of effective control exercised by the foreign State.\textsuperscript{107} Thus, the obligations to protect and fulfil require a certain amount of control over the given territory; control which allows the State to create governmental institutions and mechanisms, to impose laws, and punish violations.\textsuperscript{108} Positive obligations are argued to be ‘limited by a scope of reasonableness even when applied to a State’s conduct within its territory;\textsuperscript{109} there is no reason why application to a State’s extraterritorial conduct would not be bounded similarly by a scope of reasonableness, such that the adoption of positive measures is only required when and

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\textsuperscript{105} Christof Heyns, Special Rapporteur, \textit{Extrajudicial, Summary or Arbitrary Executions}, 68\textsuperscript{th} sess, Agenda Item 69(b), UN Doc A/68/382 (13 September 2013) [50].
\textsuperscript{107} See Cerone, ‘Human Dignity in the Line of Fire’, above n 3, 1505; Milanovic, \textit{Extraterritorial Application of Human Rights Treaties}, above n 1, 210. Similarly Krieger asserts that: ‘one might argue that only the duty to refrain is fully valid while an unrestricted application of positive obligations could exceed the obligations of an occupying power under humanitarian law’: Krieger, above n 45, 283. For the view that the text of the treaties also accommodates such an approach, see Milanovic at 212-5; Künnemann, ‘Extraterritorial Application’, above n 91, 228-9; Cerone, ‘Jurisdiction and Power’, above n 3, 448-9.
\textsuperscript{109} For instance Article 2(1) of the \textit{ICESCR} requires each State Party to take steps, ‘\textit{to the maximum of its available resources}, with a view to achieving progressively the full realization of the rights recognized’ in the Covenant (emphasis added). See also \textit{Ilascu v Moldova and Russia} [2004] VII Eur Court HR 179, 266 [332] where the Court stated that ‘\textit{[i]n determining the scope of a State’s positive obligations, regard must be had to […] the choices which must be made in terms of priorities and resources’.
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to the extent that the relevant party *de jure* or *de facto* enjoys a position of control that would make the adoption of such measures reasonable*.\textsuperscript{110}

However, when engaged in the protection and fulfilment of human rights, States conducting military operations abroad must take into account that they are not the sovereign and therefore they must neither extend their own laws to the territory over which they exercise effective control nor act as the sovereign legislator. They should therefore introduce only as many changes and reforms as are absolutely necessary and otherwise retain as far as possible the local culture, legal standards and economic traditions.

This conclusion is reached by drawing an analogy with IHL provisions relating to the law making powers of an occupying State. Accordingly, there will also be limits on the extent to which foreign States are permitted to enact laws in order to carry out their human rights obligations. Article 43 of the 1907 *Hague Regulations* provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.\textsuperscript{111}

However, Article 64 of *Geneva Convention IV* provides:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.[…]
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.\textsuperscript{112}

\textsuperscript{110} See Cerone, ‘Human Dignity in the Line of Fire’, above n 3, 1505.

\textsuperscript{111} 1907 *Hague Regulations* art 43.

\textsuperscript{112} *Geneva Convention IV* art 64. As Sassòli argues, ‘while the first paragraph of the Article explicitly refers to “penal laws”, the “provisions” referred to in the second paragraph are not so qualified’: Marco Sassòli, ‘Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century’ (Background Paper prepared for Informal High-level Expert Meeting on Current Challenges to International Humanitarian Law, Program on Humanitarian Policy and Conflict Research at Harvard University, 25–27 June 2004) 6. This view conforms with the ICRC Commentary and is supported by other scholars. See, eg, Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary IV*
Article 64 expresses in ‘a more precise, albeit less restrictive formulation’\(^{113}\) the circumstances in which an occupying power is ‘absolutely prevented’ from applying existing local law. In other words, as Dinstein observes, Article 64 allows for suspension or repeal of existing laws and the enactment of new law in three exceptional situations: (a) the removal of the occupying power of any direct threat to its security and the maintenance of safe lines of communication; (b) the duty of the occupying power to discharge its obligations under the *Geneva Conventions*;\(^{114}\) and (c) the necessity to ensure the ‘orderly government’ of the occupied territory.\(^ {115}\) Dinstein argues that this final category of necessity is not exhaustive and can be open-ended.\(^ {116}\) Accordingly, there are other circumstances that would permit occupying powers to repeal, amend or suspend existing laws, or to enact new legislation. One such situation is the necessity of fulfilling obligations under IHRL in occupied territory, which has been argued to be ‘fully encompassed within the two necessity grounds specifically enumerated under Article 64 [*Geneva Convention IV*: the necessity for maintaining public order; and the necessity of fulfilling the obligations under IHL’].\(^{117}\) The fact that there is no mention of IHRL in this additional exception to the continuing applicability of local laws can be easily explained, in the words of Sassòli, ‘by the fact that when the Hague Regulations were adopted in 1907,

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\(^{114}\) It is argued that the necessity of fulfilling the obligations under the *Geneva Conventions* should be understood as encompassing any obligations under treaty or customary IHL. See Dinstein, ‘Legislation under Article 43 of the Hague Regulations’, above n 113, 6; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff, 2009) 132. Additionally, ‘in case any legislation in force in occupied territory is incompatible with requirements of the Geneva Conventions, the occupying power is bound to amend, repeal or suspend such legislation and, if necessary, enact new laws’: at 133.


international human rights law did not yet exist, and in 1949, when Convention IV
was drafted, it had just come into being’.\textsuperscript{118}

Indeed, in the \textit{Armed Activities} case, the ICJ having concluded Uganda was an
occupying power in Ituri at the relevant time held that:

\begin{quote}
As such it was under an obligation, according to Article 43 of the
Hague Regulations of 1907, to take all the measures in its power to
restore, and ensure, as far as possible, public order and safety in the
occupied area, while respecting, unless absolutely prevented, the
laws in force in the DRC. This obligation comprised the duty to
secure respect for the applicable rules of international human rights
law and international humanitarian law, to protect the inhabitants of
the occupied territory against acts of violence, and not to tolerate
such violence by any third party.

The Court […] finds that Uganda’s responsibility is engaged both
for any acts of its military that violated its international obligations
and for any lack of vigilance in preventing violations of human
rights and international humanitarian law by other actors present in
the occupied territory, including rebel groups acting on their own
account.\textsuperscript{119}
\end{quote}

While Articles 43 and 64 relate only to belligerent occupation, there is possibly room
for their application by analogy to circumstances where States conducting military
operations abroad exercise a level of effective control sufficient to trigger their human
rights obligations to protect and fulfil. A similar suggestion has been made by
scholars in the context of peace operations.\textsuperscript{120} It is now accepted, therefore, that States
conducting military operations abroad may introduce new laws in order to give effect
to their human rights obligations. In particular, when the local laws are clearly
contrary to, or insufficient to protect human rights, the State conducting military
operations abroad is authorised to modify such laws to accord with applicable human
rights standards.

As Arai-Takahashi notes of the occupation in Iraq ‘the CPA carried out a sweeping
reform of laws for the purpose of making Iraqi laws compatible with requirements of
international human rights’.\textsuperscript{121} As such, the CPA has suspended certain aspects of
political offences in the Iraqi Penal Code. Due to the Orders that were adopted by the

\textsuperscript{118} Sassòli, ‘Legislation and Maintenance of Public Order’, above n 117, 676.
\textsuperscript{119} \textit{Armed Activities (Judgment)} [2005] ICJ Rep 168, 231 [178]-[179].
\textsuperscript{120} See, eg, Sassòli, ‘Article 43 of the Hague Regulations’, above n 112, 3; Dinstein, ‘Legislation under
\textsuperscript{121} Arai-Takahashi, above n 114, 134.
CPA, the courts were required to apply the laws in a manner that was impartial and non-discriminatory and which prohibited torture, inhumane and degrading treatment. The CPA’s reforms based on the requirements of IHRL in the field of criminal procedural law included the recognition of the right to remain silent, the prohibition of drawing adverse inference from silence, the right to defence counsel (including a funded scheme), the requirement for the provision of advice of rights, and the guarantee of fundamental due process for detainees. The CPA also adopted measures for the prohibition of child labour.

However, new laws must stay as close as possible to any similar local cultural, legal and economical standards and traditions, in order to respect the right to self-determination. The foreign State should take into account that it is not the sovereign and may introduce only as many changes as are absolutely necessary to meet its human rights obligations.

In conclusion, it is suggested that due to the very nature of negative obligations, a foreign State’s obligation to respect is territorially unlimited, meaning that it would be


bound by those obligations regardless of the effective control it exercises. In contrast, the foreign State’s obligations to protect and fulfil would be dependent on spatial jurisdiction and ultimately, the level of effective control it exercises. This means that positive obligations would apply only in circumstances in which it would be reasonable to take affirmative steps in light of the State’s degree of effective control.127

In the following sections, I propose how the tertiary model of human rights obligations in relation to the specific case of the right to education should be implemented in an extraterritorial armed conflict situation. My proposal, although not directly supported by case law, is consistent with the relevant jurisprudence and the practice of international bodies.

### 7.4.1 Extraterritorial Obligation to Respect the Right to Education

The obligation to respect would require States conducting military operations abroad to refrain from directly or indirectly impairing human rights already enjoyed by individuals in that State. Since at this level the foreign State is merely duty bound to refrain from interference, even with low levels of control there is an obligation to respect the rights of the population of the territorial State to education.

A State conducting military operations abroad must respect the right to education by not directly or indirectly ordering or causing the closure of schools, subject to general limitation clauses within IHRL,128 such as Article 4 of the ICESCR. The ICESCR recognises that the State may subject the rights in the Covenant ‘to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’.129 This means that the ability of States to impose restrictions on the right to education in armed conflict situations, which in effect deprives individuals of their rights, have to be justified, for example, on grounds of security.


128 See, eg, ICESCR art 4; ACHR art 32(2); ACHPR art 27(2).

129 ICESCR art 4.
For instance in 1989, the Israeli Ministry of Justice announced that ‘the Israeli government has temporarily closed schools which have ceased to act as centres for education’. However, B’Tselem, the Israeli Information Centre for Human Rights in the Occupied Territories, reported that closure orders were issued against the entire education system in the West Bank and against specific schools elsewhere for extended periods. The CESCR while recognising that Israel has serious security concerns, noted that these concerns ‘must be balanced with its obligations under international human rights law’. The Committee urged Israel ‘to ensure that any security measure it adopts does not disproportionately limit or impede the enjoyment of economic, social and cultural rights’, including the right to education. Similarly, the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, found that the closure of educational facilities is illustrative of the occupying Power’s violation of Palestinian human rights.

On other occasions, Israel’s emphasis on its security concerns, including its policies on closures, has been criticised by the CESCR, the CRC and Special Rapporteurs as hampering the realisation for Palestinians of, inter alia, the right to education.

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131 See ‘Closure of Schools and Other Setbacks to the Education System in the Occupied Territories’ (Information Sheet, B’Tselem: The Israeli Information Centre for Human Rights in the Occupied Territories, Jerusalem, September-October 1990) 10. The Report indicated that in February 1988 closure orders were issued for all the schools in the West Bank, including kindergartens, elementary and preparatory schools, high schools and vocational institutions. The orders affected 1,174 educational institutions and 303,000 pupils. Subsequently, the general orders were replaced by regional closure orders or closure orders for schools where clashes had occurred with the security forces. In the second year of Intifada, following a shutdown of six consecutive months, West Bank schools were permitted to reopen in late July 1989, so that the teachers could declare the formal conclusion of the school year. In 1989-90 school year schools were open for an average of 99 days. The Israeli Defence Forces in response to the report claimed that the report is replete with factual and legal inaccuracies: at 21. See also Giorgio Giacometti, Special Rapporteur, *Situation of Human Rights in the Palestinian Territories Occupied since 1967, Question of the Violations of Human Rights in the Occupied Arab Territories, Including Palestine*, 56th sess, Agenda Item 8, UN Doc E/CN.4/2000/25 (15 March 2000) [47].

132 See CESCR, *Concluding Observations: Israel*, 30th sess, UN Doc E/C.12/1/Add.90 (23 May 2003) [31].

133 See ibid [40].

134 See Richard Falk, Special Rapporteur, *Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, UN GAOR, 63rd sess, Agenda Item 67(c), UN Doc A/63/326 (25 August 2008) [22].

Extended curfews, roadblocks, security check points, closure or controlling of crossings and military incursions, have been found to have prevented Palestinians from having access to educational facilities, in violation of their right to education. Further, the Israeli blockade and military actions in Gaza, including November 2007 when 670 students were denied permission to study abroad, (including six Fulbright Scholars) have been criticised as a violation of the right to education. Additionally, as recognised by the ICJ, the construction of the separation wall and its associated regime has led to increasing difficulties for the population of the West Bank regarding access to educational establishments and has impeded their exercise of the right to education.

The deliberate targeting and destruction of educational facilities by armed forces during military incursions which inevitably forces the closure of such institutions also impacts the right to education of the population at least until such time as an alternative location is allocated. Accordingly, the Committee on the Rights of the Child has raised its concern in relation to the ‘serious deterioration of access to education of children in the Occupied Palestinian Territories as a result of the measures imposed by the Israeli Defence Forces, including road closures, curfews and mobility restrictions, and the destruction of school infrastructure’.

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137 See, eg, CESCR, *Concluding Observations: Israel*, above n 132, [19]; John Dugard, Special Rapporteur, *Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, UN GAOR, 62nd sess, Agenda Item 72(c), UN Doc A/62/275 (17 August 2007) [28], [40]-[41].
138 See Wall (Advisory Opinion) [2004] ICJ Rep 136, 189-92 [133]-[134]. See also Dugard, Special Rapporteur, *Situation of Human Rights in the Palestinian Territories*, (17 August 2007), above n 136, [28]-[29]. Palestinians living within the closed zone (the area between the Green Line and the Wall) are cut off from schools and universities. Permits are not easily granted. Bureaucratic procedures for obtaining permits are humiliating and obstructive. The opening and closing of gates leading to the closed zone are regulated in a highly arbitrary manner. In 2007, the Office for the Coordination of Humanitarian Affairs carried out a survey in 67 communities located close to the Wall which showed that only 19 of the 67 gates in the Wall were open to Palestinians for use all the year round on a daily basis: Dugard, Special Rapporteur, *Situation of Human Rights in the Palestinian Territories*, (21 January 2008), above n 137, [23]. For further examples of the effect of restriction of movement on education see, eg, ‘Student Travel between Gaza and the West Bank’ (Position Paper No 101, Gisha: Legal Center for Freedom of Movement, September 2012).
139 See, eg, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN GAOR, 66th sess, Agenda Item 65, UN Doc A/66/256 (3 August 2011) [38].
140 See CRC/C, *Concluding Observations: Israel*, above n 135, [52].
Gaza in 2006 and in Nablus in 2008 as conduct that is in breach of the obligation to respect the right to education.\textsuperscript{141}

Human rights concerns have also been expressed regarding the closure of crossings and blockade of the Gaza Strip since 2007 preventing building materials from entering Gaza and resulting in the end of most construction works aimed at rectifying the extensive damage caused by military operations to educational institutions.\textsuperscript{142} The shortage of electricity arising in part from restrictions on the availability of spare parts for repair, as a result of the blockade, has also been criticised as having an effect on the enjoyment of the right to education.\textsuperscript{143}

The extraterritorial obligation to respect the right to education does not depend on the State’s level of effective control over the territory. Consequently, States conducting military operations abroad are obliged to respect the right to education enjoyed by individuals, regardless of the amount of control they exercise.

\subsection*{7.4.2 Extraterritorial Obligation to Protect the Right to Education}

As discussed above, the extraterritorial obligation to protect requires States conducting military operations abroad to adopt necessary and reasonable measures to prevent third party interference with the enjoyment of the human rights of individuals.\textsuperscript{144} The ICJ in \textit{Armed Activities}, having concluded that Uganda was an occupying power in Ituri, Congo, found that:

\begin{quote}
Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international
\end{quote}


\textsuperscript{142} See Richard Falk, Special Rapporteur, \textit{Situation of Human Rights in the Palestinian Territories Occupied Since 1967}, UNGA, 13\textsuperscript{th} sess, Agenda Item 7, UN Doc A/HRC/13/53/Rev.1 (7 June 2010) [30]. On 9 July 2007, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) announced that it had halted all its building projects in Gaza because it had run out of building materials, such as cement. This has also affected the building of schools and educational facilities. See Dugard, Special Rapporteur, \textit{Situation of Human Rights in the Palestinian Territories}, (21 January 2008), above n 135, [20].

\textsuperscript{143} For more information regarding electricity shortage see, Falk, Special Rapporteur, \textit{Situation of Human Rights in the Palestinian Territories}, (7 June 2010), above n 142, [31].

\textsuperscript{144} See \textit{Armed Activities (Judgment)} [2005] ICJ Rep 168, 231 [179].
humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.  

Similarly, in *Cyprus v Turkey*, Cyprus requested the ECtHR to rule that Turkey was not only accountable under the *ECHR* ‘for the acts and omissions of public authorities operating in the “TRNC”, but also those of private individuals’.

In the context of the right to education, the obligation to protect includes taking reasonable measures in the circumstances to prevent non-State actors from closing schools, physically preventing children from attending schools and terrorising and harassing students to impede their attendance at school. For example, since the fall of the Taliban in 2001, Afghan girls have theoretically been free to attend school; however, that freedom is hindered by vicious militant attacks against girls’ schools or girl students carried out by extremist Islamic groups thought to be allied to the Taliban or Al-Qaeda.

On the assumption that during the armed conflict in Afghanistan there have been situations in which foreign States have exercised effective control, as that concept has been developed in this thesis, then in my view, the obligations of those States to protect the right to education would have been triggered.

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145 Ibid (emphasis added).
146 See *Cyprus v Turkey* [2001] IV Eur Court HR 1, 23 [73].
147 See, eg, *Catan v Moldova and Russia* (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [82], [150].
Preventive measures in the context of the right to education, suggested by a UNESCO Study, include providing armed guards and armed escorts for transport to schools, giving weapons training to teachers, or sending in extra troops to the area to counter general violence, monitoring threats and mobilising local communities to confront attackers, and regrouping classes inside villagers’ houses, out of sight of attackers.\textsuperscript{149} The extraterritorial obligation to protect the right to education could also entail the obligation upon foreign States to regulate the conduct of private parties:\textsuperscript{150} violations by such actors should be prevented by creating and implementing the necessary policy, legislative, regulatory, judicial, inspection and enforcement frameworks.\textsuperscript{151}

The CESCR has expressed concerns at ‘regular harassment by settlers of children and teachers’ in the West Bank and urged Israel to address violations of the right to education arising from ‘incidents of harassment and attacks by … settlers on school children and educational facilities’.\textsuperscript{152} The Special Rapporteur on the Situation of Human Rights in the Palestinian Territories has also expressed his concern as to the failure of the Israeli military forces to investigate and apprehend Israeli settlers for violent assaults, threats and impairment of the right of education of Palestinian children.\textsuperscript{153}

The extraterritorial obligation to prevent third party interference with the enjoyment of rights, including the right to education, in the context of armed conflict has also been recognised by the ECtHR. The Court in \textit{Loizidou} held that Turkey’s effective control over northern Cyprus, ‘entails her responsibility for the policies and actions of the “TRNC” […]. Those affected by such policies or actions therefore come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention’.\textsuperscript{154} The Court

\begin{footnotesize}
\begin{enumerate}
\item See Skogly, above n 8, 70.
\item See Doswald-Beck, above n 18, 35.
\item See CESCR, \textit{Concluding Observations: Israel, 47th sess}, UN Doc E/C.12/ISR/Co/3 (16 December 2011) [35]. See also Richard Falk, Special Rapporteur, \textit{Situation of Human Rights in the Palestinian Territories Occupied Since 1967}, UN GAOR, 65\textsuperscript{th} sess, Agenda Item 69(c), UN Doc A/65/331 (30 August 2010) [10], [13], [30].
\item See Richard Falk, Special Rapporteur, \textit{Situation of Human Rights in the Palestinian Territories Occupied Since 1967}, UN GAOR, 20\textsuperscript{th} sess, Agenda Item 7, UN Doc A/HRC/20/32 (25 May 2012) [30].
\item \textit{Loizidou v Turkey (Merits)} [1996] VI Eur Court HR 2216, 2235-6 [56].
\end{enumerate}
\end{footnotesize}
did not necessarily find that all of the acts of the TRNC were attributable to Turkey.\(^\text{155}\) Rather, it established that Turkey, by virtue of its effective overall control over northern Cyprus, had the positive obligation to prevent human rights violations, irrespective of whom they were committed by.\(^\text{156}\) It was in light of this conclusion, that Turkey was subsequently held responsible by the ECtHR in *Cyprus v Turkey* for the denial of appropriate secondary-school facilities for Greek Cypriots living in northern Cyprus by the TRNC authorities.\(^\text{157}\) The Greek-language secondary educational facilities which were formerly available to children of Greek Cypriots had been abolished by the TRNC authorities in the north. Since it was open to children on reaching the age of twelve, to continue their education at a Turkish or English-language school in the north, the Court held that ‘in the strict sense, […] there is no denial of the right to education’\(^\text{158}\) However, in the Court’s opinion, ‘the option available to Greek-Cypriot parents to continue their children’s education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a Greek-Cypriot school there’.\(^\text{159}\) Thus, the Court continued ‘[h]aving assumed responsibility for the provision of Greek-language primary schooling, the failure of the “TRNC” authorities to make continuing provision for it at secondary-school level must be considered in effect to be a denial of the substance of the right at issue’.\(^\text{160}\) Greek-Cypriot and Maronite school children attending schools in the south were affected due to restrictions imposed on the freedom of movement by the TRNC authorities between the north and south.\(^\text{161}\) Accordingly, the right to education of the population concerned had been disregarded by Turkey due to its failure to protect against violations by a third party, the TRNC.

Several factors were regarded as relevant in establishing Turkish effective control over northern Cyprus. More than 30,000 Turkish personnel were deployed in the

\(^{155}\) If the acts of the TRNC were attributable to Turkey, Turkey would have been responsible under the respect obligation. See *Velasquez Rodriguez v Honduras* (Judgment) (1989) IACtHR (Ser C) No 4 [172]-[176].

\(^{156}\) See Milanovic, *Extraterritorial Application of Human Rights Treaties*, above n 1, 47.

\(^{157}\) See *Cyprus v Turkey* [2001] IV Eur Court HR 1, 73 [280].

\(^{158}\) See ibid 72 [277].

\(^{159}\) See ibid 73 [278].

\(^{160}\) See ibid.

\(^{161}\) See ibid 17 [43], 75 [292].
area, making a ratio of Turkish troops to the population of 1:7. Turkish troops were stationed throughout the whole of the territory of northern Cyprus which was constantly patrolled and had check points on all main lines of communication between the northern and southern parts of the island. Additionally, the longer period of time in which the troops were present in northern Cyprus, as compared to other cases and the intention of Turkey in exercising its control on a long term basis were recognised as relevant factors in establishing effective control. The fact that the civilian administration of northern Cyprus was under the control of Turkey was also discussed as being relevant in recognising that Turkey had effective control over northern Cyprus. Accordingly, this is an example of an extraterritorial obligation to protect a second phase right and demonstrates that the existence of a considerable amount of control is required for the activation of the obligation to protect second phase rights.

The 2012 ECtHR case of Catan is another illustration of the extraterritorial obligation to protect the right to education. The Moldovan applicants who lived in Transdniestria complained about the forcible closure of their schools and measures taken by the MRT authorities to harass and intimidate them because of their choice to pursue their children’s education at Moldovan/Romanian-language schools. The Court thus had to determine whether, in respect of the acts complained of, the applicants fell within the jurisdiction of either or both Moldova and Russia, within the meaning of Article 1 of the ECHR. The question as to the jurisdiction of Russia, being

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162 See Loizidou v Turkey (Merits) [1996] VI Eur Court HR 2216, 2223 [16].
163 This ratio was regarded by the UK Queen’s Bench Divisional Court to be sufficient to establish effective control compared to the insufficient ratio of 1:340 in the case of British troops in Iraq. See R (Al-Skeini) v Defence Secretary [2007] QB 140, 157 [41]-[42].
164 See Loizidou v Turkey (Merits) [1996] VI Eur Court HR 2216, 2223 [16].
165 See Issa v Turkey (European Court of Human Rights, Chamber, Application No 31821/96, 16 November 2004) [75].
166 See R (Al-Skeini) v Defence Secretary [2007] QB 140, 281 [120] (Brooke LJ).
167 This issue was discussed as a comparison to the case of British troops in Iraq in R (Al-Skeini) v Defence Secretary [2007] QB 140, 281 [120] (Brooke LJ).
168 The facts concerning the armed conflict and events in Transdniestria are set out comprehensively in Ilascu. For a short summary of these facts see Chapter 5.2 n 57.
169 See Catan v Moldova and Russia (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [82]. This was as a result of a policy of Russification by the Transdniestrain authorities whereby schools in the region could only operate in and teach in the Moldovan/Romanian language as written in Cyrillic alphabet, rather than the much more commonly used Latin one.
one of extraterritoriality, is relevant to this thesis. In answering whether Russia’s jurisdiction was engaged, the Court accepted that ‘there is no evidence of any direct involvement of Russian agents in the action taken against the applicants’ schools’. The absence of interference by State agents, indicates that the Court was not dealing with the obligation to respect. Nonetheless, the Court was of the view that:

Russia exercised effective control over the “MRT” during the period in question. In the light of this conclusion, and in accordance with the Court’s case-law, it is not necessary to determine whether or not Russia exercised detailed control over the policies and actions of the subordinate local administration [...]. By virtue of its continued military, economic and political support for the “MRT”, which could not otherwise survive, Russia incurs responsibility under the Convention for the violation of the applicants’ rights to education.

The Court’s statement can be taken to mean that Russia’s responsibility is engaged by virtue of its positive obligation to prevent human rights violations by non-state actors (the MRT) operating in the area under its effective control. To put it in more concrete terms, it is in light of the distinction between the obligations to respect and to protect, that Catan becomes clearer. The Court did not find that the closure of schools by the MRT were attributable to Russia. Rather, it was of the view that Russia, by virtue of its effective control over Transdniestria, had the positive obligation to prevent human rights violations.

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170 The issue of whether or not Moldova had jurisdiction, being the territorial State, is not relevant to this thesis. For the Court’s argument on this issue, see Catan v Moldova and Russia (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [109]-[110].
171 See Catan v Moldova and Russia (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [114].
172 The Court referred to its previous judgment in Ilascu where the Court had concluded that the Russian Federation had jurisdiction over certain events in Transdniestria. Thus the Court concluded that the burden lied on Russia to establish that it did not exercise jurisdiction in relation to the events complained of by the applicants. See Catan v Moldova and Russia (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [112].
173 Catan v Moldova and Russia (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [150].
175 The same conclusion was reached in the case of northern Cyprus, prior to Catan, where the Court established that Turkey, by virtue of its effective overall control over northern Cyprus, had the positive obligation to prevent human rights violations, including the acts of the TRNC (obligation to protect). The Court stated in Cyprus v Turkey, "[h]aving effective overall control over northern Cyprus, [Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survived by
Although the number of Russian troops stationed in Transdniestria was not large, (around 2,000 soldiers), the Court considered that in view of the size of its weapons stocks and arsenal in Transdniestria, Russia’s military importance in the region and its dissuasive influence, that Russia enjoyed jurisdiction. Additionally, the UK Court of Appeal in comparing the case of Transdniestria with the British presence in Iraq, relied on the intention of Russia in exercising its control on a long term basis and the fact that the civilian administration of the MRT was under Russia’s control as relevant factors in recognising that Russia had effective control over part of Moldova’s territory.

In sum, the obligation to protect the right to education requires foreign States to be in a position to create and maintain an atmosphere or framework by an effective interplay of laws, regulations and other measures so that individuals will be able to freely realise their right to education. The foreign State at this level has not only the passive duty to refrain from interference with the right to education of individuals, but also has the duty to actively protect their right to education from third party interference. As the Cyprus v Turkey and Catan examples illustrate, the required level of effective control for the activation of the obligation to protect the right to education as a second phase right cannot usually be achieved at the outbreak of hostilities or during the course of hostilities. This is probably achieved at later stages when hostilities have eased, security and order has gradually replaced chaos and disorder and the State conducting military operations abroad is able to exercise some governmental functions. Accordingly, these factors seem sufficient to enliven the obligation to protect the right to education as a second phase right.

### 7.4.3 Extraterritorial Obligation to Fulfil the Right to Education

The obligation to fulfil entails the obligations to facilitate, to provide and to promote. An extraterritorial obligation to fulfil, consequently is the most onerous and costly obligation along the spectrum of obligations, and would require the foreign State to
take positive steps to promote and improve the right to education.\textsuperscript{180} The fulfilment of the right to education requires consistent funding, complex administrative systems and close collaboration between policy-makers and funding bodies at the national, regional and local levels, as well as with agencies responsible for implementation, supervision, monitoring, evaluation and enforcement.\textsuperscript{181} It demands institution building, sanitation facilities and administrative infrastructure including trained salaried teachers, teaching materials, and so on.\textsuperscript{182} In general, it entails the enactment, adoption, implementation and enforcement of laws and necessary administrative and judicial measures and requires developing the capacity to operate, maintain and improve educational services.\textsuperscript{183}

By way of illustration, the obligation to facilitate the right to education in the context of armed conflict would require foreign States to take positive measures that enable and assist individuals to enjoy the right to education, for instance by securing pathways, producing and distributing emergency kits containing essential educational supplies and materials and restoration of educational infrastructure.\textsuperscript{184} Additionally, it would require such States to take measures to reconstruct and re-equip schools and school buildings,\textsuperscript{185} securing an adequate long-term budget for education\textsuperscript{186} and implementing relief and rehabilitation programmes and investment in the capacity building of education personnel.\textsuperscript{187} The obligation to provide would require States

\textsuperscript{180} The extraterritorial obligation to fulfil is argued to be the most controversial level of obligation as it runs contrary to the principle of prohibition of intervention in the domestic affairs of a State and requires direct expenditure and resources: Skogly, above n 8, 71. See also Gondek, above n 4, 360; Nowak, ‘Obligations of States to Prevent and Prohibit Torture’, above n 18, 14.

\textsuperscript{181} See, eg, Nowak, ‘The Right to Education’, above n 67, 422.

\textsuperscript{182} In 2004, John Agresto, the US Senior Advisor to the Ministry of Education, assessed the rebuilding needs of devastated Iraqi universities. He requested from Congress $1.2 billion even though the UN and World Bank have estimated it would take almost $2 billion to ‘ensure minimal quality standards of teaching and learning’: University Reconstruction in Iraq, Education: Universities in Iraq and the US, Costs of War, <http://costsofwar.org/article/education-universities-iraq-and-us>.

\textsuperscript{183} See US Department of the Army, Stability Operations, FM 3-07 (6 October 2008) [3]-[34].

\textsuperscript{184} See, eg, Hausler, Urban and McCorquodale, above n 58, 187.

\textsuperscript{185} See, eg, US Department of the Army, Stability Operations, above n 183, [3]-[72] and Appendix F-2.

\textsuperscript{186} Although organisations such as the US Agency for International Development (USAID) usually manage public sector investment ensuring the long-term viability of public education in a State affected by armed conflict, the military force also can influence success in these programmes. At the local level, military forces may spur investment through grant programmes or direct public investment projects. See US Department of the Army, Stability Operations, above n 183, [3]-[65].

\textsuperscript{187} ‘The principle of capacity building involves the transfer of technical knowledge and skills to the local populace and institutions. Capacity building aims to strengthen national and local institutions, transfer technical skills, and promote effective policies and programs’: US Department of the Army, Stability Operations, above n 183, [C-8]. While State practice exists in relation to such activities, the question arises as to whether the US actually recognises itself legally bound by such obligations.
conducting military operations abroad to pay special attention to marginalised groups who are unable, on grounds reasonably beyond their control, to realise the right to education by themselves by the means at their disposal. During times of armed conflict, inequality and discrimination in access to education dramatically increases. For example, ‘the greater vulnerability of women and girls, including their problems of security, hygiene and the lack of adequate sanitary facilities within the educational institutions, as well as the shortage of female teachers and the fact that girls are also required to do housework,’ puts them at a disadvantage as compared to men and boys. Finally, the obligation to promote the right to education would require such States to encourage education, raise public awareness amongst the population in relation to the advantages of education and disseminate information.

States conducting military operations abroad need to exercise an extremely high level of effective control over the territory to be able to fulfil any given right, including the right to education. In order for States to fulfil their human rights obligations, they need to be in control of and have power over various institutions and governmental administrations. While in some war torn countries, such facilities have not been completely destroyed during the conflict, in others the country is left without infrastructure and resources and thus the foreign State is required to provide for the restoration of essential services. For the fulfilment of rights, the foreign State is required to plan and design strategies and schemes based on the available resources. It also involves enactment and enforcement of laws and adoption of necessary administrative and judicial measures to give effect to each right. The extraterritorial obligation to fulfil human rights demands States conducting military operations abroad to exercise thorough and complete control so as to be equivalent to the control exercised within a State’s own territorial borders. Realistically, such a high level of effective control would only occur in a prolonged and stable occupation. Although therefore the obligation to fulfil could be invoked in such situations, the legal

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188 See Muñoz, Special Rapporteur, Right to Education in Emergency Situations, above n 67, [88].
189 See ibid [93].
190 See eg, CESCR, General Comment No 14, above n 15, [37]. See also Ssenyonjo, Economic, Social and Cultural Rights, above n 5, 25; Sepúlveda, above n 8, 199-201.
191 The most obvious example of such a situation is the Palestinian territories occupied by Israel since 1967. For a view that the human rights obligations of the occupying power extend to the obligation to fulfil, see Gondek, above n 4, 360.
obligations of States undertaking such prolonged and stable occupations, as explained in the introduction, are much more extensive and would require separate analysis. 192

7.5 Conclusion and Outline of my Proposed Framework

In this Chapter I argued that similarly to the range of human rights obligations of a States conducting military operations abroad, its level of human rights obligations should also depend on the extent of effective control it exercises over the territory. I employed the tertiary model of human rights obligations, consisting of the obligations to respect, protect and fulfil to demonstrate how this will work in practice. I argued that the level of human rights obligations of such a State should gradually increase as its level of effective control over the territory expands. According to the tertiary model of human rights obligations, as the extent of a foreign State’s effective control expands so its obligations increase from the predominantly cost free and passive obligation to respect to the more active obligation to protect, and finally to the most onerous duty to take measures towards the full realisation of any given right under the obligation to fulfil. However, I suggested that the human rights obligations of a State conducting military operations abroad, unlike its obligations within its own territory, might not in practice consist of all three levels of human rights. I demonstrated how the gradual expansion of the level of obligations in relation to the specific case of the right to education could apply in an extraterritorial armed conflict situation.

The extraterritorial obligation to respect the right to education, as the lowest of the three levels, would require the State conducting military operations abroad to refrain from impairing the right to education of an individual. This would for example require foreign States to refrain from ordering or causing the closure of schools. Since the obligation to respect is merely a hands-off duty, it involves nothing more than the State having control over the conduct of its own agents. The State by definition has control over its own agents. Therefore, I concluded that the obligation to respect applies whenever a State acts extraterritorially regardless of the amount of effective control it exercises.

192 See Chapter 1. For an argument that in a prolonged occupation human rights instruments may provide a useful guide for an occupying power and should therefore be followed, see Esther Rosalind Cohen, Human Rights in the Israeli-Occupied Territories 1967-1982 (Manchester University Press, 1985) 29.
In contrast, the extraterritorial obligation to protect the right to education would imply a duty upon the foreign State not only to refrain itself from interference but also to adopt necessary and reasonable measures to prevent third party interference with the enjoyment of educational rights. This includes taking positive measures to prevent non-State actors from, for example, closing schools or physically preventing children from attending schools. This requires more than just control over the conduct of State agents, and its activation is thus dependent on the level of effective control exercised by the foreign State. I demonstrated that case law recognises an extraterritorial obligation on States conducting military operations abroad to protect the right to education once they exercise a certain amount of control. Subsequently, I identified relevant effective control factors, which have been held to be sufficient in the ECtHR’s view to enliven the obligation to protect the right to education. I concluded that such an obligation cannot usually be triggered at the outbreak of hostilities or even during the course of hostilities. However, it is probably triggered at later stages when hostilities have eased, and security and order is gradually established and the foreign State is able to exercise some governmental functions.

Finally I argued that the extraterritorial obligation to fulfil requires the foreign State to plan, design and implement strategies and schemes, enact and enforce laws and adopt necessary administrative, budgetary, judicial and other necessary measures to give effect to the right to education. It involves consistent funding, complex administrative systems and close collaboration between policy-makers and funding bodies as well as with agencies responsible for implementation, supervision and evaluation. All these require a very high level of effective control, which I concluded could only realistically occur in situations of prolonged and stable occupation.

Extending these conclusions from the example of education to the whole range of a foreign State’s human rights obligations, it is argued that States conducting military operations abroad would have the obligation to respect human rights in all circumstances regardless of their level of effective control. As hostilities decrease and security and order improve, the foreign forces will gain increased control over the area and by progressively exercising more governmental functions their obligations will gradually increase to the level of protection. However, the obligation to fulfil human rights seems highly unlikely to be triggered in any extraterritorial armed
conflict situation other than the unusual and rare occasion of a prolonged and stable occupation.

In this Chapter and the previous one, I demonstrated how both the range and level of human rights obligations incumbent upon States conducting military operations abroad are dependent on the extent of effective control exercised by such States over a given area. I now provide a summary of my model for the activation of human rights obligations of States conducting military operations abroad.

I propose a four-stage framework for the gradual activation of human rights treaty obligations in extraterritorial armed conflict situations based on the conclusions reached in relation to the range and level of obligations. Accepting that State practice in this area is still unsettled, my model has been developed based on an analysis and interpretation of relevant treaties, current practice of States and international and regional human rights bodies, related jurisprudence and a critical reading of relevant literature. It is impossible of course to accurately predict the future practice of States, however, what I offer is a coherent approach consistent with existing practice, in an important field whose terrain will only be fully visible in the longer term.

At the first stage of my framework is the obligation to respect all three phases of rights. Given that the obligation to respect involves nothing more than control of the State over the conduct of its own agents, I argued that the obligation to respect all three phases of rights applies whenever a State acts extraterritorially regardless of the amount of effective control it exercises. This indicates that the obligation to respect rights applies in all circumstances even at the outbreak of hostilities, where the foreign State may not exercise any or a minimal level of effective control.

Secondly, the activation of the obligation to protect, as it requires more than just control over the conduct of State agents, is dependent on the level of effective control exercised by the foreign State. Accordingly, at the second stage, when the foreign State has been able to exercise some moderate degree of effective control, the obligation to protect first phase rights is activated. Due to the nature of first phase rights, which are either non-derogable rights, jus cogens norms, or norms where IHL provides comparable normative protection or enhanced normative protection
compared to IHRL, the obligation to protect these rights is triggered with minimal effective control.

At the *third* stage the obligation to protect second phase rights is activated. By reviewing relevant case law in relation to the right to education, as a second phase right, I concluded that the obligation to protect such rights will not normally be triggered at the outbreak of hostilities or even during the course of hostilities. These rights are more likely to be triggered at later stages when hostilities have eased, security and order is gradually established and the foreign State is able to exercise some governmental functions.

At the *fourth* and final stage, as the foreign State exercises greater effective control, the obligation to protect third phase rights which are exclusive to IHRL, is enlivened.

I argued that the activation of the obligation to fulfil human rights since it requires a very high level of effective control is unlikely to be achieved in situations other than a stable and prolonged occupation.  

My model is best illustrated in the figure below.

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193 See Chapters 1.1 and 7.4.3.
My proposed model considers the limited amount of control exercised by foreign States and links the obligations of such States to their level of exercised effective control over the given area. Both the range and level of human rights obligations of foreign States increase gradually as their level of control expands. Such a ‘sliding scale’ as Sassòli correctly observes, keeps ‘the law realistic’ by not over burdening States involved in an armed conflict abroad, which could lead to counter-productive results and non-compliance by States. A situation divorced from the realities on the ground is likely to attract limited support from States and important actors.

Secondly, by recognising effective control as the threshold for the activation of human rights obligations in all armed conflict situations, the often complex and

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contradictory task of classifying different types of armed conflict under IHL is unnecessary.195

Thirdly, by examining the range of human rights obligations of States involved in armed conflicts abroad through the comparison of the protections provided under IHL and IHRL treaties, my approach takes into account the protections provided to individuals under both regimes in armed conflict situations. Although case law, at least post *Al-Skeini*, has recognised the possibility of tailoring and dividing human rights in extraterritorial armed conflict situations, earlier models have focused merely on the level of human rights obligations. My proposed model is distinctive in that it considers not just the *level* of human rights obligations of States conducting military operations abroad, but also the *range* of their obligations.

Fourthly, my proposed model for the extraterritorial application of human rights treaty obligations, by being practical and flexible should enhance the likelihood of compliance by States, which may ultimately result in enhanced protection of individuals caught up in armed conflict. This is due to the fact that the application of IHRL during armed conflict fills in normative gaps in the scope of protection afforded to individuals under IHL and avoids a legal vacuum of protection under IHL in relation to specific categories of individuals. Moreover, the application of IHRL potentially increases the available legal forums and the accountability and enforcement measures thus promoting the protection of individuals.

Finally, my model has the potential to offer clarity and thus predictability as it sets out the human rights obligations of States involved in armed conflicts abroad as their effective control increases over the area in question. As stated by Bethlehem, ‘the strength of the law rests heavily on its clarity, visibility, predictability and formality of application’.196 The current lack of certainty impedes the ability of States to adequately factor the applicability of human rights treaties extraterritorially into their decision-making processes when considering conducting military operations abroad. If legal norms are to be effective in a military context, ‘they must be clear and not so

195 See Chapter 1.1.
complex as to prevent practical application… [Indeed,] Civilian protection is best achieved through clear and practical rules’.197

The determination of when a particular stage is reached will always be a fact-sensitive inquiry necessitating an overall evaluative judgement of the situation. Even so, my framework provides a systematic and principled foundation that permits us to move from the question of when human rights treaties apply extraterritorially, to the far more significant and complex question of how they should do so. My thesis contributes to resolving the significant uncertainties surrounding the scope of the legal human rights obligations of States involved in an armed conflict abroad and the relationship between IHL and IHRL in such circumstances.

8 CONCLUSION

The extraterritorial application of human rights treaty obligations in armed conflict situations and the relationship between IHL and IHRL have received renewed attention since ‘the perceived rise in the level of the threat generated by terror groups’ following the horrific attacks of September 11, 2001 on the US. The increasing involvement of non-State actors in hostilities has resulted in the rapid growth in intrastate and mixed armed conflicts. In light of the ‘blurred’ boundaries of these different forms of hostilities there is increasing concern as to whether the highly-technical and slow to evolve regime of IHL can effectively respond to the new challenges that they pose.

Motivated by the pressing need and humanitarian desire to enrich and supplement the protections provided under IHL to individuals caught up in armed conflicts, the international community has moved towards recognising the co-application of IHRL alongside IHL in armed conflict situations. This welcome change is, however, associated with considerable uncertainties as to the scope of such IHRL obligations particularly in extraterritorial armed conflict situations. Despite such reservations, as Droege observes, ‘one thing is clear: there is no going back to a complete separation of the two realms’. The only solution is, in the words of Hampson, ‘to find a way forward, not back’.

This thesis has addressed some of the uncertainties pertaining to the co-application of IHL and IHRL in armed conflict. As the 2005 case of Al-Skeini demonstrates, fears of impracticality have led to resistance by some States to the acceptance of any extraterritorial application of their human rights obligations when they are involved in armed conflicts abroad. In addition, the uncertain interplay between IHL and IHRL with the resultant lack of clarity as to the human rights obligations of States in such

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circumstances, has also contributed to resistance to their application. However, it is now clear that the question is not ‘if’ but ‘how’ IHRL obligations will apply alongside those of IHL. Importantly, this co-application gives rise to the possibility of significant increases in the normative protections, interpretive materials and monitoring institutions available to protect individuals caught up in armed conflict.

This thesis has argued that the extraterritorial application of IHRL in armed conflict situations should depend on the level of effective control exercised by the State in question. The test of effective control provides a workable means of identifying when a State exercises ‘jurisdiction’ over a given territory, which is the point at which its human rights obligations are triggered. However, given that in situations of extraterritorial conduct the degree of control is usually less than that exercised by the State within its own territory, this thesis argued that human rights obligations should be applied somewhat differently and with flexibility in armed conflicts. In the words of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ‘[t]hat a State has human rights obligations with regard to conduct outside its territory does not automatically mean that those obligations are the same as those that arise within its territory’. A leaner approach to the human rights treaty obligations of States involved in extraterritorial armed conflicts has thus been proposed by this thesis.

Such a flexible approach is based on a nuanced understanding of the concept of effective control. This thesis argues that, depending on the level of control a State exercises, it may have a narrower range and level of human rights obligations than it does within its own territory. As a State’s level of effective control over the territory increases, so should its range and level of such obligations. My thesis thus proposes a four-stage framework for the gradual activation of the full range and level of a State’s human rights treaty obligations in extraterritorial armed conflict situations based on the amount of control exercised. Although such an approach leads to the divisibility and prioritisation of IHRL norms, I argue that this corresponds to the realities of armed conflict situations, where States have a limited amount of effective control. My proposal is both consistent with normative and interpretive sources of international law such as the interpretation of treaties, the practice of States and various human

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5 See Christof Heyns, Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions, 68th sess, Agenda Item 69(b), UN Doc A/68/382 (13 September 2013) [50].
rights treaty bodies and international and regional jurisprudence, and also addresses concerns of impracticability raised by States, courts and commentators. It also offers a workable compromise between IHRL principles and the practical realities of armed conflict.

While the need ‘from a practical and strategic perspective’ to ‘prioritise rights’ in their extraterritorial application has been emphasised by some commentators, a framework for a systematic approach in which such rights are to be ‘tailored’ in extraterritorial armed conflict situations is lacking. The absence of such a guide, together with confusion in relation to the effective control test as the threshold for the extraterritorial application of human rights treaties, in my view risks the human rights of individuals being disregarded by States conducting military operations based on the grounds of impracticality. To address this concern, a clear understanding of the scope of human rights obligations of States involved in armed conflicts abroad is necessary. This thesis has examined the questions as to when and how human rights treaty obligations should apply in extraterritorial armed conflict situations in a practical yet principled manner.

The application of the model developed in this thesis could assist States in more adequately dealing with the challenges posed by the co-application of IHL and IHRL in armed conflicts. It is possible, as this thesis has demonstrated, to reconcile the co-application of the existing legal regimes to achieve coherence and balance between the competing demands of military necessity and the protection of civilians.

Moreover, as this thesis has demonstrated, such an approach builds on existing State practice and international jurisprudence and would be consistent with the methods and sources in international law. However, this approach does require acceptance from both sides of the traditional ideological divide between IHL and IHRL. On the one hand, IHL lawyers need to accept that the sometimes narrow and technical regime of IHL has been struggling to respond to the fast-changing realities of contemporary armed conflict and there might be a great deal to be gained by looking to other areas of international law to assist in meeting such challenges. On the other hand, there

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needs to be recognition from IHRL scholars and activists of the need to accept the divisibility of IHRL in armed conflict situations, so as to transform what are likely to remain aspirational goals into the actual practice of States. The co-application of IHRL and IHL, if carefully approached, does not in reality threaten ‘to diminish the hard-fought gains of human rights norms and rights discourse in the past several decades’. The complementarity approach will rather provide enhanced legal protection to individuals in armed conflicts. However, this can only be possible when the obligations are clear.

My thesis contributes to resolving some of the significant uncertainties surrounding the legal scope of the human rights obligations of States involved in an armed conflict outside their territory and the relationship between IHL and IHRL in such circumstances. My conclusions provide a substantive basis for further studies to elaborate on the elements of effective control over a given territory based on the practice of States and jurisprudence as they arise. Furthermore, my conclusions articulate in more detail the human rights obligations of States involved in armed conflicts abroad. As a dedicated study on the scope of the extraterritorial human rights treaty obligations of States involved in an armed conflict, this thesis provides a starting point for other researchers to adopt and expand its methodology and conclusions to other situations, such as joint military action and armed conflicts involving UN forces.

Finally the thesis offers a novel framework for defining the human rights obligations of States involved in armed conflicts abroad. Its application could provide States and their military forces, human rights bodies and the ICRC with a more informed and unified understanding of the effective control test and the application of various human rights obligations in extraterritorial armed conflict situations. In so doing, it aims to contribute to the protection of the human rights of individuals caught up in armed conflicts.

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7 See Modirzadeh, above n 6, 373.
For my part, alongside Judge Bonello from the ECtHR, I believe that ‘those who export war ought to see to the parallel export of guarantees against the atrocities of war’.  

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8 See Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) 86 [38] (Judge Bonello).
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