

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

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TABLE OF CONTENTS

Abbreviations	iii
Abstract.....	v
Declaration.....	vii
Acknowledgments.....	viii
1 Introduction.....	1
1.1 Thesis Structure.....	11
Part One Relationship between IHL and IHRL.....	16
2 Divergence, Convergence, Complementarity and <i>Lex Specialis</i>.....	18
2.1 Introduction.....	18
2.2 The Traditional Theory of Divergence between IHL and IHRL.....	19
2.3 The Convergence of IHL and IHRL	22
2.4 The Complementarity of IHL and IHRL and the <i>Lex Specialis</i> Principle	28
2.5 Conclusion	38
3 IHL and IHRL Protections	40
3.1 Introduction.....	40
3.2 Human Rights Norms Common to both IHL and IHRL.....	43
3.2.1 Comparable Normative Protection.....	43
3.2.2 Enhanced Normative Protection under IHL.....	54
3.2.3 Enhanced Normative Protection under IHRL.....	61
3.3 Human Rights Norms Exclusive to IHRL	77
3.4 Practical Advantages of the Application of IHRL alongside IHL in Armed Conflict Situations.....	78
3.4.1 IHRL Broadens the Scope of Protection under IHL.....	79
3.4.2 IHRL as a Supplementary Source of Interpretation.....	79
3.4.3 IHRL providing Mechanisms for Implementing and Monitoring Compliance with IHL Provisions.....	81
3.5 Conclusion	83
Part Two Extraterritorial Application of IHRL Treaties in Armed Conflict Situations.....	85
4 Extraterritorial Application and Jurisdiction.....	87
4.1 Introduction.....	87
4.2 Legal Foundations for the Extraterritorial Application of Human Rights Treaties	88
4.2.1 The Law of Treaties.....	88
4.2.2 International Covenant on Civil and Political Rights (ICCPR).....	89
4.2.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)...	93
4.3 Jurisdiction.....	99
4.3.1 The International Court of Justice.....	100
4.3.2 The European Commission and Court of Human Rights.....	100
4.3.3 The Inter-American System of Human Rights.....	104
4.4 Conclusion	106

5	Effective Control over Territory	107
5.1	Introduction.....	107
5.2	Spatial Notion of Jurisdiction: The Test of ‘Effective Control Over Territory’ ..	109
5.2.1	Conclusion: Spatial Notion of Jurisdiction: The Test of ‘Effective Control Over Territory’	121
5.3	Various Elements Constituting ‘Effective Control’	121
5.3.1	Strength of the State’s Military Presence in the Area.....	122
5.3.2	Distribution of Troops.....	124
5.3.3	Period of Time of the Presence of Troops.....	125
5.3.4	Intensity of Patrols, Checkpoints and Other means of Control.....	126
5.3.5	Intensity of Insurgency and Local Resistance.....	127
5.3.6	Exercise of Some Public Powers by Foreign Forces.....	127
5.4	Conclusion	131
Part Three A Leaner Approach to the Extraterritorial Application of IHRL		
Treaties in Armed Conflict Situations		
		131
6	Range of Human Rights Obligations.....	134
6.1	Introduction.....	134
6.2	Range of Applicable Rights in Extraterritorial Armed Conflict Situations	135
6.3	Which Human Rights?.....	142
6.3.1	First Phase.....	144
6.3.2	Second Phase.....	149
6.3.3	Third Phase.....	151
6.4	Conclusion	152
7	Level of Human Rights Obligations	154
7.1	Introduction.....	154
7.2	The Tertiary Model of Human Rights Obligations	157
7.2.1	The Obligation to Respect.....	160
7.2.2	The Obligation to Protect.....	161
7.2.3	The Obligation to Fulfil.....	162
7.3	The Concept of a ‘Spectrum of State Obligations’ in the Context of the Right to Education	164
7.3.1	Obligation to Respect the Right to Education.....	166
7.3.2	Obligation to Protect the Right to Education.....	167
7.3.3	Obligation to Fulfil the Right to Education.....	169
7.4	Extraterritorial Obligations to Respect, Protect and Fulfil by a State Conducting Military Operations Abroad	170
7.4.1	Extraterritorial Obligation to Respect the Right to Education.....	178
7.4.2	Extraterritorial Obligation to Protect the Right to Education.....	181
7.4.3	Extraterritorial Obligation to Fulfil the Right to Education.....	187
7.5	Conclusion and Outline of my Proposed Framework	190
8	Conclusion	197
9	Bibliography	202

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

HRC	Human Rights Committee
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
MRT	Moldovan Republic of Transdniestria
NATO	North Atlantic Treaty Organisation
SC Res	Security Council Resolution
TRNC	Turkish Republic of Northern Cyprus
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations International Children's Emergency Fund
UN ESCOR	United Nations Economic and Social Council Official Records
UN GAOR	United Nations General Assembly Official Records
UN SCOR	United Nations Security Council Official Records
US or USA	United States of America

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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